STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

Case No. 2012-CP-1006357
Appellate Case No. 2013-000412

Virendra Puniyani, Deceased Employee, and
Rajkumari Puniyani, Claimant, ... Respondents,

v.

Avni Grocers, Employer, and South Carolina
Uninsured Employers' Fund, Carrier ..... Defendants,

of whom
South Carolina Uninsured Employers' Fund, Carrier, is ..... Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

This is a workers' compensation case. The Claimant/Respondent, Rajkumari Puniyani, is the mother of the deceased Employee, Virendra Puniyani. Mr. Puniyani and his sister-in-law, Anita Chaudhari, were murdered by a co-worker while on the job with Avni Grocers (the Employer). Each deceased worker's estate brought claims under the Act, asserting the deaths occurred during the course and scope of each decedent's employment. The South Carolina Uninsured Employers' Fund (the Fund) became involved in the matter because the Employer was operating without Workers' Compensation coverage. The primary issue in this case was whether Employer Avni Grocers regularly employed four (4) or more employees so as to be subject to the Act at the time of the Claimants' deaths.

The 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. Because the Claimants had been waiting for a year for a hearing, one Claimant had traveled from Atlanta, Georgia, and the Claimants had produced proof that the Fund *had* been properly served, the Claimants indicated a desire to proceed. Commissioner Huffstetler continued to strongly insist that the Claimants continue the hearing (confessing in his instructions for an order that he was rude to the Claimants in this effort) (Bench Instructions 1/5/06), but the Claimants still wanted to proceed. Commissioner Huffstetler concluded that the Fund was properly served with the Form 52 and received adequate notice of the hearing.

Apparently, the Fund did very little work on the file following the retirement of the lawyer previously assigned to work on these matters. The Fund called outside counsel to cover the hearing before Commissioner Huffstetler, and the Fund's counsel filed no Form 51, Form 53 or other response, nor did the Fund file a Form 58 pre-hearing brief. In fact, the Fund did not give *any* notice to the Claimants regarding any objectionable issues the Fund had as to coverage or benefits.[1]

The Employer, Anvi Grocers, failed to appear at the hearing. Following the hearing, Commissioner Huffstetler ruled that the Claimants failed to produce substantial evidence that Avni Grocers regularly employed four (4) or more employees so as to be subject to the Act and, at best, the Claimants offered proof that there were only three (3) employees where the Claimants worked.

Following the hearing before Commissioner Huffstetler, the Claimants located Harendra Pal, the owner of Avni Grocers who had moved out of state, and obtained an affidavit from Mr. Pal that established the statutory requirements were met and the Employer was subject to the Act. The Claimants then filed a motion to add additional evidence to the record. The Appellate Panel of the Commission, however, refused to accept the additional evidence. The Panel affirmed Commissioner Huffstetler's order.

Both of the Claimants appealed from both the Appellate Panel's affirmance of Commissioner Huffstetler's order as well as the Commission's denial of the motion to accept the additional evidence. The matters continued to be consolidated for purposes of judicial review.

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[1] Current counsel for the Fund was not involved in this matter at the time.

Following briefing and oral arguments, the circuit court (Judge D. Garrison Hill) held the Commission erred as a matter of law in refusing to accept Mr. Pal's affidavit as additional evidence. Judge Hill further ruled that even without Mr. Pal's affidavit, the preponderance of the evidence established that Employer regularly employed four (4) or more employees so as to be subject to the Act. Judge Hill declined to address any additional issues, and remanded the matter to the Commission for further proceedings consistent with his rulings. That order was entered September 18, 2007.

The Fund timely appealed Judge Hill's order to this Court. On May 28, 2008, this Court advised the parties that the two cases would no longer be consolidated. Hence, each case was briefed separately. On March 2, 2010, the Court of Appeals heard oral arguments on both cases jointly. At oral argument, the Claimants pointed out that Judge Hill's order was not immediately appealable because it contained a remand to the Commission. The Court requested additional briefing (Court of Appeals Order of March 5, 2010), 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 as well as Mr. Pal's live testimony.

On February 6, 2012, 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. Commissioner Wilkerson ordered compensation accordingly.

On February 29, 2012, the Fund filed a Form 30 seeking Appellate Panel review. The issues stated 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 Commissioner Wilkerson's order based upon its own review of the record. The Panel also found there was no issue before it regarding the admission of Mr. Pal's live testimony.

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 the Fund specifically challenging anything that happened at the hearing before Commissioner Wilkerson, the second time the case was tried. Judge Nicholson ruled that he could not overturn Judge Hill's order and entered a Form 4 order denying the appeal.

On February 5, 2013, the Fund served a notice of appeal, but the notice referenced *only* Judge Nicholson's ruling and did not mention or attach Judge Hill's 2007 order.

ARGUMENTS

SCOPE OF APPELLATE REVIEW

The Fund primarily asserts that the "substantial evidence" rule governs judicial review of the Commission's rulings in this case. (App. Br. pp. 6-7). However, because a determination of the number of employees under Section 42-1-150 of the South Carolina Code is jurisdictional, the circuit court and this Court on appeal should review the record and decide the issue in accordance with the Court's own view of the preponderance of the evidence, and not apply the "substantial evidence" test for appellate review. *E.g.*, *Kirksey v. Assurance Tire Co.*, 311 S.C. 255, 428 S.E.2d 721 (Ct. App. 1993) (because it is a jurisdictional issue, the commission's findings of fact relative to the number of employees employed by employer are not conclusive on appeal; the court has the power and duty to review the record and decide the issue in accordance with the preponderance of the evidence); *affirmed Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 443 S.E.2d 803 (1994) (Court of Appeals applied the correct standard of review); *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007) (same).

Furthermore, the Court may reverse a Commission decision that is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5)(d) (1976 & Cum. Supp); *Whitworth v. Window World, Inc.*, 377 S.C. 637, 661 S.E.2d 333 (2008); *Callahan v. Beaufort County School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). Workers' compensation statutes are liberally construed in favor of coverage, and South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employees within workers' compensation coverage. *Hernandez-Zuniga v. Tickle*.

