

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-6355
Appellate Case No. 2013-000282

RECEIVED

JUL 15 2013

SC Court of Appeals

Dharmendra Chaudhari, spouse of
Anita Chaudhari, Deceased Claimant/Respondent,

v.

Avni Grocers/Fast Point Amoco, Employer
and SC Uninsured Employers Fund, Defendants/Appellants.

RETURN TO MOTION TO REINSTATE APPEAL
AND FOR EXTENSION OF TIME

Pursuant to Rule 240(e), SCACR, the Respondent files the following Return to the Appellant's Motion to Reinstate Appeal and for Extension of Time.

Under ordinary circumstances, the Respondent would consent to the relief sought by this Appellant. However, the circumstances of this appeal are far from ordinary. The delay caused by the South Carolina Uninsured Employers Fund (the Fund) is simply without precedent; further delay is unconscionable. To understand the Respondent's position, the Court should consider the time-line of the events in this case.

This is a tragic case that has a very long history with the Commission. It has been pending for over a decade.

The Claimant/Respondent, Dharmendra Chaudhari, is the widower of the deceased Employee, Anita Chaudhari. Mrs. Chaudhari and her brother-in-law, Verendra Puniyani, were murdered on November 14, 2002, by a co-worker while on the job with Avni Grocers. Each deceased worker's estate brought claims under the Act, asserting that the deaths occurred during the course and scope of each decedent's employment.

The Fund became involved in both cases because the Employer was operating without Workers' Compensation coverage at the time of the murders. The primary issue in both cases became whether Employer Avni Grocers regularly employed four (4) or more employees so as to be subject to the Act at the time of the decedents' deaths.

The two matters were consolidated and called for a hearing before Commissioner David Huffstetler, on January 4, 2006. The Fund appeared and took the position that it did not have timely notice of the claims and did not submit any evidence. Commissioner Huffstetler instructed the claimants to agree to continue the matter, but because the claimants had been waiting for over a year for a hearing, because one claimant traveled to the hearing from Atlanta, Georgia, and because the claimants produced proof that the Fund had been properly served with the claims, the claimants indicated a desire to proceed with the hearing. Commissioner Huffstetler continued to strongly insist that the claimants agree to continue the hearing (confessing in his instructions for an order that he was rude to the claimants in this effort). Eventually, Commissioner Huffstetler conducted the hearing and concluded that the Fund was properly served with the Form 52 and received adequate notice of the hearing.

The Fund hired outside counsel just prior to the hearing before Commissioner

Huffstetler, and the Fund's counsel filed no Form 51, Form 53 or other response to the claimants' request for a hearing. The Fund also did not file a Form 58 pre-hearing brief. The effect of this is that the Fund raised no defenses – none – to these claims other than a general denial. See 25A S.C. Code Ann. Regs. 67-605 (Supp. 2012) (failure to file a Form 51 or Form 53 within required period shall be deemed a general denial of liability for benefits claimed and employer “shall forfeit each special and affirmative defense allowed by the Act”). In fact, the Fund did not give any notice to the claimants prior to the hearing regarding any objectionable issues the Fund had as to coverage or benefits. Current counsel for the Fund was not involved in this matter at the time.

The Employer, Avni Grocers, failed to appear at the hearing. During the prehearing conference, the claimants learned for the first time that the Fund intended to assert that Avni Grocers was not subject to the Act because it did not employ four (4) or more employees. Following the hearing, Commissioner Huffstetler ruled that the claimants failed to produce substantial evidence that Avni Groceries regularly employed four (4) or more employees so as to be subject to the Act.

The claimants timely filed a request for Appellate Panel review. While the request was pending the claimants located Harendra Pal, the owner of Avni Grocers, who had moved from South Carolina immediately after the murders. The claimants obtained an affidavit from Mr. Pal that established the statutory requirements were met and the Employer was subject to the Act. The claimants filed a Motion to Add Additional Evidence to the record and proffered the affidavit. The Appellate Panel, however, refused to accept the additional evidence and affirmed Commissioner Huffstetler's decision.

The claimants sought judicial review of both the Appellate Panel's affirmance of Commissioner Huffstetler's order as well as the Panel's denial of the motion to accept the additional evidence to the Circuit Court. The two cases for the deceased Avni Grocers employees continued to be consolidated for purposes of judicial review.

Following briefing and oral arguments, the Circuit Court (Judge Gary Hill) held that the Commission erred as a matter of law in refusing to accept Mr. Pal's affidavit as additional evidence under S.C. Code Ann. § 42-17-50 (Supp. 2007). The Circuit Court further ruled that notwithstanding Mr. Pal's affidavit, the preponderance of the evidence the claimants submitted at the hearing supported the claimants' position that the Employer regularly employed four (4) or more employees so as to be subject to the Act. The Circuit Court declined to address any additional issues, and remanded the matter to the Commission for further proceedings consistent with the Circuit Court's rulings.

The Fund timely appealed the Circuit Court's order to the Court of Appeals. On May 28, 2008, the Court of Appeals advised the parties that the two cases would no longer be consolidated. Each case was thereafter briefed separately.

On March 2, 2010, the Court of Appeals heard oral arguments on both cases jointly. At oral argument, Claimants pointed out that the Circuit Court's order was not immediately appealable because it contained a remand to the Commission. The Court requested additional briefing and on June 29, 2010, the Court of Appeals issued its consolidated opinion dismissing the appeals without prejudice because the Circuit Court's order was not immediately appealable. *Puniyani, et al. v. Avni Grocers, Employer*, 2010-UP-338 (S.C. Ct. App. filed June 29, 2010). The Court issued the

remittiturs in these cases on July 7, 2010, and the cases were returned to the Commission.

