

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 17 2014

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Circuit Court Judge

SC Court of Appeals

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

71909

Anita Chaudhari, Deceased, Employee,
and Dharmendra Chaudhari, Claimant, ... Respondents,

v.

Avni Grocers, Employer, Defendant, and The
South Carolina Uninsured Employer's Fund,

of whom

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

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

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

v.

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

of whom

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

MOTION TO CONSOLIDATE AND EXPEDITE

Pursuant to Rules 214, 240 and 263, SCACR, the Respondents in these cases request that this Court consolidate these appeals and expedite these matters for appellate review.¹

BACKGROUND

These are workers' compensation cases that share the same tragic set of facts and a very long history before the Commission and the courts. The Claimant/Respondent, Rajkumari Puniyani, is the mother of the deceased Employee, Virendra Puniyani. Mr. Puniyani and his sister-in-law, Anita Chaudhari, were murdered in November 2002 by a co-worker and an accomplice while on the job with Avni Grocers (the Employer). Each deceased worker's estate brought claims under the Act, asserting the deaths occurred during the course and scope of each decedent's employment. The South Carolina Uninsured Employers' Fund (the Fund) became involved in the matter because the Employer was operating without Workers' Compensation coverage. Since this case's inception over eight years ago, the primary issue has been whether Avni Grocers regularly employed four (4) or more employees so as to be subject to the Act at the time of the Claimants' deaths.

The matters were consolidated and called for a hearing before Commissioner David Huffstetler, on January 4, 2006. The Fund appeared and took the position that it did not have timely notice of the claims and did not submit any evidence. Commissioner

¹ On January 13, 2014, Respondents made a motion to certify, consolidate and expedite in the Supreme Court. On February 21, 2014, the Court denied the Motion to Certify by 3-2 decision. Thus, the Court did not reach the motions to consolidate and expedite the appeal. This Court, therefore, may address these motions.

Huffstetler instructed the Claimants to agree to continue the matter. Because the Claimants had been waiting a year for a hearing, one Claimant had traveled from Atlanta, Georgia, and because the Claimants produced proof that the Fund *had* been properly served with notice of the hearing, the Claimants indicated a desire to proceed. Commissioner Huffstetler continued to strongly insist that the Claimants continue the hearing (confessing in his instructions for an order that he was rude to the Claimants in this effort), but he ultimately concluded that the Fund was properly served with both Forms 52 and received adequate notice of the hearing.

Apparently, the Fund did very little work on the file following the retirement of the lawyer that was previously assigned to work on these matters. The Fund called outside counsel to cover the hearing before Commissioner Huffstetler, and the Fund's counsel filed *no* Form 51, *no* Form 53, and *no* other response. The Fund also did not file a Form 58 pre-hearing brief. In fact, the Fund did not give *any* notice to the Claimants regarding any objectionable issues the Fund had as to coverage or benefits.²

The Employer, Avni Grocers, failed to appear at the hearing. Following the hearing, Commissioner Huffstetler ruled that the Claimants failed to produce substantial evidence that Avni Grocers regularly employed four (4) or more employees so as to be subject to the Act. Commissioner Huffstetler ruled that at best, the Claimants offered proof that there were only three (3) employees where the Claimants worked. This roster consisted of both murdered claimants and the co-worker who participated in the crime.

² Current counsel for the Fund was not involved in this matter at the time. In fact, current counsel is the *fifth* lawyer to represent the Fund in this case over its long, tortured history.

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

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

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

The Fund 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 consolidated. Hence, each case was briefed separately.

On March 2, 2010, the Court of Appeals heard oral arguments on both cases jointly. At oral argument, the Claimants pointed out that Judge Hill's order was not

immediately appealable because it contained a remand to the Commission. *See, e.g., Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013) (circuit court order that contains a remand to the commission is not immediately appealable). The Court of Appeals requested additional briefing, and on June 29, 2010, the Court of Appeals issued a consolidated opinion dismissing both appeals without prejudice because the Circuit Court's order was not immediately appealable. *Puniyani, et al. v. Avni Grocers, Employer*, 2010-UP-338 (S.C. Ct. App. filed June 29, 2010). The Court of Appeals issued the remittitur in these cases on July 7, 2010, and the cases were returned to the Commission.

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

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

On February 29, 2012, the Fund filed a Form 30 seeking Appellate Panel review. The issues stated involved (1) the finding that Employer employed four (4) or more employees, and (2) the admission of Mr. Pal's affidavit as well as his live testimony. The

parties briefed the issues, and on August 28, 2012, the Appellate Panel affirmed Commissioner Wilkerson's order based upon its own review of the record. The Panel also found there was no issue before it regarding the admission of Mr. Pal's live testimony.

The Fund served a Petition for Judicial Review on September 25, 2012. The Circuit Court (Judge J.C. Nicholson) heard arguments on the appeal on January 9, 2013. The Fund noted that "the primary issue up on appeal goes back to our first round of appeals...." The Fund's argument was that the prior order by Judge Hill was improper as a matter of law. The Fund made it plain that it was not raising any new issues from the prior appeal in 2010, nor was the Fund specifically challenging anything that happened at the hearing before Commissioner Wilkerson, the second time the case was tried. Judge Nicholson ruled that he could not overturn Judge Hill's order and entered a Form 4 order that same date denying the appeal.

