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

Anita Chaudhari, Deceased Employee, and
Dharmendra Chaudhari. . . . . .Respondent

v.

Avni Grocers,
Employer/Defendant, ... Alleged Uninsured Employer

and

The South Carolina Uninsured Employer's
Fund, ... Appellant

APPELLANT'S INITIAL BRIEF

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STATEMENT OF CASE

This case is an appeal by the South Carolina Uninsured Employer's Fund (herein after referred to as "SCUEF") from the Circuit Court Order filed January 9, 2013 by Judge J.C. Nicholson. Judge Nicholson's decision summarily denied SCUEF's appeal of two (2) decisions of the South Carolina Workers' Compensation Commission (hereinafter "the Commission"), based upon a prior Circuit Court Order filed September 18, 2007, by Judge D. Garrison Hill. Judge Hill's Order reversed two (2) previous decisions of the Commission, including by a Hearing Commissioner and three member Appellate panel finding that the Commission did not have jurisdiction over this workers' compensation claim for the reason that the Claimant failed to prove that Avni Grocers regularly employed four (4) or more Employees so as to be subject to the Act. Further, Judge Hill reversed the Full Commission's decision holding that evidence sought to be submitted after the hearing was not newly discovered evidence as set forth in the regulations of the South Carolina Worker's Compensation Act. (hereinafter "Act").

This case arose upon the filing of a Form 52, Employee's Notice of Claim and/or Request for Hearing, Death Case, by Dharmendra Chaudhari, the spouse of the deceased Employee, Anita Chaudhari, in or about February of 2003. The Claimant, in his Form 52, alleged that the Employer

was Avni Grocers, who was uninsured. Following the Claimant's filing of the Form 52, an investigation was conducted by the SCWCC Division of Coverage and Compliance. A Rule to Show Cause hearing upon the issue of an Employer required to have an insurance and whether it was subject to jurisdiction from the Commission was scheduled, however, the Department of Coverage and Compliance stated that costs precluded it from publishing to locate the Employer and, therefore, no Rule to Show Cause hearing was held. Counsel for the Claimant was advised by the Department of Coverage and Compliance that he bore the burden of proof in showing that the Employer was subject to the Act, and, at a minimum, the Claimant would be required to present the Commission with evidence establishing jurisdiction over the Employer.

This matter went forward to a hearing before Commissioner David W. Huffstetler on January 4, 2006. At the hearing, counsel for SCUEF objected to venue and jurisdiction, arguing, among others matters, that SCUEF lacked proper notice and that the Employer was not subject to the Workers' Compensation Act. Following that hearing, Commissioner Huffstetler issued an order on February 15, 2006. In his Findings of Fact, Commissioner Huffstetler found that the Claimant failed to produce substantial evidence showing that Avni Grocers regularly employed four (4) or more employees so as to be subject to the Workers' Compensation Act. He also found that the Claimant was given an opportunity to agree to a postponement of the hearing, but did not do so. He found that there was not substantial evidence that the Employer regularly employed four (4) or more Employees. Therefore, the Commission did not have jurisdiction to make a determination; and that the Claimant failed to meet his burden of providing entitlement to benefits under the Act. The Commissioner ordered that the claim of the Claimant was denied.

The Claimant timely filed an appeal from the Hearing Commissioner's Order. In conjunction

with that appeal, the Claimant also filed a Motion to Introduce Additional Evidence into the Record on the Case on Review. The evidence sought to be submitted by the Claimant consisted of an affidavit allegedly signed by Harendra Pal, owner of Avni Grocers. The Claimant, along with the Motion to Introduce Additional Evidence also filed a Motion to Stay the Full Commission proceeding scheduled for the week of May 22, 2006. The Commission issued a letter granting the postponement for review, but issued an order denying the Motion to Introduce Additional Evidence.

A Full Commission review was held on October 16, 2006, following which the three member panel of the Workers' Compensation Commission issued its order on November 20, 2006. The Full Commission, by unanimous vote, determined that the Hearing Commissioner's Findings of Fact and Rulings of Law were correct and the law of the case, and sustained the order of the Hearing Commissioner in its entirety.