The cases were consolidated for trial and were heard before Commissioner Avery Wilkerson on November 29, 2011. The parties stipulated that Mr. Dharmendra Chaudhari would reaffirm his prior testimony. They also agreed to present the prior deposition of Mrs. Puniyani's mother. The Defendants objected to consideration of Mr. Pal's affidavit or his live testimony, but Commissioner Wilkerson overruled the Defendants' objections and admitted both Mr. Pal's affidavit pursuant to the Circuit Court's order as well as Mr. Pal's live testimony.

On February 6, 2012, the Commissioner Wilkerson entered an order finding Avni Grocers had four (4) or more employees at the time of the murders and was therefore subject to the Act. The Commissioner ordered compensation accordingly.

On February 29, 2012, the Fund filed a Form 30 seeking Appellate Panel review. The issues involved (1) the finding that Employer employed four (4) or more employees, and (2) the admission of Mr. Pal's affidavit as well as his live testimony. The parties briefed the issues, and on August 28, 2012, the Appellate Panel affirmed the Hearing Commissioner based upon its own review of the record.

The Fund served a Petition for Judicial Review on September 25, 2012. The Circuit Court (Judge J.C. Nicholson) heard arguments on the appeal on January 9, 2013. The Fund noted that "the primary issue up on appeal goes back to our first round of appeals...." (Tr. p. 3, ll. 1-2). The Fund's argument was that the prior order by Judge Hill was improper as a matter of law. The Fund made it plain that it was not raising any new issues from the prior appeal in 2010, nor was it challenging anything that happened at the

hearing the second time the case was tried. Judge Nicholson ruled that he could not overturn Judge Hill's order and entered judgment denying the appeal.

On February 5, 2013, the Fund served a notice of appeal, but this notice referenced only Judge Nicholson's ruling. On that same date, the Fund ordered the transcript of record and copied this Court with the letter. The Court then notified the Fund about various deficiencies in the appeal, which the Fund corrected.

On April 8, 2013, counsel for the Fund noticed a "Transfer Within Firm," indicating new counsel was assuming responsibility for the appeal. On April 9, 2013, new counsel advised the Court that prior counsel had received the Transcript of Record on March 28, 2013. Therefore, the initial brief of Appellant was due by April 29, 2013 (a Monday).

On June 5, 2013, this Court entered its order dismissing the appeal. This was thirty-seven (37) days past the date the brief was due. There had been no communication with the Court nor request for extension.

Sixteen (16) days later (June 21, 2013), this Court received the Motion to Reinstate and for an Extension of Time (the motion is dated June 14 but was clocked in by the Court on June 21). The Motion notes that the transcript had been received on March 28, 2013, and that new counsel advised the Court of that fact "as soon as reasonably possible." The record demonstrates this occurred on April 9, 2013, some seventy-three (73) days before this Court received this Motion.

The Fund is now seeking another delay, even though it has argued throughout that the issues it wishes to pursue are the same issues it raised and briefed in the prior appeal

this Court heard in March of 2010, over three (3) years ago. Presumably, the Fund should be able to simply amend the prior brief it filed to reflect the subsequent history of this case, but the issues and arguments ought to be identical.

Additionally, the Court should note that the Fund does not contend there were not four (4) or more employees working for Avni Grocers at the time these employees were murdered by a co-worker. That argument would be impossible in light of (1) Judge Hill's unchallenged finding based on his own view of the evidence, (2) Mr. Pal's affidavit and (3) Mr. Pal's live testimony. Instead, the Fund contends that it should have won these cases on a technicality. According to the Fund, the claimants should not have enjoyed an opportunity to contest the Fund's defense to these claims, even though the Fund never filed an answer or pre-hearing brief raising any defenses, and even though the claimants had the Coverage and Compliance Report which found that more than four (4) employees worked for Avni Grocers. This appeal is simply the Fund saying "we should have won the first time, and even though we were wrong on the facts, Judge Hill should not have reversed." Under the circumstances of this case (which is now firmly into its 11th year), this Court would be justified in doing unto the Fund what the Fund seeks to do unto the claimants - dispose of this case on the technical violations of the applicable appellate court rules. This is not to say that Judge Hill was wrong - he was not. However, the arguments in this case are without merit and reflect an intent to further delay the already long-delayed justice in this case.

If this Court is inclined to reinstate this Appeal, the Respondent requests that the Court expedite the schedule and order the brief to be filed immediately. The Fund has

consistently maintained that it is arguing the exact same issues it has already briefed and argued once to this Court - it should not take long to modify the prior brief for filing.

Furthermore, the Respondent would request that the Court certify this matter to the Supreme Court pursuant to Rule 204, SCACR, since the Fund has demonstrated its intent to delay this matter as long as possible. The issue the Fund is pursuing is governed by settled law in general (a regulation may not conflict with or expand a controlling statute), but the issue may be considered novel insofar as no case has ever construed the operation of 25A S.C. Code Ann. Reg. 67-701 (Supp. 2012)¹ against the backdrop of S.C. Code Ann. § 42-17-50.² Although several cases have applied the Regulation, none have discussed the precise issue in this case. No matter how this Court rules on the merits of the issues the Fund is raising, the losing party is certain to seek review by certiorari.

¹ The Regulation provides, “A. When additional evidence is necessary for the completion of the record in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner. B. When a party seeks to introduce new evidence into the record on a case on review, the party shall file a motion and affidavit with the Commission’s Judicial Department. C. *The moving party must establish the new evidence is of the same nature and character required for granting a new trial* and show: (1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; and (2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.” 25A S.C. Code Ann. Regs. § 67-707 (Supp. 2012).