The Claimant points out the correct scope of review here, even though the more restrictive "substantial evidence" rule favors affirmance from the latest Commission order (and thus favors the Claimant). If this Court intends to pierce through the last expression from the Commission and review the prior rulings, then this Court should do so by applying the correct scope of review in this appeal involving a jurisdictional question.

I. THE COURT SHOULD DISMISS THIS APPEAL

The notice of appeal the Fund filed and served states the following:

> The South Carolina Uninsured Employer's Fund appeals the [judgment] of the Honorable J.C. Nicholson, Jr., dated January 9, 2013. Appellant received written notice of entry of this judgment on January 16, 2013.

(Notice of Appeal). The *only* order attached to the Notice of Appeal was the Form 4 order Judge Nicholson filed on January 9, 2013 which provided "Appeal is Denied." (Emphasis in original). The Notice did *not* say the Fund was appealing from the 2007 order entered by Judge Hill, nor was *that* order attached to the Notice. However, all of the arguments in the Brief of Appellant are directed to Judge Hill's order from 2007, and there is *no* argument challenging anything Judge Nicholson did in his 2013 order.

Rule 203, SCACR, governs the requirements for a notice of appeal in South Carolina. The Rule provides:

> **(d) Filing**
>
> *(1) Appeals from the Circuit Court, Family Court and Probate Court.*
>
> * * *

(B) When and What to File. The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served. The notice filed with the appellate court *shall be accompanied by* the following:

* * *

(ii) A copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing;

* * *

(e) Form and Content. The notice of appeal shall be substantially in the form designated in the Appendix to these Rules.

(1) *Appeals from the Circuit Court, Family Court and Probate Court.* In appeals from lower courts, the notice of appeal shall contain the following information:

(A) The name of the court, judge, and county from which the appeal is taken.

(B) The docket number of the case in the lower court.

(C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

(D) The name of the party taking the appeal.

(E) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

(Emphasis supplied).

The Notice of Appeal in this case does not give this Court jurisdiction over Judge Hill's 2007 order because:

(1) The 2007 order was not attached to the Notice of Appeal, Rule 203(d)(1)(b)(ii);

(2) The Notice did not identify the 2007 order as being subject to the appeal because it did not:

(a) identify Judge Hill as the author of the ruling to be appealed, Rule 203(e)(1)(A);

(b) give the docket number of the case from which Judge Hill's order emanated, Rule 203(e)(1)(B); or

(c) give the date of Judge Hill's order, Rule 203(e)(1)(C).

See Ackerman v. 3-V Chemical, Inc., 349 S.C. 212, 562 S.E.2d 613 (2002) (noting Rule 203 requires the appealing party to file a copy of the order challenged on appeal with the notice of appeal if the order has been reduced to writing)

This is much more than a mere clerical error. *Cf. Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) (finding appeal proper from final order even though appellant did not "technically" refer to the final order in the notice of appeal but referenced only order denying rehearing where appellant had attached both orders to the notice of appeal). The Notice of Appeal does not reference Judge Hill's 2007 order, nor is that order attached. The prior appeal was dismissed because the order was not an appealable interlocutory ruling – it was not held in abeyance pending a final order.

This Court lacks jurisdiction to address any of the issues emanating from Judge

Hill's order of 2007. Because that is the only order that is the subject of the Fund's arguments in its Brief to this Court, the Court should dismiss this appeal.

In the event this Court refuses to dismiss, then the Court should affirm the case based upon the arguments that follow.

II. THIS COURT SHOULD AFFIRM JUDGE HILL'S DECISION REVERSING THE COMMISSION AND REMANDING FOR ADDITIONAL PROCEEDINGS ON THE ADDITIONAL GROUND THAT THE FUND FAILED TO PROPERLY PLEAD ANY DEFENSES BEFORE THE COMMISSION, AND THE COMMISSION SHOULD NOT HAVE ADDRESSED ANY OF THOSE DEFENSES

As was pointed out to the Commission and Judge Hill, at the first hearing before Commissioner Huffstetler the Fund and the Employer failed to file a Form 51 or Form 53 Answer to the Claimant's Form 52, which Commissioner Huffstetler found was properly served upon them. Furthermore, the Fund failed to file a Form 58 Pre-Hearing Brief for the hearing on the merits. These failures resulted in a waiver of any affirmative or special defenses the Fund could have raised. Both the Commission and Judge Hill, however, did not address this issue, but reached the merits of the Fund's defenses. The Claimant has raised this point throughout this process, and urges this Court to use this issue as an additional reason to affirm pursuant to Rule 220(c), SCACR.

Regulations authorized by the legislature have the force of law. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006). South Carolina Code Ann. Regs. 67-603 (Supp. 2006) mandates that a defendant file a Form 51 Answer to a Form 50 or 52. The Regulation provides:

> Failure to file a Form 51 or Form 53 within the period in section

> B(1) (within 30 days of service of the Form 50 or Form 52) shall be deemed a general denial of liability for the benefits claimed and the employer and its representative by the failure to respond within the period in section B(1) *shall forfeit each special and affirmative defense allowed by the Act....*

25A S.C. Code Ann. Regs. 67-603(C) (Supp. 2006) (emphasis added).

The Fund, having been put on notice by proper service of the Form 52, was required to file a Form 51 or Form 53, but failed to do so. Hence, under the unambiguous language of Regulation 67-603, the Fund waived any "special" or "affirmative" defense allowed under the Act. The assertion that the Employer employed less than four (4) employees within the State was beyond a mere general denial, and as such was a special or affirmative defense that the Fund waived by not filing a Form 51.

Furthermore, Regulation 67-611 requires that each attorney representing a party file a Form 58, Pre-Hearing Brief, with the hearing commissioner and serve a copy on the opposing party at least ten (10) days prior to the Workers' Compensation hearing. 25A S.C. Code Ann. Regs. 67-611(B) (Supp. 2006); *Gadson v. Mikasa Corp.*; *Morgan v. JPS Automotives*, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996). The Form 58 requires each party to disclose facts in controversy, legal issues involved, and "unusual problems," among other things. Again, the Fund failed to file a Pre-Hearing Brief mandated by Regulation 67-611, so that it did not disclose any facts or legal issues in controversy. Once again Commissioner Huffstetler should not have permitted the Fund to argue that the Employer was exempt from coverage under the Act.