On January 2, 2007, the Claimant filed in the Circuit Court of Charleston a Petition and Notice of Appeal. On June 1, 2007, Judge Hill held a Circuit Court Appeal Hearing on this case. On September 18, 2007, Judge Hill issued an order reversing the Commission decision's findings and that the Commission should have permitted Claimant to submit an affidavit after the hearing because the Claimant had "good grounds" to submit an affidavit. Further, Judge Hill reversed the Commission's decision finding that there was no "credible evidence" to support a finding that Avni Grocers regularly employed four (4) or more Employees, and remanded the matter to the Commission with instructions to allow the introduction of additional evidence into the record. On October 25, 2007, the SCUEF filed its Notice of Appeal to Judge Hill's decision, which was subsequently dismissed as interlocutory.

On remand, the matter was heard by Commissioner Avery B. Wilkerson, Jr. on November

29, 2011. In accordance with Judge Hill's Order and instructions, on February 16, 2012, Commissioner Wilkerson issued an order finding that the Claimant was entitled to benefits under the Act. A Full Commission review was held on June 19, 2012, and its decision affirming in full the Hearing Commissioner's Findings of Fact and Rulings of Law was filed on August 28, 2012. The Circuit Court affirmed the Full Commission by Form 4 Order dated January 9, 2013. This appeal follows.

FACTS

This claim arose out of the death of the Claimant's wife Anita Chaudhari while she was working at Fast Point/Amoco, a gas station/grocery store in Charleston, South Carolina, on November 14, 2002.

No insurance was found for Avni Grocers by the Commission. This file was assigned to the Department of Coverage and Compliance who advised the Claimant's attorney that the Claimant had the burden of proving that the Employer was subject to the Act, before the merits of the case could be heard. (Memo to file, Gary Smith, Coverage and Compliance, July 15, 2003.) The Department also wrote to the Employment Security Commission requesting business data for Avni International of S.C. d/b/a Stop Mart/Citgo (Letter of Workers Compensation Commission, dated May 7, 2003.)

Prior to the initial hearing, counsel for the Claimant submitted a Pre-Hearing brief on December 20, 2005 (Pre-Hearing Brief, Form 58, dated December 20, 2005) stating that the facts and controversies were the compensation rate, heirs, burial expenses, etc. Evidence submitted into the record before Hearing Commissioner Huffstetler included certificates of birth of two (2) children of the deceased Employee; the deceased's Employee's death certificate; a copy of her passport; the deceased Employee's wedding invitation; funeral expenses; obituary; five (5) articles from the Post

and Courier concerning the criminal defendants; a deposition of the Claimant; and an incident report from the City of North Charleston. (Form 58, and Notice of Witnesses and Records to be Introduced as Direct Evidence on behalf of Claimant dated December 20, 2005). No evidence was introduced as to the ownership of the Fast Point/Amoco station where the deceased Employee worked, nor of ownership of Avni Grocers, the name of the alleged Employer in the Claimant's Form 50.

The deceased Employee, Anita Chaudhari, worked as a counter attendant. (Transcript of Hearing on January 4, 2006, p.12, lines 1-4). She was paid in cash, and did not pay taxes (Transcript of Hearing, January 14, 2006, p.16, lines 22-25). The Claimant, Dharmendra Chaudhari, had never seen paychecks stating that two different locations (stores) were owned by Avni Grocers. (Transcript of hearing, January 4, 2006, p.17, line. 25 to p.18, line 2.). Anita Chaudhari worked at a store where there were three (3) people (employees). (Transcript, hearing, January 4, 2006, p.18, lines.8-10). Dharmendra Chaudhari recovered funeral expenses from the State Victims Fund. (Transcript of hearing, January 4, 2006, p.18, lines 11-24). Sherendra Pal, one of the owners of Avni Grocers, was living in Charlotte at the time of the hearing. (Hearing transcript, January 4, 2006, p.19, lines.5-12). The gas station where the deceased Employee worked was called Amoco Gas. (Transcript, hearing, January 4, 2006, p.21, lines 7-13)

Nearly six (6) years after the initial hearing before Commissioner Huffstetler, at the November 29, 2011, hearing on remand before Commissioner Wilkerson, Harendra Pal testified that Avni Grocers did own both locations, and employed six (6) employees during the time of the incident. (Transcript of Hearing dated November 29, 2011, p.17 line 12 - p. 18 line 9.)

STANDARD OF REVIEW

The Appellate Panel of the South Carolina Workers' Compensation Commission shall review an award, weigh the evidence as presented at the initial hearing, and, if good grounds be shown make its own Findings of Fact and Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner. S.C. Code Ann. §42-17-50 (2010).

While the Full Commission may act as finders of fact, Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2nd 304 (1981) establishes the Administrative Procedures Act as governing the scope of jurisdictional review of determinations by the South Carolina Workers' Compensation Commission. S.C. Code Ann §1-23-380 (A)(6)(Supp. 2010) [The Administrative Procedures Act] provides:

> The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedures;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or uncharacterized by abusive discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(A)(6)(2003 Supp.). Instead, judicial review of a Workers' Compensation decision beyond the Full Commission is governed by the substantial evidence rule. Pratt v. Morris

Roofing, Inc., 353 S.C. 339, 344 (Ct. App. 2003). It is the well-settled rule of law that the court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, and may only reverse a decision that is affected by an error of law. *Id.* In reviewing the Workers' Compensation Commission decision, the court may only review the decision to assess whether the Commission's decision is supported by substantial evidence or whether the decision is controlled by error of law. *Id.* Substantial evidence is evidence, which, considering the record as a whole, would allow reasonable, minds to reach the conclusion the administrative agency reached in order to justify its action. *Id* at 345. The court may reverse the Commission when its decision is affected by an error of law. Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

ARGUMENT

I. Did the Circuit Court judge err and/or was it an abuse of discretion to reverse the initial Decision of the Full Commission finding that an affidavit sought to be submitted after the hearing did not constitute newly discovered evidence?

Judge Hill, in reversing the decision of the Full Commission denying the submission of additional evidence, relied upon §42-17-50, S.C. Code. Ann.1976 and (Supp. 2006). That section provides in part:

> If an application for review is made to the Commission within fourteen (14) 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 therefore, reconsider the evidence, receive further evidence, re-hear the parties or their representatives and, if proper, amend the award. (Emphasis added)

Judge Hill also found that the Appellants were aware that the Coverage and Compliance Division had determined that the Employer was subject to the Act. That finding is erroneous, when, in fact, the evidence in the record is that the Claimant's attorney was advised that Coverage and

Compliance did not have sufficient resources to serve the alleged owner of Avni Grocers by publication and that, therefore, the Claimant had the threshold burden of proving that the Employer was subject to the Act, before the merits of the claim could be heard (Memo, Gary Smith, Coverage and Compliance). No Order was issued based upon a Rule to Show Cause Hearing.

Judge Hill also found that there was "uncertainty of whether the issue regarding the number of Employees could have been raised". This is also an incorrect statement of the facts in that there was no question that the Claimant bore the burden of proving the number of Employees at the time of the hearing. In fact, the Claimant was also advised of this by Commissioner Huffstetler at the time of the hearing and chose, instead, to go forward at that time. (Transcript of Hearing, January 4, 2006, p.7, 11.4-10.)

Regulation 67-607 was adopted by the Commission, and became effective on September 2, 1990. Judge Hill found that the regulation referring to newly discovered evidence altered or added to the terms of §42-17-50, which states only that if evidence may be allowed "good grounds" be shown. Instead, it appears that Regulation 67-707 defines "good grounds", and sets forth the circumstances under which the Commission will consider additional evidence. Regulation 67-707 provides that:

> A. When additional evidence is necessary for the completion in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner....
>
> C. The moving party must establish the new evidences 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 have 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 evidences being bought to the attention of the Commission immediately upon its discovery...

This Court has upheld the provisions of Regulation 67-707, as well as of prior rule 67-14. Where a party knew of the testimony of a witness prior to a hearing, the Full Commission was not required to allow a doctor's deposition to be taken and entered as evidence upon that testimony under Regulation 67-707. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 333 S.E.2d 338 (S.C. App. 1985). Similarly, in a case where an Employer had possession of a surveillance tape before a hearing, but did not have a doctor review it, a letter written by the doctor after the hearing was held not to constitute newly discovered evidence under Regulation 67-707. Martin v. Rapid Plumbing, 631 S.E.2d 547, 369 S.C. 278, re-hearing denied (S.C. App. 2006).

Judge Hill's ruling found that §42-17-50 requiring that "good cause" be shown is a conflict with 25A S.C. Code Ann. Regulation 67-707, which sets forth the requirements for the submission of newly discovered evidence in workers' compensation claims.

The Administration Procedure Act, S.C. Code Ann. §1-23-10, defines a regulation as:

> Each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency".

Any policy issued by an agency other than by regulation does not have the force or effect of law as does a regulation.

§42-3-30, S.C. Code Ann. Provides the Commission with authority and, in fact, mandates that the Commission "shall promulgate all regulations relating to the administration of the workers' compensation laws of this state necessary to implement the provisions of this title and consistent

therewith."

