

Appellate Panel
of the
South Carolina Workers' Compensation Commission

ORDER

W.C.C. FILE NO. 1308837

Esvin Leonel Lopez Perez, Employee, *Claimant*
v.
Gino's The King of Pizza, Employer, *Defendant*

Affirmed

Appellate Panel Review held in Columbia, South Carolina on October 27, 2014
per notices timely and properly served

Claimant/Appellant represented by David J. Cantey
Defendants/Respondent represented by Daniel R. McCoy
South Carolina Uninsured Employers Fund (SCUEF) by Clarke W. McCants, III

Order Filed: January 6, 2015

STATEMENT OF THE CASE

The claimant was employed by Gino's the King of Pizza to perform work in its pizza restaurant. On May 22, 2013, the claimant was involved in an accident at the restaurant where he suffered burn injuries after a gas explosion. The claimant filed a Form 50 on June 13, 2013. Gino's the King of Pizza, LLC filed a timely Form 51 asserting that it did not maintain the requisite number of employees and, therefore, was not subject to the Act. The parties were heard by Commissioner Aisha Taylor on April 23, 2014, in Horry County, South Carolina.

On July 7, 2014, Commissioner Taylor issued her decision making the following Order:

Gino's The King of Pizza, LLC is not subject to the South Carolina Worker's Compensation Act. Therefore, the South Carolina Worker's Compensation

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Commission does not have jurisdiction over this matter. All claims for benefits are denied.

AND IT IS SO ORDERED.

Within the statutory period, Counsel for the appellant filed an Application for Review in this case setting forth its reasons, a copy of which was furnished to all interested Parties prior to oral argument. A hearing was conducted before the Appellate Panel on October 27, 2014 which was comprised of Commissioner T. Scott Beck, Commissioner Melody L. James, and Commissioner R. Michael Campbell, II. All evidence, documentation, and testimony was provided to the individual members of the Appellate Panel and oral argument was delivered on the aforesaid date.

By appeal, the following issues were presented by Appellant for review:

- I. Are the several other businesses using the name Gino's Pizza related to the Employer?
- II. Did the North Myrtle Beach location have the requisite number of employees?
- III. Is the Employer's testimony credible?

In an Appellate Review, the Appellate Panel shall, pursuant to S. C. Code Ann. § 42-17-50 (1976), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the record for this matter, and listening to and considering the statements and arguments of Counsel, the Appellate Panel hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The employer in this matter is Gino's the King of Pizza, LLC.
2. The employer operates under the trade name of Gino's Pizza.
3. There are several other business entities operating under the trade name of Gino's Pizza; however, they are not related to the employer in this case.
4. The employer only owns and operates the Gino's Pizza located at 532 Highway 17 N., North Myrtle Beach, South Carolina 29582.
5. Claimant, Esvin Perez, was an employee of Gino's The King of Pizza, LLC on 5/22/2013, the date of injury.
6. On 5/22/2013 Claimant suffered burn injuries to his face and arms after a gas explosion.
7. On the date of injury, Gino's the King of Pizza, LLC did not have the requisite number of employees to make it subject to the Act.
8. There is insufficient evidence in the record to support a finding that Gino's The King of Pizza, LLC regularly employed 4 or more employees.
9. Upon cross-examination it became clear that Claimant had no actual knowledge as to the working relationship of any other persons he testified about and that his beliefs were based on speculation and hearsay.
10. Claimant presented no evidence that would support his position that any of the other people he asserted to be employees were regularly employed employees as defined by the Act.
11. The evidence is sufficient to support Gino's The King of Pizza, LLC's position that it did not regularly employ 4 or more employees at all times relevant to this action.
12. The only credible testimony was presented by Gino's The King of Pizza, LLC.

13. Specifically, two of the alleged employees asserted by Claimant were owner/members of the LLC. As members of the LLC, these individuals are not subject to the Act.
14. Additionally, the evidence showed that at least two of the other alleged employees were younger family members of the owners and came in to help out only when needed. We find these employees to be casual employees and not subject to the Act.
15. The evidence also revealed that one of the other persons alleged by Claimant to have been an employee lived in New York at all times relevant to this claim, continues to live in New York, and has never performed work for Gino's The King of Pizza, LLC. We find that he cannot be considered an employee of any kind and is not subject to the Act.
16. The evidence revealed that several of the people alleged to be employees by Claimant were family members that helped out sporadically on a voluntary and unpaid basis. We find that these people are not subject to the Act.
17. Furthermore, the evidence revealed that all other people alleged to be employees by Claimant were people that came in to help out sporadically, occasionally, indefinitely, and on a very limited basis. These instances occurred by chance and with the intention and understanding on the part of employer and employee that it would not be continuous. We find these people to be, at most, casual employees and not subject to the Act.
18. The evidence shows that only the two members of the LLC and Claimant regularly performed work at Gino's at all times relevant to this claim.
19. Gino's The King of Pizza only had 1 regularly employed employee as defined by the Act, Claimant, at all times relevant to this claim.
20. All claims for benefits are denied.