The Fund conspicuously fails to point out in its Brief to this Court that Commissioner Huffstetler found the Fund received adequate notice of the hearing but

failed to file a Form 51, Form 53, or a Form 58 Pre-Trial Brief. Under the Commission's regulations, the Fund should not have been permitted to assert that the Employer lacked the requisite number of employees to be subject to the Act, particularly in light of the determination made by the Commission's Division of Coverage and Compliance.

This Court should take notice of the critical procedural bar to the issues the Fund raised before the Commission, and should affirm the trial court's order on this additional ground.

III. JUDGE HILL CORRECTLY RULED AS A MATTER OF LAW THAT THE COMMISSION SHOULD HAVE PERMITTED THE CLAIMANT TO SUPPLEMENT THE RECORD WITH THE AFFIDAVIT OF MR. PAL, THE OWNER OF AVNI GROCERS

The Fund argues that Judge Hill erred in reversing the Commission's decision not to accept the affidavit of Mr. Harendra Pal, who owned the stores at issue in this case, regarding the number of employees he employed. This Court should affirm Judge Hill's ruling.

In July 2003, the Commission's Coverage and Compliance Division found that Employer had fifteen (15) employees, did not have coverage, and the case would be turned over to the Fund. That finding was made a part of the record before the Commission without objection. (Hearing Tr. 1/4/06, p. 4, ll. 21-23).

As noted, prior to the hearing before Commissioner Huffstetler for which the Fund received notice, the Fund did not file a Form 51 or Form 53, nor did the Fund file a Pre-Hearing Brief setting forth any defenses or objections. The Claimant therefore did not procure any additional evidence that Employer was subject to the Act since the

Employee's Personal Representative was also an employee and able to testify regarding employees and ownership. The Claimant was aware that the Commission's Compliance Division had already determined that Employer was subject to the Act.

At the hearing before Commissioner Huffstetler the Claimant learned for the first time that the Fund intended to challenge the number of Employer's employees. Despite the Division's determination and the Fund's complete lack of response in advance, and the fact that the Fund did not plead any special defenses, Commissioner Huffstetler held that the Claimant failed to establish the Employer had four (4) or more employees so as to be subject to the Act.

The Claimant's counsel then tracked down Harendra Pal, the owner of Avni Grocers, and obtained an Affidavit from him that demonstrated Mr. Pal owned both locations, and regularly employed more than five (5) employees. Hence, Mr. Pal's affidavit established that the statutory requirements were met.

The Claimant then moved the Commission to permit the introduction of this additional evidence. (Motion of 4/19/06). The Claimant reminded the Commission that in July 2003 the Commission's Coverage and Compliance Division found that Employer had fifteen (15) employees, did not have coverage, and the case would be turned over to the Fund, and that finding was made a part of the record before the Commission without objection. The Commission refused to permit the evidence and summarily affirmed Commissioner Huffstetler. (Order of 11/30/06, p. 4).

South Carolina Code Ann. § 42-17-50 (1976 & Supp. 2006) provides in pertinent part:

> 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.

(Emphasis added). In this case, the Commission excluded the evidence pursuant to 25A S.C. Code Ann. Regs. 67-707, finding the evidence was not "new evidence" as it was known to the Claimant at the time of the hearing, or by reasonable diligence could have been secured. Judge Hill held this was an error of law, however, because the Claimant established good grounds for the Commission to receive further evidence on the issue of whether Employer had four (4) or more employees in this State. This was the correct ruling.

In this case, the actions of the Fund ambushed the Claimant with its assertion that the Employer failed to employ the requisite number of employees to be subject to the Act. In the face of the testimony and the determination of the Division of Coverage and Compliance, which was part of the record, the Fund held its cards close to the vest and waited until the date of the hearing to lay them down. This kind of practice, by "gotcha" procedure, does not comport with the procedures set forth in the pleading requirements before the Commission, nor should it. Commissioner Huffstetler should have accepted the file as it was, and found that an assertion regarding the number of employees, being a special defense, was not an issue before him. Yet despite receiving the Claimant's Form 52 and adequate notice of the pending hearing, the Fund failed to file a Form 51 or 53, and did not file a Form 58 Pre-Hearing Brief. Under these circumstances, Claimant established "good ground" to require the Appellate Panel to receive the additional

evidence under § 42-17-50. The Panel's refusal to do so was an error of law.

As Judge Hill held, insofar as Regulation 67-707 appears to restrict the Claimant's ability to bring forth the additional evidence in this matter, the Regulation is at odds with § 42-17-50, which requires the Commission to "receive further evidence" upon a showing of good grounds. Although regulations have the force of law, regulations may not alter or add to the terms of a statute. *United States Outdoor Advertising, Inc. v. South Carolina Dep't of Transp.*, 324 S.C. 1, 481 S.E.2d 112 (1997); *Gadson v. Mikasa Corp.*, 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006).

The Claimant demonstrated good grounds for requiring the Commission to accept Mr. Pal's affidavit as further evidence in the case. Mr. Pal, the owner of the store, unquestionably knew the nature of the ownership and the number of employees he had at each location. As noted above, Mr. Pal did not appear at the hearing, and the Claimant relied upon the Coverage and Compliance Division's determination and the lack of any proper defensive response by the Fund in proceeding without locating Mr. Pal and obtaining his testimony.

The Fund challenges several of Judge Hill's factual findings in the order. (Appellant's Brief, p. 7). These points, however, should have been raised by a motion to reconsider or alter and amend the judgment pursuant to Rule 52 (a) and Rule 59 (e), SCRCP, but the Fund made no such motion. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) (the circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme

Court in cases where the circuit court fails to address an issue raised by a party).

The Fund also claims Judge Hill erred in finding Regulation 67-707 conflicted with § 42-17-50 because the Regulation simply defines "good grounds" for purposes of the statute. Again, this point was not argued to or ruled upon by Judge Hill, nor was it raised by post-judgment motion.

