THE 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-10-6355

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased ..... Respondent,

v.

Avni Grocers, Employer, ... Defendant,

and

The South Carolina Uninsured Employers' Fund, Carrier, ... Appellant.

INITIAL BRIEF OF RESPONDENT

John S. Nichols, Esquire
Bluestein, Nichols,
Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599 Telephone
(803) 779-8995 Facsimile
jsnichols@bntdlaw.com

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

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

MISCELLANEOUS

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Should this Court Sustain the Decision of the Circuit Court 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?

II. Did the Circuit Court Correctly Rule as a Matter of Law That the Commission Should Have Permitted Claimant to Supplement the Record with the Affidavit of Mr. Pal, the Owner of Avni Grocers?

III. Does the Preponderance of the Evidence Support the Trial Court's Decision to Reverse the Commission's Ruling That Avni Grocers Did Not Employ Four (4) or More Employees and Remand the Matter for Further Proceedings?

COUNTER-STATEMENT OF THE CASE

This is a tragic case that has a long history with the Commission and with the courts. It has been proceeding for over a decade, and this is the second time this Court has had the case. The issues, however, are fairly straightforward.

The Claimant/Respondent, Dharmendra Chaudhari, is the widower of the deceased Employee, Anita Chaudhari. Mrs. Chaudhari and her brother-in-law, Verendra Puniyani, were murdered on November 14, 2002, during an inside-job robbery by a co-worker. Both Mr. Puniyani and Mrs. Chaudhari were on the job with Avni Grocers. 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 Fund became involved in the matter because the Employer was operating without Workers' Compensation coverage at the time of the murders. The primary issue in this case became whether the Employer, Avni Grocers, regularly employed four (4) or more employees so as to be subject to the Act at the time of the decedents' deaths.

The two cases 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. Commissioner Huffstetler instructed the Claimants to agree to continue the matter. Claimants indicated a desire to proceed, however, because Claimants had been waiting for a year for a hearing. Also, one Claimant had traveled from Atlanta, Georgia, for the hearing, and the Claimants had produced proof that the Fund had, in fact, been properly served. Commissioner Huffstetler continued to strongly insist that Claimants continue the hearing (confessing in his instructions for an order that

he was rude to the Claimants in this effort) (Bench Ruling Email from Commissioner Huffstetler dated 1/5/06), but 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.

The Fund hired outside local counsel just prior to 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 Claimants prior to the hearing regarding any objectionable issues the Fund had as to coverage or benefits.[1] The Fund did not submit any evidence at the hearing.

The Employer, Avni Grocers, failed to appear at the hearing. During the pre-hearing conference, Claimants learned *for the first time* that the Fund intended to assert that Avni Grocers was not subject to the Act because it did not employ four (4) or more employees. Following the hearing, Commissioner Huffstetler ruled that 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, Claimants offered proof of only three (3) employees at the store where the decedents worked and died.

Claimants timely sought review by an Appellate Panel of the Commission. While the appeal was pending, Claimants located Harendra Pal, the owner of Avni Grocers, who had moved from South Carolina immediately after the murders. Claimants obtained an affidavit from Mr. Pal that established the statutory requirement of four (4) or more employees and that the Employer was subject to the Act. Claimants filed a Motion to Add

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

Additional Evidence to the record and proffered the Pal affidavit. The Appellate Panel, however, refused to accept the additional evidence. The Appellate Panel thereafter affirmed Commissioner Huffstetler's rulings.

Claimants sought judicial review of both the Appellate Panel's affirmance of Commissioner Huffstetler's order as well as the Appellate Panel's denial of the motion to accept the additional evidence. The two cases continued to be consolidated for purposes of judicial review.