Conclusions of Law

Gino's The King of Pizza, LLC is not subject to or bound by the provisions of the South Carolina Worker's Compensation Act. Therefore, jurisdiction of this matter before the South Carolina Worker's Compensation Commission is improper. "The issue of whether an employer regularly employs the requisite number of employees to be subject to the Workers' Compensation Act is jurisdictional." *Harding v. Plumley*, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct.App.1998). The question of subject matter jurisdiction is a question of law. *Gray v. Club Group, Ltd.*, 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct.App.2000); *Roper Hosp. v. Clemons*, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct.App.1997).

The Act does not apply to "any person who has regularly employed in service less than four employees in the same business within the State." S.C. Code Ann. § 42-1-360(2). The South Carolina Court of Appeals has defined "regularly employed" as "employment of the same number of persons with some consistency throughout the regular time period" and during that regular time period the employment is "definite and recurrent rather than occasional, sporadic, or indefinite." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 257, 647 S.E.2d 691, 702 (Ct. App. 2007).

Furthermore, the Act does not apply to casual employees. S.C. Code Ann. § 42-1-360(1). In the context of construing the statute, the term "regular" is often juxtaposed with the term "casual." *Hernandez-Zuniga* at 248, 647 S.E.2d at 697. "Where 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." *Smith v. Coastal Tire and Auto Service* 263 S.C. 77, 81, 207 S.E.2d 810, 812 (1974).

“Employment is casual when not permanent or periodically regular but occasional or by chance.”
Singleton v. J.P. Stevens & Co., Inc., 533 F.Supp. 887, 892 (D.C.S.C.1982).

Here, Claimant is asserting that Gino's The King of Pizza, LLC employed four or more regularly employed persons. However, none of the other alleged employees were present to testify as to their possible employment relationship with Gino's. In evaluating the testimony, it became clear that Claimant had no actual knowledge as to the possible employment relationships between the other alleged employees and Gino's. All assertions by Claimant as to the alleged employment relationship of other people with Gino's The King of Pizza, LLC are merely speculation and hearsay. Gino's The King of Pizza, LLC was the only party with actual knowledge regarding the potential employment relationships that was present to testify.


Two of the alleged employees asserted by Claimant were owner/members of the LLC and, because they did not opt in, are not subject to the Act. Several of the other alleged employees were family members of the owners and came in to help out sporadically and only when needed; some on a voluntary basis. Their employment cannot be characterized as permanent and occurred only by chance with the intention by all parties that it shall not be continuous. Thus, they are, at most, casual employees and not subject to the Act. All other alleged employees asserted by Claimant came in to help out sporadically, occasionally, and on a very limited basis. These instances also occurred by chance and with the intention and understanding on the part of employer and employee that it would not be continuous. As such, the evidence shows that Gino's The King of Pizza, LLC did not regularly employ 4 or more employees at all times relevant to this claim. Therefore, Gino's does not employ the requisite number of employees and is not subject to the Act.

ORDER

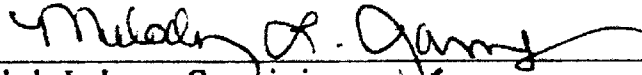
The Order of the single commissioner is hereby AFFIRMED and the same shall constitute the Decision and Order of the Appellate Panel. All Findings of Fact and Conclusions of Law are incorporated to become the final Decision and Order of the South Carolina Workers' Compensation Commission¹.

IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION



T. Scott Beck, Commissioner



Melody L. James, Commissioner



R. Michael Campbell, II

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on January 6, 2015

¹ All Findings of Fact and Conclusions of Law as contained in the single commissioner's order are specifically referenced and included in toto in the "order" portion of this decision so as to comply with the requirements of *Baldwin v. James River Corporation*, 304 S.C. 485, 405 S.E.2d 4, as well as the Administrative Procedures Act of the State of South Carolina and Sections 42-17-40 and 1-23-350 of the South Carolina Code of Laws, as per *D Shipley, South Carolina Administrative Law* at 5-109 (1983).