In any event, as Judge Hill held, the regulation cannot define a term from a statute in such a way as to limit the manner in which evidence may otherwise be admissible under that statute. *United States Outdoor Advertising, Inc. v. South Carolina Dep't of Transp.* (although regulations have the force of law, they may not alter or add to the terms of a statute); *Gadson v. Mikasa Corp.* (same). Furthermore, nothing in Regulation 67-707 defines "good grounds" as used in § 42-17-50.

The Fund asserts that this Court upheld application of Regulation 67-707 in *Holcombe v. Dan River Mills/Woodside Div.*, 286 S.C. 223, 333 S.E.2d 338 (Ct. App. 1985) and *Martin v. Rapid Plumbing*, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006). (App. Br. pp. 9, 11). The Fund's argument misses the point raised and argued in this case, and ruled upon by Judge Hill.

As Judge Hill noted, while this Court referenced Regulation 67-707 in *Wilkinson v. Palmetto State Transp. Co.*, 371 S.C. 365, 638 S.E.2d 109 (Ct. App. 2006), there was no argument in that case that application of the regulation in *Wilkinson* conflicted with § 42-17-50. (Order of Sept. 2007, p. 7 n. 1). *Holcombe* dealt with the predecessor to Regulation 67-707, and again there was no argument that application of that regulation to the evidence being proffered conflicted with the plain terms of § 42-17-50.

Martin involved the proffer of evidence as "after discovered" under the regulation without any claim that application of that regulation conflicted with § 42-17-50. In *Martin*, the proponent had a surveillance videotape prior to the hearing and sought to introduce a letter from the claimant's treating physician which proponent obtained after the hearing and after asking the doctor to reconsider his opinions on MMI and disability in light of the tape. This Court affirmed the refusal to admit the letter because it was not "newly-discovered" evidence, again because that was the only basis argued for its admission. Neither appellant in *Holcombe* or *Martin* argued that they had presented "good grounds" so as to require the Commission to admit the evidence under § 42-17-50.

Furthermore, in each of those cases (*Holcombe*, *Martin*, and *Wilkinson*), the issue to which the additional evidence related was an issue all parties knew in advance of the hearing would be in dispute before the Commission. In this case, because the Fund chose not to respond to the Claimant's Form 52 and did not file a Rule 58 Pre-Hearing Brief, it was not until the hearing was convened that the Claimant was apprised that the Fund would contest whether the Employer had the requisite number of employees to be subject to the Act. Hence, while the regulation is not invalid on its face, application of the "newly discovered evidence" rule thereunder conflicts with the plain language of § 42-17-50 under the facts and circumstances of this case such that the Commission should not have applied the regulation to exclude Mr. Pal's affidavit. Accordingly, Judge Hill's order does not conflict with *Holcombe*, *Martin*, and *Wilkinson*.

Further, Section 42-17-50 provides the Commission "shall" receive further evidence once "good grounds" are shown, but Regulation 67-707 states "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." 25A S.C. Regs. 67-707 (bold added). The permissive language "may" as used in the regulation directly conflicts with the use of the mandatory term "shall" in the statute. *E.g.*, *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003) (the term "shall" in a statute means the action is mandatory); *Thompson ex rel. Harvey v. Cisson Const. Co.*, 377 S.C. 137, 659 S.E.2d 171 (Ct. App. 2008) (same). Insofar as Regulation 67-707 provides the Commission's action in admitting evidence under § 42-17-50 is not mandatory, then the regulation further conflicts with the statute.

The Fund also contends that the definition of "good cause" as set forth in the SCRCP supports the Commission's decision in this case. (App. Br. pp. 10-11). To begin with, the statute states that "if good *grounds* be shown therefor" the Commission "shall...receive further evidence...." (Emphasis added). The statute does not require a showing of "good cause" as set forth in Rule 55(c), SCRCP, nor does it apply the restrictions for newly discovered evidence as set forth in Rule 60(b)(2), SCRCP, particularly since the Commission will not entertain new trial motions or motions to alter or amend the judgment as set forth in Rule 59(b), SCRCP). *Cf.*, *Stone v. Roadway Express, Employer*, 367 S.C. 575, 627 S.E.2d 695 (2006) (Rule 59(e), SCRCP, regarding motions to reconsider is not applicable in proceedings before the Commission).

Furthermore, the Claimant established "good grounds" so as to require the Commission to receive the additional evidence. In light of the posture the parties took prior to the hearing – that is, the Claimant proceeded following the investigation by the

Coverage and Compliance Division, coupled with the Fund's failure to file a responsive pleading or Pre-hearing brief and Mr. Pal's leaving the jurisdiction prior to the hearing – there was no need for the Claimant to believe Mr. Pal's affidavit was needed prior to the hearing.

The Fund summarily points to S.C. Code Ann. § 1-23-320 (1977 & Cum. Supp.) as providing that Mr. Pal's affidavit did not constitute "evidence" under the APA. (App. Br. P. 12). The Court should reject this argument.

First, the Fund never made this argument below, and the circuit court never ruled upon it. The Fund also never made any post-judgment motion seeking a ruling on this point. Rule 52(a), SCRCP; Rule 59(e), SCRCP. *City of Rock Hill v. Suchenski.*

Second, § 1-23-320(c) provides:

> Any party to such proceedings may cause to be taken the depositions of witnesses within or without the State and either by commission or *de bene esse*. Such depositions shall be taken in accordance with and subject to the same provisions, conditions and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas; and the same rules with respect to the giving of notice to the opposite party, the taking and transcribing of testimony, the transmission and certification thereof and matters of practice relating thereto shall apply.

There is nothing in § 1-23-320(c) that requires the "testimony of a non-medical factual witness must be presented by testimony or deposition," as the Fund asserts in its brief.

