THE STATE OF SOUTH CAROLINA

In The Court of Appeal

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No.: 2012-CP-10-6357

Virendra Puniyani, Deceased Employee, and

Rajkumari Puniyani, Claimant, Respondents,

v.
Avni Grocers, Employer, Defendant, and The South Carolina Uninsured Employers' Fund, of whom South Carolina Uninsured Employer's Fund, Carrier, is the Appellant.

PETITION FOR REHEARING

Margaret Urbanic
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Appellants petition this Court for a rehearing of its decision filed January 28, 2015. In upholding the order of Judge Hill, this Court likewise overlooked both the facts and the law.

FACTS

This claim arose out of the death of the Claimant's son Virendra Puniyani while he 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. (R. pp. 353-354) The Department also wrote to the Employment Security Commission requesting business data for Avni International of S.C. d/b/a Stop Mart/Citgo (R. pp. 211-212.)

Counsel for the Claimant submitted a Pre-Hearing brief on December 20, 2005 (R. pp. 235-236) stating that the facts and controversy were the compensation rate, heirs, burial expense, etc. Evidence submitted into the record before the Hearing Commission included a Certificate of Death, funeral expenses, five articles from the Post and Courier, the Deposition of Dharmendra Chaudhari, a police incident report, and the Deposition of Rajkumari Puniyani. (R. pp.234-268). No evidence was introduced as to the ownership of Avni Grocers, the name of the alleged Employer in Claimant's Form 58. Nor was Avni Grocers' purported owner, Harenda Pal, identified as a witness.

The Claimant, Rajkumari Puniyani, is the mother of the deceased Employee, Virendra Puniyani. (R. pp. 108, lines 4-6 and p.112, lines. 5-9). The sole witness at the hearing was the deceased employer's brother, Dharmendra Chaudhari. (R. p. 112, lines 5-7). The deceased Employee was working on November 14, 2002, when he came to his death as a result of a gunshot wound. (R. p. 240). A co-worker of the deceased Employee, who was hired just days before, was implicated in the murder. (R. p. 242). The gas station where the deceased Employee worked was known as Amoco Fastpoint (R. p. 242). The witness, Dharmendra Chaudhari, did not work at the same location as his brother (R. p. 115, lines 4-7). Only three people worked at the location where the deceased employee worked. (R. p. 115, lines 8-10.) The deceased employee was paid in cash. (R. p.115, lines 11-12). The witness was not aware of any ownership papers of Avni Grocers at two locations, including where the deceased employee worked. (R. p.116, lines 6-11). Avni Grocers bought gasoline from Amoco wholesalers (R. p. 116, lines 12-18). The location where the deceased employee worked took Amoco credit cards and sold Amoco fuel. (R. p.116, lines 19-21). Another location (where the witness worked) was Citgo (R. p.116 lines 21-24). There was no written documentation of what the deceased employee earned and he did not pay taxes. (R. p.117, lines 16-21.)

I. THIS COURT ERRED IN FINDING THAT JUDGE HILL'S ORDER PROPERLY CONCLUDED THAT THE EMPLOYER WAS SUBJECT TO THE ACT.

This Court's ruling that Judge Hill's order finding that there was a preponderance of the evidence to support the allegation that the employer had 4 or more employees is an error and not supported by the record. Judge Hill's order gives two reasons as to why he found jurisdiction. The first reason was based on the Coverage and Compliance file and the second reason was the testimony presented at the hearing in front of Commissioner Huffstetler.

A) Judge Hill's ruling that there was a finding that Coverage and Compliance made a ruling that Avni Grocer's was the Claimant's employer and subject to the Act was an error.

Judge Hill's order finds that there was Coverage and Compliance determination that Avni Grocers was the employer and that this alleged ruling of Coverage and Compliance ruling was part of the record. (R. p. 28). This is clearly wrong and all of the evidence is to the contrary. Judge Hill's order specifically references a May 7, 2003 letter to Claimant's counsel. Although the letter indicates that there are 15 employees, it does not make a legal finding. The letter does state "if the employer doesn't settle the compliance issue as Joel Scott has suggested in his letter, he will likely need your assistance in locating witnesses who can testify at a show cause hearing that the employer has four or more employees." In others words, the May 7, 2003 letter is not a legal finding or conclusion that would bind all parties including the UEF that the employer had 4 or more employees and was subject to the Act, a rule to show cause hearing needed to occur. (R. pp. 211-212). Further clarification of this was provided, on July 17, 2003, when Gary Smith of the Coverage and Compliance Division of the Workers' Compensation Commission told the Respondent's attorney in writing that "[a]t

a 52/53 hearing, the first issue will consist of your proving the employer was subject to the Act by regularly having four (4) or more employees. Thereafter, the merits of the claim will be addressed." (R. pp. 353-354). An internal memo dated July 15, 2003 in the Coverage & Compliance file that was made part of the record, states "[w]e set the case for a show-case hearing but were unable to get the employer served by process server. .... If the attorney wishes to prosecute his clients' claim, he will have to serve the Form 52 by publication. The claimant's attorney has been made aware that he bears the burden of proof in showing that the employer was subject to the Act before the merits can be heard." (R. p. 352). Judge Hill's ruling that the Claimant was unaware that he had the burden to prove is wrong. Therefore, a ruling based on an erroneous conclusion that Coverage and Compliance had made a finding that was four or more employees is an error of law; this Court should rehear this or reverse the order.

B) Judge Hill's order finding that the Claimant proved that there were 4 or more employees is an error.

There is not a preponderance of the evidence to support Judge Hill's ruling that the Claimant proved that there were 4 or more employees. The only undisputed facts were that the deceased Employee, Virendra Puniyani, was working at a grocery store/gas station, in Charleston that sold Amoco gas, on the date of his death. (R. p. 115). At that location, there were three people. (R. p.115, lines 4-7). Mr. Chaudhari was not aware of the ownership papers and did not have information on company operations. (R. p. 116, lines 6-11). Another undisputed fact is that, at the store where the deceased Employee worked, Amoco gasoline was sold (R. p. 116, lines 12-18).

Amoco charge cards were taken at that location. (R . p.116, lines 19-21). At the store were Mr. Chaudhari worked the sold Citgo gas. (R. p. 116, lines 21-27).

What was in dispute was the identity of the actual Employer in this case. The Claimant, in the Form 52, listed the Employer as Avni Grocers (R. p. 63), and in his Pre-Hearing brief as Avni Grocers/Fast Point Amoco. (R. p. 64). 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. The testimony was that at the location where the deceased worked there were three people. (R. p. 115). The questioning did not identify who the workers were to know who was counted in the three that worked there. There was no documentation of evidence showing four or people. As noted in the order instructions of Commissioner Huffstetler,

> 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." (R. pp. 207-8).

Speculative evidence does not support a ruling that there were four or more employees.

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 his death. (R. p.115, lines 8-10). The witness worked at a different store from the deceased employee (R. pp. 116-117 lines 23-1). 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.

II. It was an error for Judge Hill 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.

This Court did not address this issue and however, it was an error for the affidavit to be submitted as newly discovered evidence and the Appellants would request that this issue be heard. 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 (R. pp. 353-354). 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. (R. p, 108).

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.

Section 42-3-30, of the code 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.

The introduction of an affidavit of Mr. Pal following the hearing should not have been allowed 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.

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. Clearly, the affidavit should have been considered newly discovered evidence and the Court should address it.

III. THE LIVE TESTIMONY OF MR. HERENDA PAL SHOULD NOT HAVE BEEN ALLOWED AT THE HEARING IN FRONT OF COMMISSIONER WILKERSON.

After the initial appeal to the Court of Appeal was determined to be interlocutory and the case was remanded to the Single Commissioner. Commissioner Wilkerson allowed the testimony of Mr. Pal. Both the affidavit and the testimony were objected to at the hearing in front of the Single Commissioner. (R. p. 132). In the Form 30, the UEF repeatedly raised the issue on appeal that new evidence should not have been submitted. (R. pp. 78-79). New evidence clearly includes the testimony of Pal. These issues were also raised on the petition for review with the circuit court. (R. p. 83). This testimony should not have been allowed as there is no reason as to why it wasn't presented at the initial hearing with Commissioner Huffstetler in 2006. As argued previously in this petition, there was not a preponderance of evidence in the record that there was 4 or more employees. Thus, the Court should rehear this case and vacate the prior order.

CONCLUSION

For the reasons stated, Respondents respectfully request this Court to grant a rehearing on the issues set forth herein and vacate the prior order or, in the alternative to issue a revised opinion reversing the Circuit Court's Order.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I certify that on the 11 day of February 2015, I have served a copy of the Appellant's Petition for Rehearing by Fed Ex and United States Postal Service, postage prepaid addressed to the attorneys of record as listed below.

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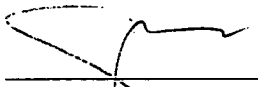

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February 11, 2015

File No.: 2006967.000

Via FED EX and Regular Mail
Honorable Jenny Abbott Kitchings
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Re: Virendra Puniyani v. Avni Grocers and the South Carolina Uninsured Employer's Fund
Case No.: 2012-CP-1006357

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Respondent's Petition for Rehearing. As the South Carolina Uninsured Employer's Fund is a state agency no filing fee is required. Additionally, is the original and one copy of the Proof of Service. I would appreciate if you could return a clocked copy of the Petition and Proof of Service to me in the self addressed stamped envelope provided.

Very truly yours,

CLAWSON and STAUBES, LLC

Margaret M. Urbanic

Enclosures

cc: John Nichols, Esq.
Jerry Wigger, Esq.