Following briefing and oral arguments, the Circuit Court (Judge Gary Hill) held that the Commission erred as a matter of law in refusing to accept Mr. Pal's affidavit as additional evidence. Judge Hill further ruled that notwithstanding Mr. Pal's affidavit, the preponderance of the evidence Claimant submitted at the hearing supported Claimants' position that the Employer regularly employed four (4) or more employees so as to be subject to the Act.[2] Judge Hill declined to address any additional issues, and remanded the matter to the Commission for further proceedings consistent with his rulings.

The Fund timely appealed Judge Hill's order to the Court of Appeals. On May 28, 2008, the Court of Appeals advised the parties that the two cases would no longer be

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[2] Because the issue involves a jurisdictional question, Judge Hill's review was governed by the preponderance of the evidence standard. *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 443 S.E.2d 803 (1994) (where issue involves number of employees under Section 42-1-150 of the S.C. Code, court may take its own view of the preponderance of the evidence); *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007) (issue of whether employer regularly employs the requisite number of employees to be subject to the Act is jurisdictional; court takes its own view of the preponderance of the evidence). That is, Judge Hill had "both the power and duty to review the entire record, find jurisdictional facts without regard to the conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of the evidence." *Id.*

consolidated. Each case was thereafter briefed separately.

On March 2, 2010, the Court of Appeals heard oral arguments on both cases jointly. At oral argument, Claimants advised the Court that Judge Hill's order was not immediately appealable because it contained a remand to the Commission. The Court ordered briefing of the appealability issue, and on June 29, 2010, the Court of Appeals issued its consolidated opinion dismissing both of the appeals without prejudice because Judge Hill'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 again for trial and were heard before Commissioner Avery Wilkerson on November 29, 2011. (Tr. p. 6, l. 20 - p. 7, l. 17). The parties stipulated that Mr. Dharmendra Chaudhari would reaffirm his prior testimony. (Tr. p. 16, ll. 4-5). They also agreed to present the prior deposition of Mrs. Puniyani's mother. (Tr. p. 14, ll. 8-24). The Fund objected to consideration of Mr. Pal's affidavit and to his live testimony. (Tr. p. 12, ll. 16-20). Commissioner Wilkerson denied the Fund's objections and admitted both Mr. Pal's affidavit pursuant to Judge Hill's order 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 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 entered an order affirming Commissioner Wilkerson based upon its own review of the record.

On September 25, 2012, the Fund filed a Petition for Judicial Review. The Fund stated seven separate grounds, all of which asserted error arising out of Judge Hill's prior order that reversed the Commission's initial decision denying Claimant's proffer of the Pal affidavit. (Petition for Judicial Review of 9/25/13).

The Circuit Court (Judge J.C. Nicholson) heard arguments in the matter on January 9, 2013. Because the exceptions raised involved only challenges to Judge Hill's order, Judge Nicholson entered a Form 4 order that same date denying the appeal. (Order of 1/9/13).

The Fund filed and served its notice of appeal to this Court on February 5, 2013.

ARGUMENTS

SCOPE OF APPELLATE REVIEW

The Fund asserts repeatedly 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).

The Court may also 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*, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007).

I. This Court Should Sustain the Decision of the Circuit Court 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

Commissioner Huffstetler found Claimant's Form 52 was properly served upon the Fund and the Employer, but neither the Fund nor the Employer filed a Form 51 or Form 53 Answer to Claimant's Form 52. 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. Claimant raised the points at every step, but neither the Commission nor Judge Hill addressed this issue but reached the merits of the Fund's defenses.

Claimant urges this Court to use this issue as an additional reason to affirm pursuant to Rule 220(c), SCACR. *See, also, I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

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 in a workers' compensation case file a Form 51 or Form 53 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) . . . 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). *See also Hargrove v. Carolina Orthopaedic Surgery Associates, PA*, 389 S.C. 119, 124, 697 S.E.2d 641, 643 (Ct. App. 2010) (under Regulation 67-603, an employer who has failed to respond to a claimant's workers' compensation action is precluded only from raising affirmative defenses but may still deny liability).