Third, even if the statute could somehow be read to limit "testimony of non-medical factual witnesses" to "testimony or deposition," Mr. Pal's sworn affidavit is sufficient to meet the standards of the statute. *See State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) ("An affidavit is a voluntary *ex parte* statement reduced to

writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation"); *Marine Wharf & Storage Co. v. Parsons*, 49 S.C. 136, 157, 26 S.E. 956, 966 (1897) (an affidavit is "a formal written (or printed) voluntary *ex parte* statement sworn (or affirmed) to before an officer authorized to take it, to be used in legal proceedings"). Mr. Pal's affidavit sets forth a statement of facts which is sworn to as the truth of the statements contained therein. It is, therefore, "testimony" which may be considered.

Fourth, this argument is so conclusory as to be deemed abandoned. *E.g.*, *Wilson v. Dallas*, ___ S.C. ___, 743 S.E.2d 746 (2013) (an argument is effectively abandoned if the appellant's brief treats it in a conclusory manner); *Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004) (conclusory argument deemed abandoned); *Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 435 (1974) (where only passage in brief relating to issue appealed was single conclusory statement which left unargued the error assigned by exception, issue was abandoned).

The Fund further summarily argues that under § 1-23-320(e), "opportunity must be afforded to all parties to respond." (App. Br. p. 12). Again, this Court should reject this argument. First, it was not made to, or ruled upon by, the circuit court, and the Fund did not seek a ruling by post-judgment motion. Rule 52, SCRCP; Rule 59, SCRCP. Second, the argument is so conclusory that it should be deemed abandoned. *Wilson v. Dallas*; *MUSC v. Arnaud*; *Solomon v. City Realty Co.* Third, the Fund had the opportunity to present evidence and argument on all issues involved, but chose not to file a Form 51 or Form 53, or a Pre-Hearing Brief Form 58. Even so, the Commission gave the Fund every

opportunity to respond and present evidence and argument on all issues, including the issue regarding the submission of the additional evidence.

Accordingly, this Court should affirm Judge Hill's reversal of the Commission's erroneous denial of Claimant's Motion to Introduce Additional Evidence into the Record on Review, and Judge Hill's remand of this matter to the Commission with instructions to reconsider its ruling in light of Mr. Pal's affidavit.

IV. THE PREPONDERANCE OF THE EVIDENCE SUPPORTS JUDGE HILL'S DECISION TO REVERSE THE COMMISSION'S AFFIRMANCE OF COMMISSIONER HUFFSTETLER'S RULING THAT AVNI GROCERS DID NOT EMPLOY FOUR (4) OR MORE EMPLOYEES

The Fund contends Judge Hill erred in reversing the Commission's finding that the record did not establish that the Employer, Avni Grocers, regularly employed four (4) or more employees so as to be subject to the Act. (App. Br. pp. 12-17). This Court should affirm.

South Carolina Code Ann. § 42-1-150 (1985 & Supp. 2006) provides, in pertinent part, "The term '*employment*' includes ... all private employments in which four or more employees are regularly employed in the same business or establishment." Pursuant to S.C. Code Ann. § 42-1-360 (2) (Supp. 2006), the Act "shall not apply to any person who has regularly employed in service less than four employees in the same business within the State...." Thus, an employer is exempt from coverage under the Act if the employer has less than four employees in this State. *Hill v. Eagle Motor Lines*, 373 S.C. 422, 645 S.E.2d 424 (2002).

As Judge Hill found, the preponderance of the evidence supported the Claimant's

assertion that the Employer had four (4) or more regular employees within the State at the time of the murders in this case. First, the Commission's Coverage and Compliance Ruling in the WCC file stated that the Commission found that Avni Grocers was the Employer, and the Division's ruling was part of the Commission's file and thus before the Commission. (Memo of 7/15/03; letter of 7/17/03). At the outset of the first hearing Commissioner Huffstetler ruled, without objection, that the Commission's file became part of the record with the exception of self-serving declarations and unstipulated medical reports. (Tr. 1/4/06, p. 4, lines 21-23). The Commission's Division of Coverage and Compliance, in correspondence to Claimant's counsel dated May 7, 2003, stated that Employer had fifteen (15) employees who were paid in cash and only one employee who was reported to the Employment Security Commission, and that the Division's investigation led to the opinion that the Employer was subject to the South Carolina Workers' Compensation Act and was uninsured. (Letter of 5/7/03).

The Claimant therefore arrived at the hearing unaware that there would be any challenge to the number of employees at that hearing. The ambush was completed by the Fund's failure to file a Form 51 or Form 53 in response to Claimant's Form 52, or to even file a Form 58 Pre-Hearing Brief outlining any defenses it might want to assert, including a challenge to the number of employees at Avni Grocers. *See* 25A S.C. Code Ann. Regs. 67-603(C) (Supp. 2006) ("Failure to file a Form 51 or Form 53 within the period in section B(1) (within 30 days of service of the Form 50 or Form 52) shall be deemed a general denial of liability for the benefits claimed and the employer and its representative by the failure to respond within the period in section B(1) *shall forfeit each special and*

affirmative defense allowed by the Act....") (emphasis added).

The evidence before the Commission demonstrated the Employer failed to respond to any inquiries and fled the State to North Carolina. Since the Employer failed to cooperate, the Claimant provided undisputed, uncontradicted testimony at the hearing as to the number of employees, and that the number exceeded four (4). Dharmendra Chaudhari testified by deposition that his deceased brother was employed by Avni Grocers and worked for Avni Grocers seven (7) days a week. (Dep. p. 6, lines 7-16; p. 7, lines 7-11; p. 9, ll. 23-25). Mr. Chaudhari testified at the hearing that there were two locations of the Defendant's store, one in Vance, South Carolina, and one in Charleston. (Tr. p. 15, lines 12-18; See also Tr. p. 13, lines 14-20). Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. (Tr. p. 17, lines 15-24). The Fund offered no evidence to contradict this testimony.

Furthermore, there was nothing in the record to reflect that Mr. Chaudhari's testimony lacked credibility, and in fact the testimony was corroborated by the newspaper accounts and all of the documents that Mrs. Chaudhari was an employee, that Mr. Puniyani was an employee (they were both killed at work), that one of the killers was an employee (Claimant's Pre-Hearing Brief and Attachments; Incident Report and attachments), and that Mr. Chaudhari was an employee. This totals four (4) employees regularly employed at the same store, one of whom went back and forth between the two stores. Additionally, Mr. Pal, the owner, was also an employee. As Judge Hill held, Mr. Chaudhari plainly testified that Avni Grocers regularly employed "altogether six" people.