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

The appeal in Puniyani has been perfected. The briefing has been done in Chaudhari, but the Court of Appeals is considering Respondents' letter advising the Court that the Fund had unilaterally altered the caption on this round of appeals (the Fund included the words "Alleged Uninsured Employer" following Avni Grocers, and the Court of Appeals advised Respondent to do the same). Thus, although the briefing is done and the record has been designated, the final briefs and the Record on Appeal have not been filed.

DISCUSSION

The Supreme Court recently commented on the long procedural history in a workers' compensation case. *See Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014) (noting a workers' compensation case came to the court after multiple workers' compensation hearings/appeals spanning more than 11 years). Like the *Hudson* case, the appeals in these cases have also been pending for over a decade and have been subject to multiple hearings and appeals before both the Commission and the Courts. Despite failing to file any responsive pleadings or pre-hearing briefs in the original matter before Commissioner Huffstetler in January 2006, the Fund orally raised an affirmative challenge at the hearing to the number of employees in this case. The Fund continues to cling to this challenge even though it knows it is factually wrong.

In reviewing the Commission's 2006 ruling, Judge Hill made two rulings: (A) the Pal affidavit was wrongfully excluded and established Avni Grocers had four or more employees at the time the Claimants were murdered; and (B) even without the Pal affidavit, the preponderance of the evidence established Avni Grocers had four or more employees. The Fund challenged Judge Hill's ruling regarding the admission of the Pal affidavit, but *did not* challenge the alternative ruling (the Commission so found following the remand). Thus, there are significant error preservation problems with the issues the Fund continues to try to raise here.

Despite the unchallenged rulings and the existence of overwhelming evidence to support both Judge Hill's ruling and the Commission's decision on remand, the Fund continues to pursue appellate review of these cases. The Fund has demonstrated a resolve

not to pay these claims until the last appeal has been exhausted. No benefits have been paid to these Respondents even though these deaths occurred over 11 years ago.

The Fund has made it abundantly clear that it is pursuing only the issues it initially raised in the first appeal from Judge Hill's order (an appeal that was fully briefed and argued before the Court of Appeals in March 2010, over four years ago). The Fund has also made it abundantly clear that it intends to pursue every avenue of review and to delay the resolution of this matter for as long as possible. Again, these cases have been pending in one forum or another for over a decade, and the likelihood of reversal is minimal at best.

The Court should consider expediting these appeals. Rule 263(b), SCACR, provides "The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof." In view of the extensive history of this case, the Fund's determination to pursue these appeals to the absolute end, and the Supreme Court's denial of the Motion to Certify, Respondents request that the Court expedite its rulings on these matters whether by submitting them for decision without argument pursuant to Rule 215, SCACR, or by scheduling argument pursuant to Rule 216, SCACR, as quickly as possible.

Further, the Court should consider consolidating these two appeals. Rule 214, SCACR, provides:

Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its

discretion, order the appeal to be consolidated.

The same questions are involved in these two appeals: (1) Whether Avni Grocers employed four (4) or more employees for purposes of the Workers' Compensation Act; and (2) whether the issues the Fund argues are preserved for this Court's review. The cases have been consolidated and then separated several times throughout their existence. They are currently separated and on different tracks in the appellate system. Given that there is no dispute as to the basic facts (except for the number of employees for Avni Grocers) or the applicable law, and the precise law applies to both cases, Respondents request that the Court consolidate the appeals, hear them together if oral argument is had, and decide them together in one opinion.

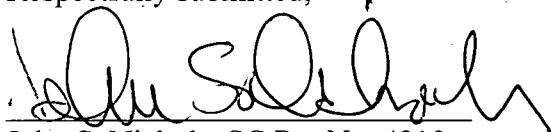
CONCLUSION

As the Supreme Court recently stated, the oft-quoted phrase "justice delayed is justice denied," while invoked usually in the criminal context, "is no less applicable to civil cases." *In re Atwater*, 397 S.C. 518, 528, 725 S.E.2d 686, 691 (2012). The maxim applies fully to these two appeals. The murders occurred in November 2002, over twelve years ago. The cases have been pending in the Workers' Compensation system since February 20, 2003, when counsel filed a Form 52 request for a hearing for each of the Claimants. Thus began an 11-year odyssey which has once again found these cases on this Court's shore. There is no honest way for the Fund to dispute that Mr. Pal actually employed more than four (4) employees with Avni Grocers and that the two locations were, in fact, part of one business. Rather, the Fund seeks a technical win, ignoring the

error preservation challenges before it and pursuing these appeals solely for the purpose of delay.

Accordingly, Respondents respectfully request that this Court (1) consolidate the matters for decision, *cf. Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013) (wherein the Supreme Court certified related case and consolidated with pending matter where the dispositive issue in each case was identical); and (2) expedite review of these cases. *See* Rule 263 (b) ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof.").

Respectfully submitted,



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April 17, 2014

Attorneys for Respondents

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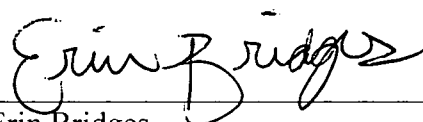
South Carolina Uninsured Employers' Fund, Carrier, is Appellant.

PROOF OF SERVICE

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

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April 17, 2014
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