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" defenses allowed under the Act but could still generally deny liability. *Hargrove*. The assertion that the Employer employed less than four (4) employees within the State was not a mere general denial. This was a special or affirmative defense that the Fund waived by not filing a Form 51. *Cf. Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992) (affirmative defense conditionally admits the allegations of the complaint but asserts new matter to bar the action); *FMI, Inc. v. RMAX, Inc.*, 286 S.C. 343, 333 S.E.2d 360 (Ct. App. 1985) (affirmative defense assumes all elements of the plaintiff's case have been established).

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 Form 58 Pre-Hearing Brief mandated by Regulation 67-611. It did not disclose any facts or legal issues the Fund contended were in controversy. Thus, once again the Commission 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. (App. Br. pp. 2-3). 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 by the Commission's Division of Coverage and Compliance that Employer was, in fact, subject to the Act.

This Court should take notice of the critical procedural bar to the issues the Fund raised before the Commission and before Judge Hill, and should affirm Judge Hill's order under this additional reason.

II. The Circuit Court Correctly Ruled as a Matter of Law That the Commission Should Have Permitted 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 original 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. (App. Br. pp. 7-13). This Court should affirm Judge Hill's ruling in its entirety.

A. Judge Hill's Rulings Were Correct

This Court should affirm Judge Hill's 2007 order in its entirety.

Prior to the hearing before Commissioner Huffstetler for which the Fund received notice, the Fund did not file a Form 51 or Form 53 (Answer), nor did the Fund file a Form 58 Pre-Hearing Brief setting forth any defenses or objections. 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. Claimant was also aware that the Commission's Compliance Division had already determined that Employer was subject to the Act. (Letter of Dept. of Coverage & Compliance of 5/7/03). Despite the Division's determination, the Fund's complete lack of response in advance, and the fact that the Fund did not plead any special or affirmative defenses, Commissioner Huffstetler held that Claimant failed to establish the Employer had four (4) or more employees so as to be subject to the Act.

Following the hearing before Commissioner Huffstetler at which Claimant learned for the first time that the Fund intended to challenge the number of Employer's

employees, Claimant's counsel tracked down Harendra Pal, the owner of Avni Grocers, and obtained the 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.

Claimant then moved the Appellate Panel to permit the introduction of this additional evidence. Claimant asserted 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. That finding was made a part of the record before Commissioner Huffstetler without objection. (Tr. 1/4/06, p. 4, ll. 21-23). Yet the Panel denied the motion and refused to permit the evidence under Regulation 67-707.

Section 42-17-50 of the South Carolina Code 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.

S.C. Code Ann. § 42-17-50 (1976 & Cum. Supp.)(emphasis added). In this case, the Appellate Panel excluded the evidence pursuant to Regulation 67-707, finding the evidence was not "new evidence" as it was known to Claimant at the time of the hearing, or by reasonable diligence could have been secured. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2006). Judge Hill held this was an error of law, however, because 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 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 Compliance, which was part of the record (Tr. 1/4/06, p. 5, ll. 5-7), 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 a "good ground" to require the Appellate Panel to receive the additional evidence under Section 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 Claimant's ability to bring forth the additional evidence in this matter, the Regulation is at odds with Section 42-17-50, which provides the Commission "shall ... 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).

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 knows 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 first hearing, and Claimant relied upon the Compliance Division's determination and the lack of any defensive response by the Fund in proceeding without locating Mr. Pal and obtaining his testimony.

The Fund challenges several of the factual findings in Judge Hill's order. (Appellant's Brief, pp. 7-8). 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 Section 42-17-50 because the Regulation in fact simply defines "good grounds" for purposes of the statute. (App. Br. p. 9). Again, this point was not argued to or ruled upon by Judge Hill, nor did the Fund raise the point 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). This 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 the application of the regulation in *Wilkinson* conflicted with Section 42-17-50. (Order of 9/2007, p. 7, footnote). *Holcombe* dealt with the predecessor to Regulation 67-707, and there was no argument that application of that Regulation to the evidence being proffered conflicted with the plain terms of Section 42-17-50.