(Tr. p. 12, lines 4-10; p. 13, lines 7-10). Neither Commissioner Huffstetler nor the first Appellate Panel found Mr. Chaudhari's testimony not credible. *See* § 42-1-360 (2) (the Title shall not apply to any person who has regularly employed in service less than four employees in the same business within the State).

The Fund attempted to create a question of ownership by alleging that because the stores sold Amoco gas that they were owned by Amoco. However, Mr. Chaudhari, who was also an employee of the Employer, testified that he worked at both locations and both locations were the same company name, "Avni Grocers." (Tr. p. 13, lines 6-24; See also p.17, lines 15-24). Mr. Chaudhari further testified that the only connection between Avni Grocers and Amoco was that Avni Grocers purchased only Amoco gas to sell from its locations from the suppliers and that there was no direct relationship with Amoco. (Tr. p. 13, lines 12-24; p. 21, lines 5-19). Mr. Chaudhari also indicated that one of the stores sold a different type of gas - Citgo.

The Fund contends the ownership of the business was in dispute, and that Claimant failed to present any evidence concerning the ownership of the business. (App. Br. pp. 15-16). Of course, Mr. Pal's affidavit, which the Commission improperly excluded, settled the issue since he stated he owned both locations and employed more than four (4) people to work those locations. Even without Mr. Pal's affidavit, however, the preponderance of the evidence demonstrated that Avni Grocers operated both locations.

The Fund also cites to *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007) in support of its position that there was no proof the Employer employed

at least four (4) employees. (App. Br. p. 17). In *Tickle*, the Court of Appeals disagreed with Claimant's argument that the employer had four (4) "regular employees" during the time Claimant, a house painter, was injured, so that the exemption found in S.C. Code Ann. § 42-1-360(2) (Supp. 2006) did not apply. However, that case actually supports Judge Hill's ruling in this case.

In *Tickle*, the Court of Appeals began its analysis by discussing Professor Larson's treatise, which contrasted "regular employees" with "casual employees." 4 Larson, *Larson's Workers' Compensation Law* §§ 74.01-02 (2000 & Cum. Supp.). The Court also noted that "[w]here employment cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual." Following North Carolina case law, the Court noted North Carolina has defined "regularly employed" as "employment of the same number of persons throughout the period with some constancy."

Next, the Court noted that it had to identify the relevant time period, which was difficult for the type of employment (such as in that case) in which workers come and go due to the nature and type of work they perform. The Court of Appeals adopted the following definition of "regularly employed" for purposes of the Act: "[E]mployment of the same number of persons with some constancy throughout a relevant time period." The Court ruled that the relevant time period should be identified by considering:

(1) the employer's established mode of operation;

(2) whether the employer generally employs the jurisdictional number at any

time during his operation; and

(3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite.

The *Tickle* Court agreed with the Commission that the evidence established that the employer did not have four (4) or more "regular employees" during the relevant time period. The Court noted that Mr. Tickle had left his employer and was "engaged in itinerant projects" to earn income while developing his business plan. Mr. Tickle's mode of operation was "project to project," and the Court viewed the relevant time period for ascertaining coverage to be when the claimant began working for Mr. Tickle until shortly after claimant was injured. During that period, Mr. Tickle's workers undertook three projects: two (2) people worked on the first project painting beach chairs, and three (3) people worked on each of the two (2) houses (the first one was the "Garrett project," and the second was the "Hewitt project"). Two (2) of the three (3) moved from the Garrett home to the Hewitt home, and the third, "Victor," remained behind to finish up work on the Garrett home, where they were purportedly joined by a fourth worker, Franklin Hernandez-Zuniga (Franklin).

The Court of Appeals found the preponderance of the evidence established that Franklin was not "regularly employed" by Mr. Tickle during the relevant period. Mr. Tickle denied knowledge that Franklin worked on any of the projects, though he knew that another person may have worked on the second home (the Hewitt project). Beth Garrett, the owner of the first home project, never observed more than three (3) workers painting her home. The Court of Appeals stated "Even if Victor worked for Tickle at the

same time, but in another location, Claimant still fails to demonstrate Tickle regularly employed at least four workers with some constancy during the relevant period."

What is missing from that sentence in the opinion, however, is the reason Claimant in *Tickle* still failed to establish the requisite number of employees, to wit: The fact that Claimant failed to prove that Franklin was regularly employed with some constancy during the relevant time period. Hence, even though claimant counted Victor, the worker who stayed behind at the Garrett home, counting Victor with Claimant and the other worker without counting Franklin yielded a total of three (3) workers who were employed with come constancy during the relevant time period.

Applying the test adopted by the Court of Appeals in *Tickle* to the facts of this case, the Claimant established by a preponderance of the evidence that Avni Grocers "regularly employed" four (4) or more employees during the relevant time period.

(1) The Employer's Established Mode of Operation

Tickle	This Case
In *Tickle*, the employer hired workers for itinerant projects, and workers would "come and go due to the nature and type of work they perform."	In this case, all employees worked regularly in either location of the store, and the job was far from the "itinerant" employment engaged in by Mr. Tickle, *i.e.*, hiring hands to help on each painting project.

(2) Whether the Employer Generally Employs the Jurisdictional Number at Any Time During His Operation

Tickle	This Case
The preponderance of the evidence demonstrated Mr. Tickle "regularly employed" with any constancy only the claimant, Alle and Victor during the relevant time; although there was some evidence that Franklin may have worked on the Hewitt job while Victor stayed behind to finish the Garrett project, the preponderance of the evidence did not establish that Franklin was regularly employed by Mr. Tickle during the relevant time period.	Mr. Chaudhari testified that his deceased wife was employed by Avni Grocers and worked for Avni Grocers seven (7) days a week. (Tr. p. 12, ll. 1-6; Chaudhari Dep. p. 6, ll. 14-16). Mr. Chaudhari testified at the hearing that there were two (2) locations of the Defendant's store, one in Vance, South Carolina, and one in Charleston. (Tr. p. 13, ll. 14-15; p. 17, ll. 15-19). He worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. (Tr. p. 13, ll. 6-24; p. 17, ll. 15-24). Mr. Chaudhari further testified that the only connection between Avni Grocers and Amoco was that Avni Grocers purchased only Amoco gas to sell from its locations from the suppliers and that there was no direct relationship with Amoco. (Tr. p. 21, l. 5- p. 22, l. 14). Mr. Chaudhari also indicated that one of the stores sold a different type of gas - Citgo. Mr. Chaudhari's testimony was corroborated by the newspaper accounts and all of the documents that Mrs. Chaudhari was an employee, that Mr. Puniyani was an employee (they were both killed at work), that one of the killers was an employee (Claimant's Pre-Hearing Brief with Attachments; Incident Report), and that Mr. Chaudhari was an employee. This totals four (4) employees at the same store, one who went back and forth between the two stores. Mr. Chudhari's testimony was buttressed by the excluded affidavit of Mr. Pal, the owner of Avni Grocers, who stated that Mr. Pal owned both locations, and regularly employed more than five (5) employees. As argued above, the Commission erred, under the circumstances of this case, in refusing to permit Claimant to supplement the record with Mr. Pal's affidavit.

(3) The Period During Which Employment Is Definite and Recurrent Rather than Occasional, Sporadic, or Indefinite

<table>
<tr><th>Tickle</th><th>This Case</th></tr>
<tr><td>The evidence revealed that the employment in Tickle was occasional, sporadic or indefinite. Mr. Tickle worked "project to project" and moved his employees accordingly.</td><td rowspan="2">In this case, the evidence was that the two (2) murdered claimants, Mrs. Chaudhari and Mr. Puniyami, and one of the murderers, were employed with some constancy, as was Mr. Chaudhari, who regularly worked at both the Vance and Charleston locations of Avni Grocers. Mr. Pal, the owner, was also employed at the stores.</td></tr>
<tr><td>The only evidence was that claimant, Alle and Victor worked with any constancy on the three (3) projects that took place during the relevant time frame. Even if Franklin did some work on the Hewitt project, which was disputed, the evidence did not establish that Franklin worked with any constancy on the Tickle projects during the relevant time period.</td></tr>
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In conclusion, the *Tickle* decision actually supports a finding of the requisite number of employees in the case *sub judice*, and the facts of *Tickle* are meaningfully distinguishable from the facts of this case.

This Court should apply the test adopted in *Tickle* and hold that, in accordance with the liberal construction in favor of coverage, and resolving doubts in favor of inclusion within workers' compensation coverage, Judge Hill correctly reversed the Commission's decision.

V. THE COMMISSION'S AFFIRMANCE OF THE COMMISSIONER WILKERSON'S DECISION TO PERMIT MR. PAL TO TESTIFY LIVE AND SUBJECT TO CROSS-EXAMINATION RENDERS THE FUND'S ARGUMENT ABOUT MR. PAL'S AFFIDAVIT MOOT

Mr. Pal testified live at the hearing on remand before Commissioner Avery Wilkerson. The Fund implies that this testimony was "in accordance with Judge Hill's Order and instructions...." (App. Brief, p. 3). In fact, Judge Hill's 2007 order said *nothing* about Mr. Pal testifying but found that, under the unique posture of the case, Claimant established "good grounds" for the Commission to accept Mr. Pal's affidavit under S.C. Code Ann. § 42-17-50. (Order of 9/13/07, pp. 6-7). Commissioner Wilkerson permitted the live testimony in his discretion, and that decision was not challenged before the Appellate Panel, the circuit court, or this Court on Appeal. The Court should find any complaint about the Pal affidavit is therefore moot.

At the outset, the Court should consider the circumstances that persuaded Judge Hill that fundamental fairness compelled the Commission to consider the Pal affidavit. Claimant obtained a decision from the Commission's Coverage and Compliance Division that included a finding that Avni Grocers had four (4) or more employees and was subject to the Act, and that decision was made part of the Commission's record. The Fund did *not* file a Form 51 or a Form 53, and thereby failed to raise any challenge to Claimant's assertion that jurisdiction was proper (that is, that Avni had four (4) or more employees based on the Coverage and Compliance Division's determination). The Fund also did *not* file a Form 58 Pre-hearing Brief, thereby concealing the attack it subsequently raised for the *first* time when everyone arrived at the first hearing before Commissioner Huffstetler.

This point was crucial to Judge Hill's decision and bears repeating: The first hearing before Commissioner Huffstetler was the *first* time the Fund notified the Claimant that it was challenging the number of employees at Avni Grocers. Although the Claimant believed the testimony presented from Mr. Chaudhari established the business had four (4) or more employees anyway, Commissioner Huffstetler found against coverage, prompting the Claimant to locate Mr. Pal and obtain the affidavit. Judge Hill recognized the sandbagging that occurred and the Fund's ambush of the Claimant at the hearing, and ruled this sufficiently established "good grounds" requiring the Commission to "receive further evidence" under Section 42-17-50. Although the Fund then appealed that ruling, the Court of Appeals dismissed and remanded because the ruling was not an appealable interlocutory order under settled Supreme Court precedent.

The Commission was thereafter bound to follow the mandate in Judge Hill's order that the Commission consider Mr. Pal's affidavit. *See Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission.") (citations omitted). Accordingly, Commissioner Wilkerson had to accept the Pal affidavit into evidence. But nothing about Judge Hill's order compelled Commissioner Wilkerson to permit any evidence other than the Pal affidavit.

Following the remand from the Court of Appeals, however, Mr. Pal returned to South Carolina, and Claimants called him to testify separately from his affidavit.

Although the Fund objected at the hearing, Commissioner Wilkerson overruled the objection.