The issue here is whether §42-17-50, which allows additional evidence if "good grounds" be shown, is inconsistent with Regulation 67-707 providing the newly discovered evidence rule, or if that regulation is merely necessary to implement the provisions of the title.

No cases directly on point could be found, however, the Supreme Court has discussed the application of other sections of the Workers' Compensation Act and its regulations as "being read together" to provide for an award. Glover by Cauthen v. Suitt Const. Co., 318 S.C. 465, 458 S.E.2d 535, rehearing denied (1995).

Analogously, the Supreme Court has discussed the authority of school districts to prescribe regulations not inconsistent with state law. It has been held that a municipal ordinance or regulation conflicts with state law only if conditions are inconsistent or irreconcilable with state law. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990). It has further, been held that, in order for there to be a conflict between a state statute and municipal regulation; "both must contain either express or implied conditions which are inconsistent and irreconcilable with each other...if either is silent where the other speaks, there can be no conflict between them...As a general rule, additional regulation to that of a state law does not constitute a conflict therewith..."

In the case at bar Regulation 67-707 is not at conflict, nor inconsistent, with §42-17-50, but instead is an additional regulation to the law, to assist in its implementation. Good cause is defined as "[a] legally sufficient reason. Good cause is often the burden placed on the litigant...to show why a request should be granted or refused. Black's Law Dictionary 235 (8th ed. 2004). The newly discovered evidence regulation adopted by the Commission merely defines what is required to avail a request for additional evidence. This regulation is almost identical to Rule 60(b), SCRCP which

allows only..."newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

This Court has upheld the application of 25A S.C. Code Ann. Reg. 67-707 (1997) as providing the requirements to introduce newly discovered evidence, and in disallowing additional evidence where it could by, reasonable diligence have been discovered. Martin v. Rapid Plumbing, *supra*. Clearly, Regulation 67-707 sets forth the recognized grounds to introduce evidence in a workers' compensation case, merely defining "good cause" as set forth in the statute.

Judge Hill found that the alleged employer did not appear at the hearing before Commissioner Huffstetler, and that the Claimant relied upon the Compliance Division's determination. In fact, there had been no determination by the Compliance Division. That Division specifically advised counsel for the Claimant that it would be necessary to prove that the Employer regularly employed four (4) or more Employees. The Claimant did not present the testimony of any member of the Department of Coverage and Compliance as to the investigation conducted and the basis for any conclusion it may have reached. The Claimant was clearly on notice that he would have to prove that the Employer regularly employed four (4) or more employees.

The introduction of an affidavit of Mr. Pal following the hearing should not have been allowed either on the basis of "good cause" or of being additional and newly discovered evidence. The evidence was known to the moving party at the time of the hearing or by reasonable diligence could have been secured, as is evidenced by the ease with which it obtained an affidavit from Mr. Pal following the hearing, and the Claimant's testimony at the hearing that Mr. Pal was residing in Charlotte. (Transcript of Hearing, January 4, 2006, p. 19, 11. 5-12).

Additionally, an affidavit does not constitute evidence allowed under the Administrative

Procedures Act. The testimony of a non-medical factual witness must be presented by testimony or deposition. S.C. Code Ann. §1-23-320(4)(c). Further, opportunity must be afforded to all parties to respond. S.C. Code Ann. §1-23-320(4)(e).

While the Court's sympathies are understandable, it was error of law to reverse the Full Commission's initial decision that the evidence sought to submit be submitted did not constitute additional and newly discovered evidence. There is no conflict between the statute and regulation, and this Court has consistently upheld the application of Regulation 67-707.

Further, it is not a function of the reviewing Court to weigh the submission of additional evidence, but only to consider whether the Commission's determination disallowing the submission of that evidence constituted error as a matter of law. Therefore, it was an abuse of discretion for Judge Hill to reverse the Commission's decision that the evidence sought to be submitted did not constitute newly discovered evidence. As such, Judge Nicholson's dismissal of SCUEF's appeal after remand was also in error.

In a similar situation this Court addressed Rule 55(c), SCRCP, which allows a Court to set aside an entry of default for good cause shown. Whether to grant relief from an entry of judgment is within the trial court's (here the Commission's) discretion. In reviewing the Court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, but rather whether the determination is supported by the evidence and not controlled by a matter of law. Pilgrim v. Miller, 350 S.C. 637, 567 S.E.2d 527 (S.C. App. 2002). Here, the Circuit Court judge acts as an appellate Court and his authority is limited to whether the Commission's determination was supported by the evidence and not controlled by a matter of law. The Circuit Court, in reversing the Full Commission's decision and order, exceeded its authority by

substituting the Court's judgment for that of the Commission, which is erroneous and improper under South Carolina law.

II. Did the Circuit Court judge err in reversing the initial decision of the Full Commission, affirming the decision of a Hearing Commissioner's finding that there was not substantial evidence in the record to support a finding that Avni Grocers regularly employed four (4) or more Employees as to be subject to the Workers' Compensation Act?

As a necessary threshold to jurisdiction of the Workers' Compensation Commission, it must be found that the Employer regularly employed four (4) or more Employees. §42-1-150, S.C. Code defines employment as:

> "all private employments in which four (4) or more Employees are regularly employed in the same business or establishment.

Contrary to Judge Hill's statement that the Claimant was confused about the issues before the Hearing Commissioner, jurisdiction is always a requisite to a workers' compensation award. (Emphasis added).

The Claimant was also aware prior to the hearing that the SCEUF contested jurisdiction, the Notice of Hearing dated December 2, 2005, stated that the Subject of Hearing was to determine issues as set forth on Forms 52 and 53. (Notice of Hearing, December 2, 2005). In the Form 52, No.2 states that: "both the Employee and the Employer were subject to the Workers' Compensation Act at the time of the injury."

Further, both the Department of Coverage and Compliance (Memo dated July 10, 2003); (Transcript of Hearing dated January 6, 2006) and the Hearing Commissioner advised the Claimant that this was a necessary element. The Hearing Commission even gave the Claimant an option to a postponement, which he refused. The opportunity for postponement become important under both issues on appeal before this Court. As to the first issue, the Motion for Additional Evidence, it has

been held by this Court that where a party in a Workers' Compensation case had evidence it could have shown to a witness before a hearing, and it "did not make a motion to adjourn or leave the record open to develop the evidence" that it did not satisfy the newly discovered evidence rule set forth in 25A S.C. Ann. Reg. 67-707 (1997). Martin, *supra.*

Even with the reviewing Court being allowed to review the evidence upon jurisdictional issues, the only reasonable conclusion in this case, is that the Claimant initially failed to meet his burden of proving by whom the deceased Employee was employed, as well as whether the Employer regularly employed four (4) or more Employees.

The only undisputed facts were that the deceased Employee, Anita Chaudhari, was working at a grocery store/gas station, in Charleston that sold Amoco gas, on the date of her death.(Transcript of Hearing, January 4, 2006, p.18). At that location, there were three people. (Transcript of hearing, January 4, 2006, p.18, lines 8-9). Although the Claimant, Dharmendra Chaudhari testified that a location where he worked, in Vance, was owned by the same company, he agreed that he had never seen ownership papers nor paychecks stating that they were the same company. (Transcript of Hearing, January 4, 2006, p.17), lines 20-18, line 2). Another undisputed fact is that, at the store where the deceased Employee worked, Amoco gasoline was sold (transcript of hearing, January 4, 2006, p.21, lines 5-13). Amoco charge cards were taken at that location. (Transcript of hearing, January 4, 2006, p.22, lines 12-13). Mr. Chaudhari was not working as an accountant for Avni, and did not know of its relationship with Amoco. (Transcript of hearing, January 4, 2006, p.22, lines 15 to 18).

What was in dispute was the identity of the actual Employer in this case. The Claimant, in the Form 50, listed the Employer as Avni Grocers (Form 50), and in his Pre-Hearing brief as Avni Grocers/Fast Point Amoco. (Form 58). The Department of Coverage and Compliance in its letter

to the Employment Security Commission listed the Employer as Avni International of S.C. d/b/a Stop Mart/Citgo. The Claimant made no effort to present any evidence concerning the ownership of the company, including any records from the Secretary of State; State Treasurer; paychecks; testimony of any competent witnesses; or by any other information reflecting ownership of the Fast Point/Amoco station where the deceased Employee came to her death.

As discussed in the Standard of Review, substantial evidence is not "mere scintilla" of the evidence, nor evidence viewed blindly from one side of the case. Ethredege, *supra*. Here, it is clear that the evidence purportedly relied upon by Judge Hill in reversing the decision of the Full Commission constitutes a "mere scintilla of evidence", that evidence being from an individual who had never seen any paychecks; never seen any ownership papers; and is unclear about the relationship of Avni Grocers to Fast Point Amoco or the relationship of Amoco to Fast Point Amoco. For the Circuit Court to have reversed the agency's decision and findings of fact was to have viewed this case blindly from one side–disregarding the Commission's findings of fact after weighing the evidence. A review of the entire record in this matter supports a finding only there was not substantial evidence to establish by whom the location where the deceased Employee came to his death was owned until after the evidence had been closed and ruled upon by the Hearing Commissioner.

The Hearing Commissioner succinctly summarized the evidence in his request for an Order:

> "This is a tragic, heart-rendering case. However, I am bound to the facts and the law without emotion. As I said at the hearing, I think it was ill advised for the Claimant to proceed with these hearings with so many procedural issues, I was close to, if not in fact, rude in questioning the Claimant's decision to go forward. But they did proceed and I am limited to the evidence that was presented...the more critical question deals with whether the employer is subject to the Act. Mr. Chaudhari testified that there were three (3) employees at each of the two locations of Avni Grocers. However, there is no evidence that these two stores were owned by the same person or company. They both bear the name Avni, but certainly could be

> operated by different family members with different business interests. Perhaps not, but there is no evidence of who owned or operated these stores. In his deposition, Mr. Chaudhari mentions Omni International South Carolina limited. He also says the store was also called Fast Point Amoco. There is no evidence concerning Omni International South Carolina Limited other than the one comment in the deposition. Perhaps Amoco actually owns these stores. Once could assume that since the store is called Fast Point Amoco, but there is no proof. I cannot speculate on these issues."

This Court has held in the case of Hernandez-Zuniga v. Tickle, 374 S.C. 235, 64 S.E.2d 691 (Ct. App. 2007), that where there is a jurisdictional question, the Court's review is governed by the preponderance of the evidence standard. While the Court of Appeals has the power and duty to review the entire record and find jurisdictional facts without regard to conclusions of the Commission, a construction should not be adopted that does violence to the specific provisions of the Act where workers' compensation statutes are to be literally construed. In Zuniga, it was held that there was not substantial evidence to find that an Employer regularly employed four (4) or more Employees even though there was evidence that four (4) may have worked on one or more occasions. Hernandez-Zuniga, also found that it must be proven that the Employer "regularly" employed four (4) or more Employees.

In this case, the evidence offered at the initial hearing was that three (3) Employees worked at the store where the deceased Employee came to her death. (Transcript of Hearing, January 4, 2006, p.11, lines 8-10). The witness worked at a different store from the deceased employee (Transcript of Hearing, January 4, 2006, p.11, lines 4-7). It was unclear what, if any, relationship there was between the two stores. Further, there was no competent evidence offered at the initial hearing that this number of Employees were "regularly" employed.

The requirement of §42-1-150 is, not only that there be regular employment, but Employees also be "employed in the same business or establishment". Emphasis added. The issue of whether Mr. Pal was the owner of a company which regularly employed four (4) or more Employees was not proved at the initial hearing. At best, the evidence offered at the initial hearing before Commissioner

Huffstetler was that three (3) Employees worked at one (1) business or establishment, and three (3) Employees worked at another second business or establishment. There was no evidence at the time of hearing that the location where the deceased Employee to his death was the "same business or establishment" where his spouse, the Claimant, worked.

It is the well-settled rule of law that any findings of the Commission must be founded upon the substantial evidence and cannot rest on surmise, conjecture, or speculation. Wynn v. Peoples Natural Gas, 238 S.C. 1, 118 S.E.2d 812 (1961). In the case at hand the only way in which a determination could be made that Avni Grocers was the Employer of the location where the deceased Employee came to her death, and that it regularly employed four (4) or more employees in the same business or establishment is purely speculation. Therefore, it was error for the Circuit Court to reverse the initial Decision and Order of the Full Commission of November 20, 2006, finding that the Claimant failed to meet his burden of proving entitlement to benefits in this case. It was further error for the Circuit Court to affirm Claimant's entitlement to benefits on appeal of the matter on remand.

CONCLUSION

It was error, as a matter of law, as well as an abuse of discretion, for the Circuit Court to substitute its judgment as to whether or not additional evidence could be submitted into the record. There is no conflict between the Workers' Compensation Act, and its Regulations as to the submission of additional evidence. The evidence sought to be submitted was not newly discovered evidence, and the Full Commission's decision of November 20, 2006, should be reinstated and affirmed. Further, even with this Court reviewing the entire record for a determination of jurisdiction at the time of the initial hearing, any finding that there is an Employer who regularly employed four (4) or more employees would have been purely speculative, and the decision of the Circuit Court should be reversed, to uphold the initial Decisions of the Hearing Commissioner and

the Full Commission.

Dated: September 26, 2013.

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