Martin involved the proffer of evidence as "after discovered" under the Regulation. This was without any claim that application of that Regulation conflicted with Section 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. Nobody in *Holcombe* or *Martin* argued that they had presented "good grounds" so as to require the Commission to admit the evidence under

the statute.

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 Claimant's Form 52 and did not file a Rule 58 Pre-Hearing Brief, it was not until the hearing was convened that Claimant was apprised that the Fund would contest whether the Employer had the requisite number of employees to be subject to the Act. Thus, while the Regulation is not invalid on its face, application of the "newly discovered evidence" rule thereunder conflicts with the plain language of Section 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*.

Section 42-17-50 provides that 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 Section 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. p. 12). The Court should not be persuaded by this argument.

To begin with, the statute states that "if good *grounds* be shown therefor" the Commission "shall...receive further evidence...." 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, 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 – the Fund failed to file a responsive pleading and the Claimant did nothing more than follow the investigation by the Coverage and Compliance Division – there was no need for Claimant to believe Mr. Pal's affidavit was needed prior to the hearing before Commissioner Huffstetler.

The Fund summarily points to Section 1-23-320 of the South Carolina Code as providing that Mr. Pal's affidavit did not constitute "evidence" under the APA. (App. Br. pp. 11-12). The Court should reject this argument for several reasons.

First, the Fund never made this argument below, and Judge Hill 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* (Rule 59 applies when a circuit court sits in an appellate capacity).

Second, Section 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.

S.C. Code Ann. § 1-23-320 (Supp. 2012). There is nothing in Section 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 under the statute.

Fourth, this argument is so conclusory as to be deemed abandoned. *E.g.*, *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) (same).

The Fund further summarily argues that under Section 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 Judge Hill, and the Fund did not seek a ruling by post-judgment motion. Rule 52, SCRCP; Rule 59, SCRCP; *City of Rock Hill v. Suchenski.* Second, the argument is so conclusory that it should be deemed abandoned. *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, or even offer evidence at the hearing. Even so, Commissioner Huffstetler 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, if this Court addresses the merits of this issue, the 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 the matter to the Commission with instructions to reconsider its ruling in light of Mr. Pal's affidavit.

B. The Issue of the Admission of the Pal Affidavit is Now Moot

Even if the issue is preserved for this Court's review, and even if Judge Hill ruled erroneously about whether the Pal affidavit should have been admitted, that issue is now moot. At the hearing before Commissioner Wilkerson following remand, Claimant presented not only the Pal affidavit but Mr. Pal's live testimony. That testimony established beyond doubt that Mr. Pal employed four (4) or more employees so as to be subject to the Act. This Court should therefore affirm.

Judge Hill's order said nothing about Mr. Pal testifying. Rather, Judge Hill found that, under the unique posture of the case, Claimant established "good grounds" for the Commission to accept Mr. Pal's affidavit under Section 42-17-50. (Order of 9/13/07, pp. 6-7). The decision to permit Mr. Pal's live testimony was a decision Commissioner Wilkerson made within his own discretion. That decision is not challenged in this appeal.

As noted previously, Judge Hill was persuaded that fundamental fairness compelled the Commission to consider the affidavit were these: 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; that decision was made part of the record; the Fund did *not* file a Form 51 or a Form 53, thereby failing to raise any challenge to Claimant's assertion that jurisdiction was proper; and the Fund also did *not* file a Form 58 Pre-hearing Brief, thereby concealing the attack it subsequently raised for the *first* time at the first hearing before Commissioner Huffstetler.