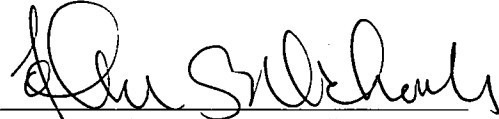
² The statute provides, “If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, the Commission *shall* review the award and, *if good grounds be shown therefor*, reconsider the evidence, *receive further evidence*, rehear the parties or their representatives and, if proper, amend the award.” S.C. Code Ann. § 42-17-50 (Supp. 2012) (emphasis added).

CONCLUSION

For the reasons stated, the Court should deny the Fund's motion to reinstate this appeal. If the Court reinstates the appeal, the Court should expedite briefing. Lastly, the Court should certify this matter to the Supreme Court pursuant to Rule 204, SCACR.

July 15, 2013

Respectfully submitted,



John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599, ext. 115

Jarrel L. Wigger, SC Bar #11824
Wigger Law Firm, Inc.
8086 Rivers Avenue, Suite A
North Charleston, South Carolina 29406
(843) 553-9800 Telephone
(843) 553-1648 Facsimile

Attorneys for Respondent

1 STATE OF SOUTH CAROLINA

CIRCUIT COURT

2 COUNTY OF CHARLESTON

3 DHARMENDRA CHAUDHARI, spouse of 2012-CP-10-06355
4 ANITA CHAUDHARI, deceased,
5 Claimant,

6 -vs-

TRANSCRIPT OF RECORD

7 AVRIL GROCERS and the SOUTH
8 CAROLINA UNINSURED EMPLOYERS' FUND,
9 Defendant.

10 -&-

11 RAJKUMARI PUNIYANI in re 2012-CP-10-06357
12 VIRENDRA PUNIYANI, deceased,
13 Claimant,

14 -vs-

15 AVNI GROCERS and the SOUTH
16 CAROLINA UNINSURED EMPLOYERS' FUND,
17 Defendant.

18 Heard on Wednesday, January 9, 2013
19 Charleston, South Carolina

20 BEFORE:

THE HONORABLE J. C. NICHOLSON

21 APPEARANCES:

22 Counsel on Behalf of the Claimant:
23 John Nichols, Esq.

24 Counsel on Behalf of the Fund:
25 Terri J. Morrill, Esq.

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29803-5232

1 ON WEDNESDAY, JANUARY 2, 2013 AT 9:37 A.M.:

2 THE COURT: All right. I believe the -- what's the
3 first case? Good morning.

4 MS. MORRILL: Good morning.

5 THE COURT: Sorry for all the confusion yesterday.

6 MS. MORRILL: And I apologize as well.

7 THE COURT: Well, apparently it wasn't your fault. It
8 was lack of, I guess, clear and proper communication but
9 thank you for being here this morning.

10 MS. MORRILL: Thank you, Your Honor.

11 THE COURT: I believe this is, what, a Worker's
12 Compensation appeal; is that correct?

13 MS. MORRILL: That is correct.

14 THE COURT: Who's doing the appeal?

15 MS. MORRILL: I am. I'm the Appellant, Your Honor.

16 THE COURT: Okay.

17 MS. MORRILL: I'm Terry Morrill of Clawson and
18 Staubes, LLC. And I'm here on behalf of the South
19 Carolina Uninsured Employers' Fund. And if you hear me say
20 SCUEF, I'm lapsing into the abbreviation that's most
21 commonly used.

22 THE COURT: Okay.

23 MS. MORRILL: So you may hear me say that, SCUEF,
24 instead of the Fund.

25 This case is an interesting case, Your Honor. We're

1 actually on our second round of appeals. And the primary
2 issue up on appeal goes back to our first round of appeals
3 which were filed by the Claimant.

4 This is -- by the way, this is a very tragic death
5 claim and no one disputes that. And you'll see actually a
6 finding made by the Hearing Commissioner as to the fact
7 that this was very tragic, but nonetheless --

8 THE COURT: This is a second?

9 MS. MORRILL: This is our second go-round because --

10 THE COURT: What happened in the first go-round?

11 MS. MORRILL: The first go-round the -- well, let me
12 give you a little bit more background.

13 The Work Comp Commission once they went into some
14 budgetary constraints no longer had what they called a
15 rule to show cause hearing in cases where there was
16 allegedly not Worker's Compensation insurance to determine
17 if, one, an alleged employer didn't have insurance and,
18 two, to determine if they had jurisdiction to hear the
19 case based upon a finding of four or more employees.

20 So the Commission stopped having those rule to show
21 cause hearings. And when they did so they sent letters to
22 the claimants' attorneys, as they did in this case,
23 saying, this is what we've determined in our
24 investigation; however this is not a ruling, this is not
25 evidence. You have the burden of proving in the first

1 instance that any hearing before the Commission didn't
2 have jurisdiction based upon a finding of four or more
3 employers.

4 THE COURT: What was the dispute as far as
5 jurisdiction?

6 MS. MORRILL: That there were not four or more
7 employees.

8 THE COURT: Were not four or more employees?

9 MS. MORRILL: Exactly, Your Honor. The next step is
10 because --

11 THE COURT: Why isn't this going to the Court of
12 Appeals rather than here?

13 MS. MORRILL: Because it was on remand -- oh. Because
14 it's a pre-2007 claim which is when the new statute went
15 into effect allowing it to go to the Court of Appeals.

16 THE COURT: Okay.

17 MS. MORRILL: So we're still back in that four-level
18 appellate process. This is the second time, because the
19 first time it was found that the Judge's remand was not a
20 final order, just an interlocutory.

21 THE COURT: All right. What did the Hearing
22 Commissioner rule on the four employees issue?

23 MS. MORRILL: As additional information of importance
24 to Your Honor is that we got to the hearing. I
25 represented the SCUEF at that hearing.

1 At the time of the hearing the Hearing Commissioner
2 said to the counsel for Claimant: You realize you have to
3 prove jurisdiction, are you prepared to go forward today?
4 The response was: Yes, sir, we are prepared to go
5 forward.

6 The Commissioner said: You know you bear the burden
7 of proving jurisdiction. The Claimants were prepared to
8 go forward.

9 The evidence in this case, the undisputed evidence in
10 this --

11 THE COURT: Well, what did the Commissioner rule?

12 MS. MORRILL: The Commissioner ruled that there were
13 not four or more employees and that the Claimant failed to
14 --

15 THE COURT: And that went to the full Commission;
16 right?

17 MS. MORRILL: Yes, the full Commission.

18 THE COURT: What did the full Commission do?

19 MS. MORRILL: The full Commission affirmed.

20 THE COURT: They affirmed. All right. And then it
21 went to the Circuit Court?

22 MS. MORRILL: That's correct.

23 THE COURT: And what happened at the Circuit Court?

24 MS. MORRILL: Okay. One more detail you need to know
25 about the full Commission hearing.

1 THE COURT: Okay.

2 MS. MORRILL: Contemporaneously with the appeal to the
3 full Commission, the Claimant moved to submit an affidavit
4 of the alleged employer. And the full Commission denied
5 that affidavit saying that under our regulations that is
6 not newly-discovered evidence because newly-discovered
7 evidence is evidence which is defined as evidence not
8 discoverable by the party at the time of the hearing or
9 could not have with due diligence been found.

10 THE COURT: As to, what, the regulation?

11 MS. MORRILL: As to the regulation. That's correct.
12 What the Circuit Court Judge did is --

13 THE COURT: All right. And then I assume they
14 affirmed the Hearing Commission?

15 MS. MORRILL: They affirmed the Hearing Commission.
16 That's correct, Your Honor.

17 THE COURT: And then it went to the Circuit Court?

18 MS. MORRILL: Then it went to the Circuit Court on
19 appeal by the Claimant.

20 THE COURT: What happened at the Circuit Court?

21 MS. MORRILL: At the Circuit Court the Judge found
22 that Section 42-15 -- I'm sorry, 42-17-50 of the Worker's
23 Compensation Act, which is the section that says: The
24 Commission shall review the award and if good grounds be
25 shown therefore...

1 The Circuit Court Judge found that that was at odds
2 with Regulation 67-707 which is the regulation that
3 defines newly-discovered evidence as evidence not known to
4 the moving party at the time of the first hearing or by
5 reasonable diligence new evidence could not have been
6 secured. And the discovery has to be brought to the
7 attention of the Commission immediately.

8 THE COURT: Okay.

9 MS. MORRILL: And you'll see --

10 THE COURT: So the Circuit Court Judge ruled that that
11 statute --

12 MS. MORRILL: Was at odds with the regulations.

13 THE COURT: Okay.

14 MS. MORRILL: Okay.

15 THE COURT: And what happened? What did he do?

16 MS. MORRILL: He remanded it back to --

17 THE COURT: He remanded it back to the full
18 Commission?

19 MS. MORRILL: Back to the full Commission and they
20 automatically remand back to a hearing.

21 THE COURT: What did the full Commission do on the
22 remand?

23 MS. MORRILL: On the remand they were under the order
24 of the Circuit Court Judge to allow that evidence which
25 they have denied. They then didn't consider it at that

1 point. They remanded it back to the Hearing
2 Commissioner.

3 THE COURT: Okay.

4 MS. MORRILL: In addition to allowing the affidavit at
5 the hearing, the actual testimony of this individual was
6 --

7 THE COURT: Well, when did it -- it went on up; didn't
8 it? Or did it?

9 MS. MORRILL: It went to the Court of Appeals. It was
10 ruled -- actually we both appeared at that time and the
11 Court of Appeals concluded it was an interlocutory order
12 and remanded --

13 THE COURT: You can't appeal remands; right?

14 MS. MORRILL: No.

15 THE COURT: But you appealed the remand?

16 MS. MORRILL: We did, making the argument that it was
17 an issue of law that needed to be addressed and that as a
18 result it did not need -- and it's a jurisdictional issue
19 that the Court could consider it without considering the
20 other underlying issues. But the Court said, no, we find
21 -- we still find that's an --

22 THE COURT: The Court of Appeals remanded it back to
23 the full Commission to follow the Circuit Court's order?

24 MS. MORRILL: That's -- well, they dismissed the
25 appeal and, yeah, said it goes back now to the full

1 Commission. The full Commission remanded it back to a
2 Hearing Commissioner.

3 THE COURT: And then what happened at that hearing?

4 MS. MORRILL: It went to a hearing. Now bear in mind
5 that based on the Circuit Court order both the full
6 Commission and the Hearing Commissioner were under order
7 to allow this affidavit.

8 And bear in mind also that both the Hearing
9 Commissioner and the full Commission had concluded there
10 was not substantial evidence --

11 THE COURT: Do you have a copy of the Circuit Court
12 order?

13 MS. MORRILL: Pardon?

14 THE COURT: Do you have a copy of the Circuit Court
15 order so I can take a look at it?

16 MS. MORRILL: I don't know. Let me see if I do, Your
17 Honor. I've got the full Commission order.

18 THE COURT: I mean, did the order -- normally on
19 remands you order them to take evidence or have another
20 hearing. You don't order -- them to tell them what to
21 do. I mean, did the Circuit Court actually tell them,
22 hey, you got to accept this affidavit --

23 MS. MORRILL: Yes.

24 THE COURT: -- or are they just telling them that
25 42-17-50 applied, not the regulation?

1 MS. MORRILL: I don't have the order. John, if you do,
2 I have no problem with you handing it up. I'll read that
3 portion of the order.

4 MR. NICHOLS: I brought a copy of the appellate --

5 THE COURT: Do you mind if I just take a look at the
6 Circuit Court order? That's what I want to look at, the
7 Circuit Court order.

8 MS. MORRILL: Sure. It's a very lengthy order, Your
9 Honor.

10 (Document handed to the Judge.)

11 THE COURT: Okay. Thank you very much.

12 MS. MORRILL: You're welcome.

13 THE COURT: Is it attached?

14 MS. MORRILL: That is the order itself.

15 THE COURT: Oh, this is the order? Okay. This is the
16 order. Let me see. (Pause.)

17 So he found that they did have four employees and
18 reversed the Commission's refusal to admit. Okay.

19 So the only thing he did was just order that the
20 affidavit was admissible; right?

21 MS. MORRILL: That's correct. And remanded it back
22 for reconsideration.

23 THE COURT: And then remanded it back to have another
24 hearing with that affidavit admitted; is that correct?

25 MS. MORRILL: That's correct, Your Honor.

1 THE COURT: Okay.

2 MS. MORRILL: Again, the basis --

3 THE COURT: Let me finish reading. I'll listen to
4 you. Okay?

5 MS. MORRILL: I'm sorry, Your Honor.

6 THE COURT: I can't listen to you and read at the same
7 time.

8 MS. MORRILL: Yes, sir.

9 THE COURT: I apologize. My wife says I've just got a
10 one-track mind. I can't do two things at once like she
11 does. (Pause.)

12 Remanded to the Commission for other -- consistent
13 with this order. All right. Thank you very much. Be
14 glad to hear you.

15 MS. MORRILL: Thank you, Your Honor. And the basis
16 for appeal is that it was an error.

17 THE COURT: Let me see. It goes back to the
18 Commission for a hearing.

19 MS. MORRILL: That's correct.

20 THE COURT: What did the Hearing Commissioner do?

21 MS. MORRILL: The Hearing Commissioner then ruled
22 based on the affidavit as well as additional testimony of
23 that individual --

24 THE COURT: So they offered additional testimony?

25 MS. MORRILL: Right. Of that individual who wasn't at

1 the first hearing. They allowed the opportunity to --

2 THE COURT: So basically that's a new evidentiary
3 hearing?

4 MS. MORRILL: Exactly.

5 THE COURT: For the Commission to make the evidentiary
6 rule on whether it was four employees or not four
7 employees?

8 MS. MORRILL: Exactly.

9 THE COURT: And then that got appealed to the full
10 Commission?

11 MS. MORRILL: Exactly. And they just affirmed as
12 directed by the Circuit --

13 THE COURT: So now you're here on the full Commission,
14 the affirmation of the Hearing Commissioner?

15 MS. MORRILL: Exactly. With, continuing throughout
16 the objection being made that this case should have never
17 gone back to the Commission in the first place because the
18 Hearing Commissioner's ruling, the full Commission ruling
19 were correct and proper based upon the statute and the
20 regulations and it was error for the Circuit Court Judge
21 to remand.

22 So that's why I told you initially we're in that
23 second round because the Court of Appeals would not
24 consider it just upon the jurisdictional issue, but
25 required the remand and a final order.

1 We now come back upon the same issue on appeal which
2 is: Did the Circuit Court err in finding that that
3 evidence should have been allowed and then remanded it?
4 If it had been affirmed, the appeal would then have gone
5 to the Court of Appeals. So --

6 THE COURT: Well --

7 MS. MORRILL: Let me give you, I'd like to --

8 THE COURT: -- you preserved that issue at the Hearing
9 Commissioner level?

10 MS. MORRILL: Yes.

11 THE COURT: You preserved that at the full
12 Commission?

13 MS. MORRILL: The issue was always, once it was
14 remanded back it was error to have a hearing --

15 THE COURT: Whether the regulation applied or whether
16 the statute applied?

17 MS. MORRILL: Yes -- I'm sorry?

18 THE COURT: So your objection was that you preserved
19 your argument, the regulation applied versus the statute
20 applied?

21 MS. MORRILL: No. That they are not inconsistent.

22 THE COURT: They're not inconsistent?

23 MS. MORRILL: Exactly. Which was our argument at the
24 Circuit Court as well. The argument --

25 THE COURT: Well, assuming they aren't inconsistent,

1 how does that affect the findings of the second Hearing
2 Commission, that they --

3 MS. MORRILL: There would have been no findings at the
4 second Commission. It would not have been remanded. It
5 would have never gotten back to a Hearing Commissioner.

6 At that point if the Judge had not found that they
7 were inconsistent, he would have affirmed the order of the
8 Hearing Commissioner and the full Commission.

9 THE COURT: Well, why -- I guess I'm just thinking,
10 why isn't that moot at this point in time? I mean, you
11 had two evidentiary hearings.

12 MS. MORRILL: That's correct.

13 THE COURT: You had the second evidentiary hearing and
14 the Commissioner said, yes, there were four employees.

15 MS. MORRILL: Because --

16 THE COURT: And then the full Commission has affirmed
17 that. Now you're trying to raise something that occurred
18 at the first process --

19 MS. MORRILL: Because we have to --

20 THE COURT: -- in the first process. -

21 MS. MORRILL: That's the only way we can get to the
22 Court of Appeals on that issue, of the error of the
23 initial Circuit Court Judge because, remember, before the
24 Court of Appeals said, well, you can't appeal this order
25 at this point because it's a remand order and everything

1 that occurred below again is based upon the Circuit Court
2 Judge's reversal in what we submit as errors as a matter
3 of law in his finding that the statute is inconsistent
4 with the regulation.

5 Now, your Honor, let me give you a couple of the
6 thoughts -- a couple of additional things.

7 THE COURT: I mean, the Hearing Commission still
8 could've evidentially at the hearing said, I don't believe
9 the employee. I don't believe --

10 MS. MORRILL: Right.

11 THE COURT: Was the affidavit admitted or was his
12 testimony taken?

13 MS. MORRILL: No, well at the hearing there was
14 additional testimony presented.

15 THE COURT: But was the affidavit admitted into
16 evidence?

17 MS. MORRILL: Yes, it was as well.

18 THE COURT: All right. The Hearing Commissioner still
19 could have taken the position: Hey, I don't believe the
20 testimony, I don't believe the affidavit, there weren't
21 four employees.

22 MS. MORRILL: Yes, they could have.

23 THE COURT: That was the purpose of the remand; right?

24 MS. MORRILL: Not exactly.

25 THE COURT: I mean, that's why he remanded it back.

1 MS. MORRILL: And the appeal. This is a very crucial
2 issue.

3 The whole purpose of the remand was that the Judge
4 found that the Commission's regulation was not proper so
5 additional evidence should be allowed.

6 That goes to a very basic premise of procedure in
7 presenting a case. And that's why I pointed out to you
8 very early on that -- and there's some interesting things,
9 statements in the prior Circuit Court Judge's order. He
10 says: Well, the Claimants didn't know that jurisdiction
11 was going to be an issue at the hearing. Well, in the
12 Form 52 which is the death claim --

13 THE COURT: All right. Put the mootness issue aside.
14 What's your argument?

15 MS. MORRILL: The argument is that that Circuit Court
16 order was improper as a matter of law. The Circuit Court
17 Judge allowed evidence that was not presented and was
18 available.

19 THE COURT: There's a whole history of cases that
20 basically say that one Circuit Court Judge is not allowed
21 to overrule another Circuit Court Judge. And there's a
22 whole line of cases --

23 MS. MORRILL: And that's probably why you asked me
24 about --

25 THE COURT: Why are you sitting here asking me to

1 overrule a Circuit Court Judge?

2 MS. MORRILL: Because I have to.

3 THE COURT: Pardon?

4 MS. MORRILL: I have to. I have to, Your Honor. And
5 that's when you asked me why you weren't going straight to
6 the Court of Appeals because this is a pre-2007 case. So
7 the only way I can get back to the Court of Appeals --

8 THE COURT: I mean, I don't have the authority to
9 reverse that Circuit Court order. The Court of Appeals
10 does.

11 MS. MORRILL: That may be your ruling and at that
12 point we then appeal to the Court of Appeals at that
13 point. We're now appealing from a final order because,
14 remember before they dismissed this as an interlocutory.
15 But we can't get back to the Court of Appeals without
16 coming to you because of this being a pre-2007 case.

17 THE COURT: Is this sort of a catch 22?

18 MS. MORRILL: It very may well be, Your Honor. And I
19 hadn't really thought about it that way but what I would
20 like you to look at is the --

21 THE COURT: I mean, I hate to shorten your argument
22 and I'll listen to the other side, but my position is that
23 if you're appealing the first Circuit Court order and
24 asking me now to reverse that.

25 MS. MORRILL: Right.

1 THE COURT: I don't have the authority to do that,
2 period.

3 MS. MORRILL: Right. And, Your Honor, that's a very
4 good question. And there should be a mechanism in place
5 and perhaps that's why they have now passed a law saying
6 that we go straight to the Court of Appeals. That kind of
7 thing can't happen anymore.

8 THE COURT: Well, I don't think that's the reason. I
9 think they had too many appeals involved in Worker's
10 Comp. It was taking years and years and years.

11 MS. MORRILL: That may be as well.

12 THE COURT: They wanted to short-circuit it.

13 MS. MORRILL: Right. A couple of other things that I
14 did want to bring to your attention is -- and the thing I
15 think that bothers me so very much about this case is this
16 Claimant or these, it's actually the same Claimant in both
17 of the death claims, had every opportunity to present and
18 prove his case.

19 The Work Comp Act -- and I only do Worker's
20 Compensation. The Work Comp Act is very clear
21 procedurally about what must be done at hearings, how you
22 file your pleadings, how you preserve your evidence, what
23 evidence can be submitted in addition to a hearing on
24 appeal.

25 And we come back to a very basic premise which is,

1 this Claimant didn't prove his case.

2 THE COURT: Well, apparently he did the second time.

3 MS. MORRILL: Yes, based on evidence that was known to
4 him by due diligence, discoverable by him and with failing
5 to use two mechanisms in place that --

6 THE COURT: Well, wasn't that your argument at the
7 evidentiary hearing level?

8 MS. MORRILL: Well, that's the argument throughout and
9 --

10 THE COURT: That's the argument that you made and that
11 was rejected; right?

12 MS. MORRILL: That's correct. And that's why we have
13 to continue the appeal process to get that order back
14 before the Court of Appeals to have it considered, that
15 order, because that was the whole reason we even went
16 back.

17 The whole reason we even went back to a new hearing
18 was based on allowing evidence that we submit was
19 discoverable by due diligence, was readily available at
20 the time of the hearing. And basically what the Court was
21 allowing is a party not to present and prove their case.
22 You know, very, very basic.

23 And, in fact, that regulation is almost identical to
24 the rule, I think it's 60-B, that says newly-discovery
25 evidence is not evidence which could have been discovered

1 by due diligence. I mean, it's a very basic premise. If
2 this is allowed to stand this means the Claimants could go
3 forward to a hearing, not prove their case, appeal it,
4 present to the Commission evidence that they could have
5 discovered at the first hearing but didn't present, and
6 then have a different ruling.

7 I mean, it's just such a basic procedural premise that
8 I'm very bothered by it. And obviously that's the whole
9 basis that we want to get back to the Court of Appeals
10 because that is a very serious issue; the failure to
11 prepare and present the case and present the evidence upon
12 which the Commission has ruled. And that simply did not
13 occur.

14 THE COURT: Okay.

15 MS. MORRILL: Thank you, Your Honor.

16 THE COURT: Thank you very much.

17 MR. NICHOLS: Judge.

18 THE COURT: Mr. Nichols?

19 MR. NICHOLS: If I told you everything that bothered
20 me about this case, we'd be here all day but I'm not going
21 to do that.

22 This case, these people we murdered over ten years
23 ago. This should have been an admitted case. Let me
24 clear up a couple of things on the record.

25 Counsel said they knew, they knew they would have to

1 come here. Well, let me tell you. The procedures under
2 the Worker's Comp Act are very clear on other points as
3 well that were not followed by the Fund here.

4 For example, when you want to file an answer and
5 challenge the number of employees, what do you do? You
6 file an answer. They didn't do that here. When you want
7 to file something else and challenge other things you file
8 those and you put the other side on notice that you're
9 going to make an issue out of this.

10 Mr. Wigger had the coverage and compliance report
11 which said that this employer had two locations. They
12 were related. And actually found that there were
13 potentially as many as 15 employees at these two
14 locations.

15 So Mr. Wigger shows up -- this case had been dragging
16 and dragging and had been going on for over a year.
17 Mr. Wigger shows up at the hearing and at that point
18 without even filing a third document that the Fund could
19 have filed at that time which is a pre-hearing brief under
20 Rule 50-A, they didn't do that. They didn't put anybody
21 on notice that they were going to challenge the number of
22 employees in this case.

23 So Mr. Wigger has got his folks over from Atlanta.
24 They're ready to go forward. And Commissioner Hufstetler
25 says: I want you to pull your 50, I want you to delay

1 this. And Mr. Wigger said: No, we've been delayed,
2 delayed, delayed. My folks have come over from Atlanta.
3 There's really nothing undisputed. It's admitted as far
4 as liability under the Act. It's admitted as far as the
5 compensation because it's a death case.

6 And at that point is when the Fund first said, wait a
7 minute. We're going to challenge the number of
8 employees. You're going to have to prove jurisdiction
9 under the Act.

10 And it was under those circumstances that this first
11 case first came before Commissioner Hufstetler who turned
12 to Mr. Wigger and strongly urged him to pull his 50 and
13 let them come back in and do what they should have done
14 already.

15 And that's one of the things that bothers me about
16 this --

17 THE COURT: Well, what does that do to their argument
18 on the four employees? Did they waive it or what
19 happened?

20 MR. NICHOLS: Well --

21 THE COURT: I mean, what's the consequences of that?

22 MR. NICHOLS: Well, that is up in the air because four
23 employees or more, the Worker's Compensation Commission
24 does not have jurisdiction to hear a case. There's --

25 THE COURT: Well, unless they got four employees.

1 MR. NICHOLS: Unless they have four or more employees,
2 the employer is not subject --

3 THE COURT: Well, what kind of testimony was offered
4 at that first hearing with Mr. Wiggers concerning the four
5 employees?

6 MR. NICHOLS: Well, and let me clear up that. This is
7 the second thing that bothers me. Judge Hill also --

8 THE COURT: Tell me what happened at the Worker's Comp
9 hearing.

10 MR. NICHOLS: Mr. Chaudhari, whose wife was one of the
11 murdered employees, testified that he also worked at both
12 locations.

13 THE COURT: Okay.

14 MR. NICHOLS: So if you get the killer, who was one of
15 the employees, the two employees who were murdered and
16 Mr. Chaudhari, you had four employees. But he also
17 testified about other employees.

18 THE COURT: But Hufstetler just rejected that?

19 MR. NICHOLS: Hufstetler rejected that.

20 THE COURT: Okay.

21 MR. NICHOLS: The appellate panel summarily affirmed.
22 But because it's a jurisdictional issue, Judge Hill had
23 the authority -- and this is the second part of the order
24 which was not presented to you. The second part of the
25 order which -- if I can hand it up to you.

1 THE COURT: Yes, sir.

2 MR. NICHOLS: That's part two of the order. And this
3 is critical in this case, Judge. Part two of the order,
4 Judge Hill says: Even apart from Mr. Paul's affidavit,
5 whether it should have been admitted or not, I find that
6 the evidence supports a finding of four or more
7 employees.

8 He made his own finding which he's allowed to do
9 because this is a jurisdictional question. And I can
10 quote you case law back from when the Act was first --

11 THE COURT: Well if he found that, why did he remand
12 it?

13 MR. NICHOLS: Because the Commission did not -- the
14 Commission has to make the award. He could not make the
15 award. He has to remand and he actually remanded it all
16 the way back to the Hearing Commissioner. That's where
17 the award has to be made.

18 THE COURT: Well, why don't they have the right to
19 appeal that issue, Judge Hill's order now?

20 MR. NICHOLS: Because the Supreme Court said in
21 Montjoy and more recently in the Bone case which they
22 reheard now that where a Circuit Judge remands the matter
23 is not a final order under the Administrative Procedures
24 Act which controls the Worker's Comp Act.

25 THE COURT: But they still can preserve it and raise

1 that whenever they get to the Court of Appeals or the
2 Supreme Court.

3 MR. NICHOLS: Yes, sir, they can. But it appears that
4 --

5 THE COURT: What are y'all asking me to do? I'm not
6 going to reverse Judge Hill's order.

7 MR. NICHOLS: That's right. You can't.

8 THE COURT: I can't. I'm not going to do that. So
9 what do y'all want me to do?

10 MR. NICHOLS: I've got that in the brief. And by the
11 way, these are two appeals but they're essentially the
12 same case.

13 THE COURT: All right.

14 MR. NICHOLS: But there's a possibility that you could
15 find that you're hearing this on different evidence. And
16 I don't think you are because they make very clear here
17 that they're only up here on Judge Hill's ruling of law
18 that the statute --

19 THE COURT: That's the appeal issue. So, I mean, I
20 don't know what I can do. My hands are sort of tied. I
21 mean, all I can do is affirm his order and let y'all go on
22 to the Court of Appeals. Tell me what else I can do.

23 MR. NICHOLS: You can make a finding apart from that
24 that this issue is moot now that the Commission has gone
25 ahead and allowed Mr. Paul's live testimony as well as his

1 affidavit which would make it based on different -- a
2 presentation of a different set of facts.

3 THE COURT: Well, yeah. If she -- apparently at the
4 hearing level, the second hearing level tried to preserve
5 that and preserved it again at the full Commission, does
6 that really make it moot?

7 MR. NICHOLS: Not as to that question of law. But I
8 would actually say that it does, Judge, because what
9 they're complaining about is the appellate panel denying
10 Mr. Wigger's request that -- because they sandbagged him
11 at that hearing. He found Mr. Paul. Mr. Paul had left
12 the country, but he found him and he got an affidavit from
13 him and he tried to present that affidavit and he tried to
14 present it under 42-17-50.

15 THE COURT: Well, I mean, that's -- whether it's a
16 statute or whether it's a regulation, whether they are the
17 same, that's still a factual finding that the fact
18 finder's going to determine, right, whether they're going
19 to allow additional testimony or not.

20 MR. NICHOLS: If they find -- they have to make a
21 finding of good cause, but Judge Hill was permitted to
22 make that same finding because this is a jurisdictional
23 issue.

24 THE COURT: Right. I understand. And he found that
25 factually they should have allowed the affidavit under the

1 statute or the rule.

2 MR. NICHOLS: That's correct. You can't do anything
3 about that.

4 THE COURT: There's nothing I can do about that.

5 MR. NICHOLS: You're correct. And I think we're -- I
6 think we're here again --

7 THE COURT: Well, you're just here because you got to
8 go here to get to the Court of Appeals is what it amounts
9 to.

10 MR. NICHOLS: Because this is an old law case.

11 THE COURT: Right.

12 MR. NICHOLS: And we're stopping to visit on the way
13 up.

14 THE COURT: I mean, that's the only issue she's
15 appealing on is Judge Hill's order.

16 MR. NICHOLS: But that is the only issue that they
17 have.

18 THE COURT: You're not appealing the issue that the
19 second Hearing Commissioner and the full Commission made a
20 error factually, and abused their discretion factually;
21 are you?

22 MS. MORRILL: Your Honor, not based on the additional
23 evidence that was presented but the objection is the
24 additional evidence even being allowed. So we have to go
25 back to that order of the Circuit Court Judge.

1 This case was over. The full Commission dismissed it.
2 I mean, the Hearing Commissioner dismissed it, the full
3 Commission dismissed it. It was only because the Circuit
4 Court Judge --

5 THE COURT: Well, I'm going to shorten it for you.
6 I'm going to deny your appeal. I'll do a Form Four
7 order. You all have fun in Columbia.

8 MR. NICHOLS: You don't need a full order, Judge?

9 THE COURT: Unless you want to present one.

10 MR. NICHOLS: Well, I don't think --

11 THE COURT: I'd be happy if you want to present me
12 with an order. I'm just trying to save you the trouble.

13 MR. NICHOLS: Form Four order works for me, Judge.

14 THE COURT: Do you want a Form Four?

15 MS. MORRILL: I think that's appropriate, Your Honor.
16 I think that gives us what we need to appeal to the Court
17 of Appeals.

18 THE COURT: You're asking me to reverse Judge Hill's
19 order, and I don't have the authority to do it. So I
20 might as well just deny it and y'all have fun.

21 MS. MORRILL: Well, at least we gave you an
22 interesting morning.

23 THE COURT: Right. It's an interesting question.

24 MR. NICHOLS: Thank you, Judge. Good to see you.

25 THE COURT: Nice to see you. Thank you very much.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-6355
Appellate Case No. 2013-000282

RECEIVED
JUL 15 2013

SC Court of Appeals

Dharmendra Chaudhari, spouse of
Anita Chaudhari, Deceased Claimant/Respondent,

v.

Avni Grocers/Fast Point Amoco, Employer
and SC Uninsured Employers Fund, Defendants/Appellants.

PROOF OF SERVICE

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

Natalie Byars Fisher, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492



Erin Bridges
Paralegal
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

July 15, 2013
Columbia, South Carolina