Importantly, none of the Fund's exceptions to the Appellate Panel adequately raised any issue in Commissioner Wilkerson separate ruling that permitted Mr. Pal to testify live. *See* 25A S.C. Code Ann. Reg. 67-701(A)(3)(a) (2011) (grounds for appeal must be set out in detail on the Form 30; "each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error"). Furthermore, none of the arguments in its Brief to the Appellate Panel asserted error in the Hearing Commissioner receiving this evidence. The Appellate Panel expressly found "[t]he Fund did not raise any challenge before this Appellate Panel to the hearing commissioner's ruling permitting Mr. Pal to testify." (Appellate Panel Order, p. 12, ¶ 10).

The Commission concluded "[t]he hearing commissioner's consideration of Mr. Pal's live testimony is unchallenged before this Appellate Panel and is therefore affirmed." (Appellate Panel Order, p. 13, ¶ 11). There was no challenge to this finding before the circuit court, nor is there any challenge to it in the brief to this Court. This is an alternative basis to affirm the decision in this case. *See* Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 707 S.E.2d 397 (2011) (the appellate court may affirm for any reason appearing in the record). *See also Sloan v. Department of Transp.*, 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005) ("The failure to appeal an alternative ground of the judgment below will result in affirmance."); *State v. Branham*, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) (unappealed alternative ground for judgment

becomes the law of the case and provides an independent basis to uphold decision).

The Appellate Panel also affirmed Commissioner Wilkerson's finding that Mr. Pal's testimony plainly established that Avni Grocers employed four (4) or more employees. (Appellate Panel Order, p. 12, ¶ 11). Once again there was no challenge to this finding before the Commission so that this issue was not properly before the Appellate Panel. *Cf. Mixson v. Westinghouse Elec. Corp.*, 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 1991) (the failure to argue an exception in a brief ordinarily amounts to an abandonment of it). There was also no challenge to this finding at the circuit court or in the brief to this Court, rendering it the law of this case. *Shirley's Iron Works, Inc. v. City of Union*, ___ S.C. ___, 743 S.E.2d 778 (2013) (an unappealed ruling is the law of the case and requires affirmance).

The Appellate Panel further found that "[e]ven without Mr. Pal's live testimony or his affidavit, Mr. Chaudhari's uncontradicted testimony establishes that Avni Grocers employed four (4) or more employees." (Appellate Panel Order, p. 12, ¶ 13). Again, the Fund did not challenge this separate finding before the circuit court or this Court on Appeal. This is another alternative basis to affirm the decision in this case. Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*; *Sloan v. Department of Transp.*

Additionally, the Appellate Panel held that:

> [E]ven without Mr. Pal's live testimony or his affidavit, or this Panel's own review of the other evidence in the record, the circuit court found that other evidence in the record established that Avni Grocers employed four (4) or more employees, and that finding is binding upon the Commission.

(Appellate Panel order, p. 12, ¶ 14). The Fund has never challenged that alternative

ruling in Judge Hill's order and it is the law of this case. It is also an alternative reason to affirm. Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*; *Sloan v. Department of Transp.*

Apart from these procedural reasons to affirm, the Court should affirm on the record. The evidence in this case establishes by at least the preponderance of the evidence that Avni Grocers included both locations (Vance and North Charleston), that there were five (5) to (7) employees during the relevant times, and that when Mr. Chaudhari is counted with the killer and her victims, there were at least four (4) employees at the location where the murders occurred. Thus, even though the *only* evidence in this case establishes there were, in fact, four (4) or more employees, the Fund contends it should have won this case on a technicality it created by sandbagging the Claimant. That is, 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 unchallenged live testimony. Instead, the Fund contends that it should have won these cases on the technicality created by its own behavior. According to the Fund, the Claimant should not have enjoyed an opportunity to contest the Fund's late in the day defense to these claims, even though the Fund never filed an answer or pre-hearing brief raising any defenses, and even though the Claimant 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 should apply settled rules governing appellate procedure and affirm this case on these unchallenged alternative grounds. This is not to say that Judge Hill was wrong - he was not. This is also not to say that the latest expression from the Commission is flawed - it is not. However, the arguments in this appeal reflect the Fund's intent to further delay the already long-delayed justice in this case.

Also, any complaint about allowing Mr. Pal's affidavit is now moot. As noted above, the Fund did not preserve its objection to Mr. Pal's live testimony. A moot case exists where a judgment rendered will have no practical effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing entity. *Ex parte Doe*, 393 S.C. 147, 711 S.E.2d 892 (2011).

The Pal affidavit provides:

> I, HERENDRA PAL, do hereby state that I was the sole owner of Avni Grocers/Avni International of South Carolina. I owned both locations, which regularly employed more than five employees. No other entity had any interest in the company or the two stores. This case involves the death of Virendra Puniyani by his co-workers while working in my store located at 1900 McMillan Avenue, N. Charleston, SC 29405.

(Commission's file, Order p. 2, Stipulation 4). Here, Mr. Pal's unchallenged live testimony rendered moot any challenge to his affidavit. Mr. Pal's testimony contains the same facts as those that are in the affidavit.

Even so, as Judge Hill previously held from his own view of the evidence in the first hearing before Commissioner Huffstetler, apart from the Pal affidavit or testimony,

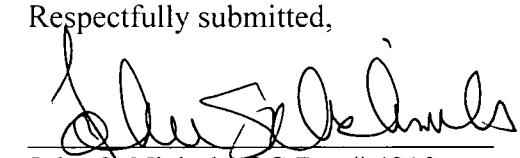
the record contained a preponderance of the evidence that Avni Grocers employed four (4) or more employees so as to be subject to the Act. That holding is correct and, in any event, is unchallenged in this appeal.

Accordingly, the Court should affirm the Appellate Panel, which affirmed Commissioner Wilkerson's ruling that the evidence establishes the Employer employed four (4) or more employees and was therefore subject to the Act.

CONCLUSION

For the reasons stated, this Court should dismiss this appeal because the Fund did not appeal Judge Hill's order, and all of its appellate arguments are aimed at that order. Alternatively, the Court should affirm Judge Hill's order in its entirety, and should order the matter remanded to the Commission for further proceedings consistent with the latest expression from the Commission.

Respectfully submitted,



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