This point was crucial to Judge Hill's decision and should not be overlooked. The

first hearing before Commissioner Huffstetler was the *first* time the Fund notified Claimant that it was challenging the number of employees at Avni Grocers.[3] Although Claimant believed the testimony presented from Mr. Chaudhari established the business had four (4) or more employees, Commissioner Huffstetler (astonishingly) found *against* coverage, prompting Claimant to locate Mr. Pal and obtain the affidavit. Judge Hill recognized the sandbagging that occurred and the Fund's ambush of 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, this Court dismissed and remanded because Judge Hill's ruling was not an appealable order.

Following the remand from this Court, Mr. Pal returned to South Carolina and Claimants called him to testify separately from his affidavit. Although the Fund objected at the hearing, none of the Fund's exceptions to the Appellate Panel adequately raised any issue in Commissioner Wilkerson permitting Mr. Pal to testify live at the hearing on

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[3] Incredibly, the Fund asserts "Claimant was also aware prior to the hearing that the SCEUF contested jurisdiction...." (App. Br. P. 13). This statement is patently false, and lacks *any* basis in this record. The Fund filed *nothing* prior to the hearing to alert the Commission and Claimant that it was contesting anything, including jurisdiction. There was no Form 51 or Form 53 (answers), nor did the Fund file a Form 58 (pre-hearing brief). The Fund points to Claimant's allegation that "both the Employee and the Employer were subject to the Workers' Compensation Act at the time of the injury," and from this statement the Fund divines a challenge by *the Fund* to the number of employees. (App. Br. p. 13). The short answer is that this argument is made for the first time on appeal and was not raised to, nor ruled upon by, the commission or either circuit court judge in this case. The longer answer is that the conclusion the Fund reaches does not flow from its premise and is nonsensical. The Court should reject the Fund's conclusory syllogism out of hand. Claimant repeatedly points out the Fund's lack of pleading before Commissioner Huffstetler because the Fund conspicuously and repeatedly omits these facts in its discussions of the issues.

remand. (Fund's Request for Appellate Panel Review). *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 Commissioner Wilkerson receiving Mr. Pal's live testimony. *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). This issue was not properly before the Appellate Panel. It is also not properly before this Court.

On the merits, Mr. Pal's testimony plainly establishes that Avni Grocers employed four (4) or more employees. The Appellate Panel properly affirmed Commissioner Wilkerson's ruling in light of Mr. Pal's affidavit as well as his live testimony. Those items of evidence establish by a preponderance of the evidence that Avni Grocers included both locations (Vance and North Charleston), that there were five (5) to seven (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. (Tr. 11/29/11, p. 17, l. 6 - p. 19, l. 4; p. 25, l. 20 - p. 29, l. 25).

Any complaint now about allowing Mr. Pal's affidavit is moot because 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 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). Mr. Pal's testimony contains the same facts as those that are in the affidavit and augments that information with further explanation of whom he employed at Avni Grocers. Mr. Pal's unchallenged live testimony thus renders moot any challenge to his affidavit.[4]

The Fund is complaining on appeal only of Judge Hill's ruling that the Commission's decision denying Claimant's motion to permit the additional evidence violated Section 42-17-50. The fact that Commissioner Wilkerson permitted Mr. Pal to testify live, and that ruling is not appropriately challenged on appeal, renders moot the Fund's entire appeal.

At bottom, the Fund seeks to prevail where its own behavior (failing to file required pleadings or a Form 58 Pre-hearing Brief in the first hearing) lulled Claimant into believing falsely that the number of employees would not be an issue. There is no argument that Avni Grocers did not, in fact, employ four (4) or more employees – rather,

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[4] Even so, Judge Hill held that 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. The Fund did not challenge *that* finding in either the prior appeal to this Court or the proceedings following this Court's remand. That ruling is, therefore, the law of this case. *See* Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012) (an unappealed ruling, right or wrong, is the law of the case). This unappealed alternative ground also serves as an independent basis upon which to affirm. *See* State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) (an unappealed alternative ground that constitutes an independent basis to uphold the decision is the law of the case and mandates affirmance).

the Fund is contending it should win by default because the evidence establishing the requisite facts should not have been admitted. This argument is offensive at every level, and this Court should not reverse the Commission's order which is grounded in the actual facts in evidence.

Accordingly, the Court should affirm the Appellate Panel, which affirmed Commissioner Wilkerson's ruling that Employer was subject to the Act.

III. The Preponderance of the Evidence Supports the Trial Court's Decision to Reverse the Commission'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. 13-17). This Court should affirm.

South Carolina Code Ann. § 42-1-150 (1976 & Cum. Supp.) 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) (1976 & Cum. Supp.), 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 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. (Tr. 1/4/06, p. 4, ll. 21-23). 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, ll. 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 Dept. of Coverage & Compliance date 5/7/03). Hence, Claimant 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....*").

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, 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 wife was employed by Avni Grocers and worked for Avni Grocers seven (7) days a week. (Dharmendra Chaudhari Dep., p. 6, lines 7-16,

Tr. p. 11, lines 4-8). 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. 1/4/06, p. 13, ll. 5-8, ll. 12-18). 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 (see incident and newspaper articles, APA #'s 5, 6, 7, 8, 9 and 11)(see incident and newspaper articles, APA #'s 5, 6, 7, 8, 9 and 11), 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. 13, lines 7-10). Neither Commissioner Huffstetler nor the first Appellate Panel found Mr. Chaudhari's testimony not credible. The only evidence, therefore, was that Avni Grocers was subject to the Act. *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. 17, lines 15-24). Mr. Chaudhari further testified that the only connection between Avni Grovers 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, 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. p. 14). Of course, Mr. Pal's affidavit, which the Commission improperly excluded, settles 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 demonstrates 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. 16). 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 the circuit court'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, 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. (Dharmendra Chaudhari Dep., p. 6, lines 7-16, Tr. p. 11, lines 4-8). 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, lines 14-20). He 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). 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, lines 5-19). 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 (see incident and newspaper articles, APA #'s 5, 6, 7, 8, 9 and 11), 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

Tickle	This Case
The evidence revealed that the employment in *Tickle* was occasional, sporadic or indefinite. Mr. Tickle worked "project to project" and moved his employees accordingly. 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.	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.

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.

Once again, the Fund misstates the appropriate scope of judicial review in this case, contending the "substantial evidence" test required Judge Hill to accept Commissioner Huffstetler's ruling. (App. Br. pp. 15, 17). Of course, the issue of whether an employer has four or more employees involves a question of the Commission's jurisdiction, so that both the circuit court and this Court on appeal may find facts from the court's own assessment of the preponderance of the evidence. *See Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 443 S.E.2d 803 (1994) (where issue involves number of employees under Section 42-1-150 of the S.C. Code, court may take its own view of the preponderance of the evidence); *Hernandez-Zuniga v. Tickle* (issue of whether employer regularly employs the requisite number of employees to be subject to the Act is jurisdictional; court takes its own view of the preponderance of the evidence).

In sum, 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, the circuit court correctly reversed the Commission's decision.

CONCLUSION

This Court should affirm Judge Hill's order in its entirety, and should remand the matter for the Commission to compute interest and other remedies available for the Fund's failure to pay the benefits that the Commission ordered the Fund to pay.

Respectfully submitted,

John S. Nichols, SC Bar No. 4210
Bluestein, Nichols,
Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599 Telephone
(803) 779-8995 Facsimile
jsnichols@bntdlaw.com

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

Attorneys for Respondent

October 28, 2013.

THE 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-10-6355

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased ..... Respondent,

v.

Avni Grocers, Employer, ... Defendant,

and

The South Carolina Uninsured Employers' Fund, Carrier, ... Appellant.

PROOF OF SERVICE

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

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

Erin Bridges

October 28, 2013
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC