THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No.: 2012-CP-10-6357
Appellate Case No.: 2013-000412

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

v.

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

of whom South Carolina Uninsured Employers' Fund,
Carrier, is the Petitioner

APPENDIX

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The South Carolina Court of Appeals

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 the Appellant.

Appellate Case No. 2013-000412

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc:

FILED
March 5, 2015

John S. Nichols, Esquire
Jarrel L. Wigger, Esquire
Margaret Mary Urbanic, Esquire

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

February 12, 2015

VIA HAND DELIVERY
Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Virendra Puniyani, Deceased Employee, and Rajkumari Puniyani vs. The South Carolina Uninsured Employers' Fund
Case Tracking No.: 2013-000412

Dear Ms. Kitchings:

This letter concerns the appellant's petition for rehearing. Pursuant to Rule 240(e), SCACR, my client (the respondent) is electing not to file a return unless requested to do so by the Court. We believe all of the arguments in the petition were addressed in the Court's opinion and the briefing.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

JSN:emb
cc: Jarrel L. Wigger, Esquire
Margaret M. Urbanic, Esquire

THE STATE OF SOUTH CAROLINA

In The Court of Appeal

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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

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SC Court of Appeals

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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

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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.

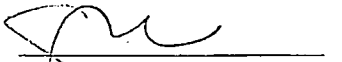
III. THE LIVE TESTIMONY OF MR. HERENDA PAL SHOULD NOT HAVE BEEN ALLOWED AT THE HEARING IN FRONT OF COMMISSIONER WILKERSON.

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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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 the Appellant.

Appellate Case No. 2013-000412

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-050
Heard December 9, 2014 – Filed January 28, 2015

AFFIRMED

Margaret Mary Urbanic, of Clawson & Staubes, LLC, of Charleston, for Appellant.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Jarrel L. Wigger, of

Wigger Law Firm, of North Charleston, both for Respondents.

PER CURIAM: In this appeal from the circuit court, the South Carolina Uninsured Employers' Fund (the Fund) argues the circuit court erred in reversing the Workers' Compensation Commission's (the Commission) decision to deny benefits to Ms. Rajkumari Puniyani (Claimant), the mother of Virendra Puniyani. The Fund argues the circuit court erred in finding (1) substantial evidence in the record supported the conclusion that Avni Grocers (Employer) was subject to the Workers' Compensation Act (the Act) and (2) Mr. Harendra Pal's affidavit was admissible as newly discovered evidence. We affirm.

1. As a preliminary matter, Claimant argues this court lacks jurisdiction over Judge Hill's order because the Fund did not attach the order with its notice of appeal. We find the Fund's appeal of Judge Nicholson's final order grants this court jurisdiction over Judge Hill's interlocutory order. *See Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 435-36 (Ct. App. 1995) (rejecting the respondent's attempt to have the appeal dismissed on jurisdictional grounds when the appellants neglected to appeal one of a series of cases tried together).

2. As an additional preliminary matter, Claimant argues the Fund waived the right to argue the Commission lacked jurisdiction under the Act by failing to file a Form 51, 53, or 58 prior to the hearing before Commissioner Huffstetler. We find the Fund did not waive the right to argue the Commission lacked jurisdiction because subject matter jurisdiction can be raised at any time. *See Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) ("Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." (citations omitted)).

3. As to whether Judge Hill erred in reversing the Appellate Panel's finding that the record did not contain evidence that Employer regularly employed four or more employees so as to be subject to the Act, we find Judge Hill properly concluded that—based on a preponderance of the evidence—Employer was subject to the Act by employing more than four employees. *See* S.C. Code Ann. § 42-1-360 (Supp. 2013) (stating an employer is subject to the Act if it employs four or more employees in the same business within the state); *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 244, 647 S.E.2d 691, 695 (Ct. App. 2007) ("Our precedent lucidly

establishes that an appellate court reviews jurisdictional issues by making its own findings of fact without regard to the findings and conclusions of the Appellate Panel." (citations omitted)); *id.* at 243, 647 S.E.2d at 695 ("A reviewing court has both the power and duty to review the entire record, find jurisdictional facts without regard to conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of evidence." (citations omitted)); *id.* ("Workers' compensation statutes are construed liberally 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." (citations omitted)).

4. Because we find the circuit court properly concluded Employer was subject to the Act, we do not reach the question of whether the circuit court erred in finding Mr. Harendra Pal's affidavit was admissible as newly discovered evidence. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when determination of a prior issue is dispositive).

AFFIRMED.

WILLIAMS, GEATHERS, and McDONALD, JJ., concur.

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APPEAL FROM CHARLESTON COUNTY
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v.

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

and

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

RECORD ON APPEAL

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DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0221896

Anita Chaudhari,
Deceased/Employee,

Dharmendra Chaudhari,
Claimant
-vs-

Avni Grocers,
Alleged Uninsured Employer, with

The South Carolina Uninsured Employers' Fund
Appearing.

HEARING:	Held on January 4, 2006, in Charleston, South Carolina, per notices timely and properly served upon all parties of interest.
APPEARANCES:	Jarrel L. Wigger, and J. David Murrell, Esquire, Davidson, Bennett & Wigger, of Charleston, South Carolina, appearing on behalf of the Claimant. No appearance was entered on behalf of the Employer. Terri Morrill Lynch, Esq., The Lynch Law Firm, LLC, Mount Pleasant, South Carolina, appearing on behalf of the South Carolina Uninsured Employers' Fund.
PURPOSE OF HEARING:	To determine issues as set forth on Forms 52 and 53.
DECISION & ORDER:	By Commissioner David W. Huffstetler
Filed:	2/15, 2006

STIPULATIONS

The parties stipulated, as follows:

1. The parties agree that South Carolina Workers' Compensation Commission has jurisdiction to determine whether or not the Employer was subject to the Act and/or whether any benefits are due under the Act.

2. The parties agree that venue is proper in Charleston, South Carolina.

3. The parties also stipulated that deceased Employee, Anita Chaudhari, came to her death on November 14, 2002.

APA SUBMISSIONS

The Claimant, on behalf of the deceased Employee, submitted into evidence:

	NAME OF PHYSICIAN/OTHER	DATE OF REPORT	PAGE NUMBER(S)
1	Certificate of Birth of Aashka Chaudhari	7/8/93	1
2	Certificate of Birth of Avni Chaudhari	8/15/98	2
3	Certificate of Death	11/14/02	3
4	Copy of Anita Dharmendra's Passport		4
5	Anita Dharmendra's Wedding Invitation	5/4/92	5
6	J. Henry Stuhr, Inc. Funeral Expenses	11/15/02	6
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The Uninsured Employer did not appear.

The Uninsured Employer's Fund took the position that it did not have timely notice of the claim and, therefore, did not submit any evidence.

STATEMENT OF CASE

The Claimant, Dharmendra Chaudhari, the widower of the deceased employee, Anita Chaudhari, claimed that his wife came to her death as the result of an injury by accident arising out of and in the course of her employment with Anvi Groceries. He also contended that Avni Groceries regularly remployed four (4) or more employees so as to be subject to the Act.

The Uninsured Employer, Avni Groceries did not appear at the hearing.

The South Carolina Uninsured Employers' Fund, by counsel, asserted that the Claimant had the burden of proving that the Employer regularly employed four or more employees so as to be subject to the Act. The Uninusred Employers' Fund also noted that it did not have timely notice of the hearing and that no dependency investiation had been conducted into this matter should benefits be awarded. Additionally, the Uninsured Employes' Fund asserted that Amoco Oil is a necessary party to this matter and should be added. Based upon the foregoing the South Carolina Uninsured Employer's Fund moved for a postponement of the hearing. Counsel for the Claimant would not agree to a postponement and sought to go forward.

SUMMARY OF EVIDENCE

The Claimant submitted into evidence, over objection of counsel for the South Carolina Uninsured Employers' Fund, a "dependency investigation". Additionally, the Claimant submitted into evidence, the birth certificates of Aashka and Avni Chaudhari, the death

certificate of Anita Chaudhari, a copy of Anita Dharmendra's passport, a copy of Anita Dharmendra's wedding invitation, a summary of funeral expenses, numerous Post & Courier newspaper articles, the transcript of deposition of Dharmendra Chaudhari, and an incident report.

Mr. Dharmendra Chaudhari, the husband of the deceased employee, testified in a deposition taken on April 14, 2003. He testified that his wife worked for Avni Groceries, which was also known as Fast Point Amoco. He believed that that store was owned by a company called Omni International of South Carolina Limited. He claimed, in his deposition, that five (5) people worked for Avni Groceries.

The Claimant, Dharmendra Chaudhari, also testified at the hearing. He testified that he was married to the deceased employee, whith whom he has two (2) daughters, who live with him in Athens Georgia. Mr. Chaudhari worked for Avni Groceries as a cashier and counter attendent. Mr. Chaudhari worked at another location. He admitted that his wife was paid only in cash, and that she did not pay taxes on any of her earnings. Mr. Chaudhari admitted that he did not know whether the store at the location where he worked, and the location where his wife came to her death, were owned by the same company as he had never seen ownership papers, nor any paychecks indicating that they were the same company. At the location where he worked, there were only three people, and at the location where his wife worked there were also only three people. Mr. Chaudhari also testified that Avni Groceries sold Amoco gas, which was sold to them wholesale, and was the only brand of gasoline they used. That grocery store also took Amoco charge cards.

The Uninsured Employers' Fund, both at the beginning of the hearing and at its' conclusion asserted that Amoco Oil was a necessary party to this matter.

The undersigned Commissioner has had an opportunity to review the evidence submitted at the hearing as well as observe and weigh the testimony of the witness. Based upon that review, the following are made:

FINDINGS OF FACT

1. The Claimant, Dharmendra Chaudhari, failed to produce substantial evidence showing that the alleged Employer, Avni Groceries, regularly employed four or more employees as to be subject to the Workers' Compensation Act. In fact, at best, he testified that there were three (3) employees where his wife worked.

2. The Claimant, Dharmendra Chaudhari, was not, specifically, aware of the ownership of the grocery/gas station where his wife came to her death, nor of the ownership of a separate location where he worked.

3. The Claimant, was given an opportunity to agree to a postponement of the hearing moved by the South Carolina Uninsured Employers' Fund, but did not agree.

4. There not being substantial evidence in the record that the Employer regularly employed four (4) or more employees, the South Carolina Workers' Compensation Commission does not have jurisdiction to make a determination in this matter.

5. The Claimant has failed to meet his burden of proving entitlement to any benefits whatsoever under the South Carolina Workers' Compensation Act due to his failure to prove that the Employer regularly employed four (4) or more employees.

CONCLUSIONS OF LAW

1. Under Section 42-1-140 the Claimant has failed to prove that the Employer, Avni Groceries, was subject to the terms of the Workers' Compensation Act.

2. Under Section 42-1-160, the Claimant has failed to prove that the deceased Employee came to her death as the result of an injury by accident arising out of and in the course of her employment with an Employer subject to the Workers' Compensation Act.

3. Under Section 42-9-110, §42-9-120, §42-9-130, §42-9-140, or any other section of the Act, the Claimant has failed to prove entitlement to any benefits whatsoever under the Act.

ORDER

IT IS, THEREFORE, ORDERED that the claim of the Claimant, Dharmendra Chaudhari, is, thereby, denied based upon his failure to prove that the Employer regularly employed four (4) or more employees in the state of South Carolina, or was subject to the Workers' Compensation Act.

THEREFORE, the claim of the Claimant, Dharmendra Chaudhari, is hereby denied.

No hearing costs are assessed in this instance.

IT IS, SO ORDERED.

Commissioner David W. Huffstetler

Dated: February 15, 2006

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 15 day of February, 2006

By Kellie Hindley
Administrative Assistant to the Commissioner

JW/DM
ANI-E
TL
UEF/LE

FULL COMMISSION ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0221896

DHARMENDRA CHAUDHARI, HUSBAND OF ANITA CHAUDHARI, DECEASED,
EMPLOYEE,
CLAIMANT,

- V. -

AVNI GROCERS,
EMPLOYER,

AND

UNINSURED EMPLOYERS' FUND,
CARRIER,
DEFENDANTS.

ORDER

Claimant represented by Jarrel L. Wigger, Esquire, of North Charleston, South Carolina.

Defendant/ Uninsured Employers' Fund represented by Terri Morrill Lynch, Esquire, of Mt. Pleasant, South Carolina.

No appearance was made by or on behalf of the Defendant/Employer.

This matter came before the South Carolina Workers' Compensation Full Commission on June 26, 2006 on Claimant's Motion to Stay and Motion to Admit Additional Evidence into the record pursuant to 25A S.C. Code Ann. Regs. 67-707 (Supp. 2005). The regulation provides the criteria for admitting new evidence and requires a showing the new evidence is of the same nature and character required by the common law governing the admission of newly discovered evidence in the application for a new trial. In Re: Crawford, 205 S.C. 72, 30 S.E.2d 841 (1944).

The Commission has reviewed the Motion to Stay, the Motion to Admit Additional Evidence, the reply thereto, and the entire record in this matter. Based on this review, we enter the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This matter was heard on January 4, 2006, and an Order was issued on February 15, 2006. The Single Commissioner ordered the Claimant failed to prove the Employer regularly employed four (4) or more employees on a regular basis and was not subject to the Act.

2. On February 28, 2006, Claimant filed her Form 30.

3. On April 14, 2006, Claimant filed her Motion to Stay. The grounds for the Motion are as follows:

a) The Claimant moves for an Order staying the Commission Review scheduled for the week of May 22, 2006 until the Motion to Introduce Additional Evidence into the Record is heard and resolved.

b) The addition of the evidence could change the previous ruling and avoid the need for the review hearing.

4. The Claimant also filed her Motion to Introduce Additional Evidence into the Record on April 14, 2006. The evidence sought to be admitted consists of the

Affidavit of Harenda Pal, the owner of Avni Grocers, the employer of the deceased Claimant. The grounds for the Motion are as follows:

a) The evidence would likely have produced a different result had the evidence been procurable at the initial hearing.

b) The claim arises out of the shooting and death of the deceased, Anita Chaudhari. It was determined by the Commission the Employer was subject to the Act and was in violation by being uninsured. In July 2003, the Coverage & Compliance Division determined the Employer had 15 employees who were paid in cash and only one employee who was reported to the Employment Security Commission.

c) Claimant's counsel was notified of the findings, and he was also advised the case would then be turned over to the Uninsured Employers' Fund (UEF) to pay or defend. The findings were not challenged by the Claimant and the UEF was placed on notice of the claim pending on behalf of the deceased. Neither the Employer nor the UEF filed a brief raising any issues or defenses. Based on the Commission's findings and the lack of any brief being submitted by either Defendant, the Claimant did not procure any further evidence of the Employer's subjectivity to the Act as the Claimant's Personal Representative was an employee and able to testify regarding employees and ownership.

d) The hearing was held on January 4, 2006. Based on a letter sent by the Commission, the Claimant was aware the Commission had already determined the Employer was subject to the Act. Neither the Employer nor the UEF submitted any briefs or defenses. Even though the issue had already been addressed and a determination already made by the Commission, and there was undisputed evidence from the Claimant, the Hearing Commissioner made the determination the Employer was not subject to the Act.

e) Had the Claimant known the issue was up for additional review during this hearing to determine benefits, Claimant would have procured additional evidence regarding the Employer being subject to the Act. Defendants did not raise that issue in their brief, and in fact submitted no brief. Since the hearing, counsel has located and contacted the deceased Claimant's previous Employer, Harenda Pal, owner of Avni Grocers/Avni International of South Carolina.

f) Mr. Pal's Affidavit states he was the sole owner of Avni Grocers/Avni International of South Carolina; he owned both locations, which regularly employed more than five (5) employees; and no other entity had any interest in the company or 2 stores.

g) Based on the findings of the Coverage & Compliance Division, and the determination of coverage and notification of same provided to counsel for Claimant,

Claimant was not on notice the subjectivity of the Employer to the Act would be of issue at the hearing.

h) Had the Claimant known the Commission's own findings could or would be challenged at the hearing or the Defendant Employer/UEF was raising such as a defense, Claimant would have procured the additional evidence supporting the Commission's Coverage & Compliance ruling.

5. On April 25, 2006, the Defendants filed their Response to the Motion to Introduce Additional Evidence.

a) R.67-707 provides the method by which additional and newly discovered evidence may be presented to the Full Commission on review.

b) Claimant seeks to submit an affidavit of the alleged prior owner of the alleged employer. Claimant has not shown how that evidence was not known to him at the time of the first hearing, and, in fact, it appears to be evidence readily available to him, as he was able to obtain it at this point. It appears that if the Claimant was able to obtain this evidence at this point, he could additionally also, by reasonable diligence, have presented it at the hearing.

c) An affidavit of a witness is not sufficient for purposes of the APA which allows only for the submission of written expert reports as evidence and not their testimony, by affidavit, or otherwise. Therefore the UEF does not believe the evidence sought to be admitted by the Claimant is proper nor is it evidence of a nature so as to constitute additional or newly discovered evidence.

d) Claimant also asserts the reason he did not present this evidence at the hearing, which further infers it would have been available at that time, was because he believed the issue had already been adjudicated, and was not aware the number of employees was an issue for a hearing.

e) In reviewing Garry Smith's correspondence of July 17, 2003, he advised the Claimant's counsel that no Form 52 had been served on the Employer, and the file had not been sent to the Judicial Department for a hearing. Mr. Smith also advised that costs precluded Coverage & Compliance from serving by publication and, therefore, they were unable to present their case at a "Show Cause Hearing". In fact, there has never been either a "Show Cause Hearing" or a capitulation agreement signed by the Employer which would constitute an order to this matter reflecting the Employer regularly employed four (4) or more employees in South Carolina so as to be subject to the act.

f) The issue of whether the employer regularly employed four (4) or more employees was a threshold issue in any case. In the letter of July 17, 2003, Mr. Smith noted that at the 52/53 hearing the first issue will be the Claimant proving the

Employer was subject to the Act. In a memo to the file, Mr. Smith noted the Claimant's attorney had been made aware he bore the burden of proof in showing the Employer was subject to the Act before the merits of the claim can be heard.

g) Claimant's counsel asserts the UEF should not be able to raise the issue of whether the Employer employed four (4) or more employees at the time of the hearing because they did not submit a pre-hearing brief to raise that issue. The UEF only received notice of the hearing the day before the hearing was set. Because the UEF's attorney could not appear at the hearing, local counsel was obtained. The UEF was unable to and did not file a brief on their behalf; however, they raised that issue at the hearing.

h) Where there has been no capitulation agreement, nor a Rule to Show Cause Order issued, the issue of whether the Employer regularly employed four (4) or more employees is always the threshold issue before the Commission.

6. The evidence sought to be admitted into the record existed prior to the hearing and could have been obtained prior to the hearing through reasonable diligence.

7. The Motion to Introduce Additional Evidence is denied.

8. When a Motion to Admit Evidence is filed, it always is considered and disposed of prior to the appeal hearing.

9. The Motion to Stay is dismissed as moot.

Based upon the findings of fact are the following:

CONCLUSIONS OF LAW

1. The evidence sought to be admitted could have been obtained through the use of reasonable diligence. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2005).

2. The evidence sought to be admitted into the record does not meet the criteria for newly discovered or after discovered evidence. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2005).

3. Oral argument will not be heard on the motion. The Commission will act upon the motion and issue an order before the view hearing is held. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2005).

4. If the Commission grants the motion, the review hearing is stayed. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2005).

5. If the Commission denies the motion, the case may remain on the review hearing docket unless otherwise provided. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2005).

ORDER

IT IS, THEREFORE, ORDERED the Motion to Admit Additional Evidence be, and hereby is, denied.

IT IS FURTHER ORDERED the Motion to Stay is dismissed as moot.

AND IT IS SO ORDERED.

Susan S. Barden, Commissioner

Columbia, South Carolina

July 13, 2006

12

CONCURRING:
Commissioner George N. Funderburk
Commissioner G. Bryan Lyndon
Commissioner J. Alan Bass

NOT PARTICIPATING:
Commissioner Lisa C. Glover
Commissioner J. Michelle Childs
Commissioner David W. Huffstetler

(a:\0221896.fc)

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above-captioned action upon all parties to this cause by depositing a copy hereof, first class postage paid, or if indicated below by certified mail, return receipt requested, in the United States mail addressed to the attorney or attorneys for said parties.

This 14th day of July, 2006

By _____
Marion Buraczynski, Paralegal

Jarrel L. Wigger, Esquire
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Terri Morrill Lynch, Esquire
1470 Ben Sawyer Blvd., Suite 10
Mt. Pleasant, SC 29464

06-942
Recd 12/4/06

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0221896

ANITA CHAUDHARI, DECEASED/EMPLOYEE,
and
DHARMENDRA CHAUDHARI, CLAIMANT/APPELLANT,

- V -

AVNI GROCERS, EMPLOYER,

AND

S.C. UNINSURED EMPLOYERS' FUND, CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina on October 16, 2006 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed November 30, 2006.

APPEARANCES:

Claimant/Appellant represented by Jarrel L. Wigger, Esquire, of North Charleston, South Carolina.

Defendants/Respondents represented by Terri Morrill Lynch, Esquire, of Mount Pleasant, South Carolina.

STATEMENT OF CASE

The parties were heard by Commissioner David W. Huffstetler on January 4, 2006 in Charleston, South Carolina. On February 15, 2006, he issued the following Order:

> IT IS THEREFORE, ORDERED that the claim of the Claimant, Dharmendra Chaudhari, is, thereby, denied based upon his failure to prove that the Employer regularly employed four (4) or more employees in the state of South Carolina, or was subject to the Workers' Compensation Act.
>
> THEREFORE, the claim of the Claimant, Dharmendra Chaudhari, is hereby denied.

Within the statutory period, counsel for the Claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on October 16, 2006. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, Claimant respectfully submits the following:

1. The hearing commissioner erred in failing to accept the Commission's Coverage and Compliance ruling that Avni Grocers was the Employer.

2. The hearing commissioner erred in failing to accept the Commission's Coverage and Compliance ruling that Avni Grocers had the requisite number of employees and was subject to the Act.

3. The hearing commissioner erred in failing to accept the uncontradicted and undisputed evidence that Avni Grocers was the owner of the business.

4. The hearing commissioner erred in failing to accept the uncontradicted and undisputed evidence that the deceased Anita Chaudhari was employed by Avni Grocers.

5. The hearing commissioner's ruling that there may have been some other unidentified and unnamed owner of the business was arbitrary and capricious and based upon speculation and conjecture.

6. The hearing commissioner erred in not interpreting the Act liberally and in favor of coverage.

7. The hearing commissioner erred in penalizing Claimant at the hearing on January 4, 2006, for the Uninsured Employers Fund's failure to conduct dependency investigations, submit APA submissions, assign an attorney to the file, and investigate the claim when the Uninsured Employer's Fund had notice of the claim on January 24, 2005.

8. The hearing commissioner erred in penalizing Claimant for proceeding with the hearing after traveling from Atlanta, Georgia, after waiting for twelve months for a hearing to be conducted.

9. The hearing commissioner erred in not ruling that since the Uninsured Employer's Fund failed to file a Form 51 after being properly served with the Form 50, they waived all affirmative defenses.

10. Whether the Statement of the Case misstated the facts regarding notice?

11. Whether the Statement of the Case was in error by failure to note the service of documents and notice documents provided by counsel to the hearing commissioner who based on the documents allowed the hearing to go forward?

12. Whether the Statement of the Case misstates the facts?

13. Whether the Statement of the Case leaves out certain undisputed testimony regarding Mr. Chaudhari working at both locations?

14. Whether the Uninsured Employer's Fund and Defendant Avni could contest the applicability of the Act as they failed to timely answer the Form 50 of the Claimant.

15. Whether the Findings of Fact leave out the undisputed fact that Dharmendra Chaudhari worked at both locations in question and indicated they were owned by the same person.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), 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 in the instant case, the Panel, by unanimous vote, has determined all of the Hearing Commissioner's Findings of Fact and Rulings of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case, and; therefore, the Order is sustained in its entirety. The Hearing Commissioner's decision is incorporated by reference as if set forth verbatim herein.

ORDER

IT IS, THEREFORE, ORDERED the Order of the Single Commissioner filed in the above-captioned matter on February 15, 2006 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

AND IT IS SO ORDERED.

S. C. WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

FULL AFFIRMATION

CONCUR:

George N. Funderburk, Commissioner

J. Alan Bass, Commissioner

(L:\0221896.gbl.app.doc)

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above-entitled action upon all parties to this cause by placing a copy hereof, postage paid, in the United States Mail, addressed to the attorney or attorneys of said parties.

JLW
TMW

This 30th day of November, 2006

By Silvana Marin

Administrative Assistant to the Commissioners

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S
100 BROAD STREET, SUITE 106
CHARLESTON, S.C. 29401-2258

RETURN SERVICE REQUESTED

CHARLESTON COUNTY
SOUTH CAROLINA

www3.charlestoncounty.org

66

NICHOLS, JOHN S
PO BOX 7965
COLUMBIA SC 29202-7965

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

ORDER - ORDER-CONCLUSION ON DEPENDENCY LACKS SUFFICIENT SUPPORT IN THE RECORD OR IN THE FINDINGS OF FACT & IS REVERSED & REMANDED TO THE COMMISSION FOR FURTHER PROCEEDINGS

THIS JUDGMENT WAS ENTERED ON THE 18TH DAY OF SEPTEMBER, 2007 AND A COPY MAILED FIRST-CLASS THIS 27TH DAY OF SEPTEMBER, 2007 TO ALL COUNSEL OF RECORD AND/OR ALL PERSONS ENTITLED TO RECEIVE NOTICE.
YOU MAY VIEW AND DOWNLOAD THIS DOCUMENT AT WWW3.CHARLESTONCOUNTY.ORG

NICHOLS, JOHN S
PO BOX 7965
COLUMBIA , SC 29202

2007-CP-10-000013
PUNIYANI, VIRENDRA ETAL
VS.
AVNI GROCERS FAST POINT AMOCO

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Virendra Puniyani, Deceased Employee, and Rajkumari Puniyani,
Claimant/Appellant,

vs.

Avni Grocers,
Employer/ Defendant,

and
The South Carolina Uninsured Employers' Fund,
Carrier/Defendant/Respondent.

C.A. No.: 2007-CP-10-0013

FILED
2007 SEP 18 PM 3:37
JULIE J. ARMSTRONG
CLERK OF COURT

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased,
Claimant/Appellant,

vs.

Avni Grocers,
Employer/ Defendant,

and
The South Carolina Uninsured Employers' Fund,
Carrier/Defendant/Respondent.

C.A. No.: 2007-CP-10-0014

ORDER

HEARING DATE: June 1, 2007
JUDGE: D. Garrison Hill
APPELLANT'S ATTORNEYS: John S. Nichols, Esquire
Jarrel L. Wigger, Esquire
RESPONDENTS' ATTORNEY: Terri Morrill Lynch, Esquire

DH

These two workers' compensation appeals were consolidated and heard together before the South Carolina Workers' Compensation Commission as well as before this Court. Appellants Virendra Puniyani, Deceased Employee, Rajkumari Puniyani, and Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased, (collectively Claimants) appeal from an order of an Appellate Panel of the South Carolina Workers' Compensation Commission upholding a Hearing Commissioner's ruling that Claimants failed to establish that the Defendant/Employer, Avni Grocers, regularly employed four (4) or more employees so as to be subject to the South Carolina Workers' Compensation Act (the Act), and that Claimants were not entitled to benefits under the Act from the South Carolina Uninsured Employers' Fund ("the Fund"). The Appellate Panel also upheld the decision of a second Hearing Commissioner, joined by four other members of the Commission, denying Claimants' motions for a Stay as well as Claimants' Motions to Admit Additional Evidence.

This Court held a hearing on these appeals on June 1, 2007. Present for Claimants were John S. Nichols, Esquire, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia, South Carolina, and Jarrel L. Wigger of the Wigger Law Firm of Charleston, South Carolina. Present for the Fund and the Defendants was Terri Morril Lynch of Clawson & Staubes, LLC, of Charleston, South Carolina. After hearing arguments of counsel and reviewing briefs and memoranda submitted by all parties, the Commission's decision is reversed and the matter is remanded to the Commission for proceedings consistent with this order.

SCOPE OF JUDICIAL REVIEW

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). Whether an employee is exempt pursuant to § 42-1-360(2) is a jurisdictional issue. *Kirksey v. Assurance Tire Co.*, 311 S.C. 255, 428 S.E.2d 721 (Ct. App. 1993). When the Commission's jurisdiction is at issue, this Court is not bound by the Commission's findings of fact upon which jurisdiction is dependent. *Hill v. Eagle Motor Lines*. In fact, this Court has both the power and the duty to review the entire record in order to find the jurisdictional facts without regard to the Commission's conclusions on the issue of jurisdiction. *Hill v. Eagle Motor Lines*. Accordingly, the Court must decide the jurisdictional question in accordance with the preponderance of the evidence, bearing in mind that the basic purpose of the Act is to include, rather than exclude, employers and employees within its coverage. *Hill v. Eagle Motor Lines*; *White v. J.T. Strahan Co.*, 244 S.C. 120, 135 S.E.2d 720 (1964); *Hernandez-Zuniga v. Tickle*, Op. No. 4253 (S.C. Ct. App. filed June 14, 2007) (Shearouse Adv. Sh. No. 24 at 31).

STATEMENT OF THE CASE

The claims involved in this case arise out of a tragic set of facts. The Claimant/Appellant, Dharmendra Chaudhari, is the widower of the deceased Employee, Anita Chaudhari. Mrs. Chaudhari and her brother-in-law, Virendra Puniyani, were

murdered by a co-worker 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 Fund became involved in the matter because the Employer was operating without Workers' Compensation coverage. The primary issue in this case is whether 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 matter was 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 claim and did not submit any evidence. The Hearing Commissioner instructed the Claimants to agree to continue the matter. Because Claimants had been waiting for a year for a hearing, one Claimant had traveled from Atlanta, Georgia, and the Claimants had produced proof that the Fund had been properly served, Claimants indicated a desire to proceed. The Hearing Commissioner continued to strongly insist that Claimants continue the hearing, but Claimants still wanted to proceed. The Hearing Commissioner concluded that the Fund was served with the Form 52 and received proper notice of the hearing.

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

had as to coverage or benefits.[1] The Employer, Anvi Grocers, failed to appear at the hearing. Following the hearing, the Hearing Commissioner ruled that Claimants failed to produce substantial evidence that Avni Groceries regularly employed four (4) or more employees so as to be subject to the Act and, at best, Claimants offer proof that there were only three (3) employees where the decedents worked.

Claimants filed a Motion to add Additional Evidence to the record. Following the merits hearing, Claimants located Harendra Pal, the owner of Avni Grocers who had moved out of state, and obtained an affidavit from Mr. Pal that clearly established the statutory requirements were met and the Employer was subject to the Act. The Commission, however, refused to accept the additional evidence. Claimants appeal from both the Appellate Panel's affirmance of Commissioner Huffstetler's order as well as the Commission's denial of the motion to accept the additional evidence.

DISCUSSION

Following a review of the entire record, and considering the arguments and briefs of the parties, I find, taking the testimony as a whole, that the preponderance of the evidence supports the Claimants' assertion that the Employer had four (4) or more regular employees within the State at the time of the deaths in this case. I also reverse the Commission's refusal to admit Mr. Pal's affidavit in light of the confusion that abounded at the hearing before Commissioner Huffstetler.

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

I. Refusal to Admit Mr. Pal's Affidavit

As a preliminary matter, I find that the Commission should have permitted Claimants to supplement the record with Mr. Pal's affidavit. The record reveals that there was some confusion at the hearing about whether the jurisdictional issue had been raised or could have been raised before the Commission. Before the hearing, for which the Fund received notice, the Fund did not file a Form 51 or Form 53, nor did the Fund file a pre-hearing brief setting forth any defenses or objections. Claimants 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. Claimant therefore did not procure any additional evidence that Employer was subject to the Act since Mr. Chaudhari was also an employee and was able to testify regarding ownership and the number of employees. Claimants were aware that the Commission's Compliance Division had already determined that Employer was subject to the Act. Despite the Division's determination and the Fund's lack of response, the Hearing Commissioner held that Claimants failed to establish the Employer had four (4) or more employees so as to be subject to the Act, which is why Claimants thereafter took steps to locate Mr. Pal and obtain the affidavit.

Given the uncertainty of whether the issue regarding the number of employees could have been raised and was, in fact, properly raised by the Fund, I find that fairness compelled consideration of Mr. Pal's affidavit, and the Commission should have allowed Claimants to supplement the record with that affidavit. Mr. Pal's affidavit demonstrated Mr. Pal owned both locations, and regularly employed more than four (4) employees, so as to confer jurisdiction upon the Commission.

South Carolina Code Ann. § 42-17-50 (1976 & Supp. 2006) 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.

(Emphasis added). In this case, the Commission excluded the evidence pursuant to 25A S.C. Code Ann. Regs. 67-707, finding the evidence was not "new evidence" as it was known to Claimants at the time of the hearing, or by reasonable diligence could have been secured. This was an error of law, however, because Claimants 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.

Insofar as Regulation 67-707 appears to restrict Claimant's ability to bring forth the additional evidence in this matter, it is at odds with § 42-17-50, which requires the Commission to "receive further evidence" upon a showing of "good grounds." Although regulations have the force of law in this State, they 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).[1]

Claimants 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

[1] The court is mindful that our court of appeals referenced Reg. 67-707 in Wilkinson v. Palmetto State Transp. Co., 371 S.C. 365, 638 S.E.2d 109 (Ct. App. 2006), a case that presented quite different facts. The court in Wilkinson was not faced with an argument that Reg. 67-707 conflicted with S.C. Code § 42-17-50. Moreover, there was no allegation that the affiant in Wilkinson had absented himself from the state as Mr. Pal evidently did here, a circumstance that bears directly on any due diligence analysis.

at each location. As noted above, Mr. Pal did not appear at the hearing before Commissioner Huffstetler, and Claimants relied upon the Compliance Division's determination and the lack of any proper defensive response by the Fund in proceeding without locating Mr. Pal and obtaining his testimony. It would be fundamentally unfair to refuse this evidence on this critical issue under the facts and circumstances of this case where Mr. Pal's whereabouts were unknown, and Claimants were not put on notice that the number of employees would be an issue in the case.[2] Accordingly, the Commission's denial of Claimant's Motion to Introduce Additional Evidence into the Record on Review is reversed, and this matter is remanded to the Commission for further proceedings consistent with this order.

II. The Commission's Jurisdiction

Even without Mr. Pal's affidavit, there was credible evidence before the Commission that Avni Grocers regularly employed more than four (4) employees.

First, the Commission's Coverage and Compliance Ruling in the WCC file stated that the Commission found that Avni Grocers was the employer, and that ruling was part of the Commission's file and thus evidence in this matter. At the outset of the hearing, Commissioner Huffstetler ruled that without objection, the Commission's file became part of the record with the exception of self-serving declarations and unstipulated medical reports. (Transcript of Hearing, p. 4, lines 21-23). The Commission's Division of

[2] Analogy can be drawn to Rule 29, SCRCrimP, which allows new trials even in criminal cases where the after discovered evidence is (1) material to guilt or innocence, (2) would likely change the result of the trial, (3) could not have been discovered at trial, and (4) is not merely cumulative or impeaching. State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993). Here, Mr. Pal's knowledge was not only material, but was outcome-determinative of the jurisdictional issue. His withdrawal from the jurisdiction made him, as a practical matter, unavailable for the hearing. It would make little sense to impose a stricter standard on the receipt of such dispositive evidence in workers' compensation cases than that which applies in criminal cases, where the need for accuracy and finality in the fact finding process is arguably much more acute.

Coverage and Compliance, in correspondence to Claimants' counsel dated May 7, 2003, stated that Employer had fifteen (15) employees who were paid in cash, only one (1) 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. Hence, Claimants were unaware there would be any challenge to the number of Avni Grocer's employees at the hearing.

The record also reveals that Mr. Pal failed to respond to any inquiries and fled the State to North Carolina. Since the Employer failed to cooperate, Claimants provided undisputed, uncontradicted testimony at the hearing as to the number of employees of Avni Grocers. As noted above, 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 that there were two locations of the Employer's business, one in Vance, South Carolina, and one in Charleston, South Carolina. (Tr. p. 13, lines 14-20). 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). Mr. Chaudhari plainly testified that "altogether six" people were employed by Avni Grocers. (Tr. 13, lines 7-10) Nothing elicited on cross examination persuades this court that Mr. Chaudhari's testimony should be rejected on this critical point.

The Fund offered no evidence to contradict any of this testimony. Furthermore, there was nothing in the record to reflect that Mr. Chaudhari's testimony lacked

credibility,[2] 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 (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, including one employee who went back and forth between the two stores. There was also evidence that Mr. Pal, the owner, was an additional employee.

The Fund alleged that because the stores sold Amoco gas that they were owned by Amoco. However, as previously noted, Mr. Chaudhari testified that he worked at both locations and both locations had 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.

Taking the testimony as a whole, there was credible evidence in the record that Avni Grocers regularly employed at least four (4) employees during the relevant time period. Accordingly, the Commission's ruling that Claimants failed to establish the requisite number of employees to subject Avni Grocers to the Act is reversed, and the matter remanded for further proceedings consistent with this order.

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[2] Neither the hearing commissioner nor the appellate panel found Mr. Chaudhari's testimony was not credible.

III. The Commission's Dependency Ruling

Commissioner Huffstetler, in conclusory fashion, held that Claimants failed to prove entitlement to any benefits whatsoever under the Act pursuant to S.C. Code Ann. §§ 42-9-110, 42-9-120, 42-9-130, 42-9-140, or any other section of the Act. The referenced Code sections are the dependency provisions under the Act. In his bench ruling, Commissioner Huffstetler ruled the "dependency investigation falls well short of being compelling," although Claimants testified regarding dependency and there was no evidence to refute this testimony.

In the written order, Commissioner Huffstetler made no factual findings to support this conclusion of law. This was error. An administrative body's findings of fact must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence. *Parsons v. Georgetown Steel*, 318 S.C. 63, 456 S.E.2d 366 (1995). When an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case to allow the agency the opportunity to make those findings. *Frame v. Resort Services, Inc.*, 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004).

Furthermore, the conclusion that Claimant failed to establish dependency simply lacks support in the record, and must therefore be reversed. *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 454 S.E.2d 320 (Ct. App. 1995).

Accordingly, this portion of the Commission's ruling is vacated and the matter is remanded for the Commission to set forth sufficient findings of fact to support the conclusion that Claimant failed to establish dependency pursuant to the Act.

CONCLUSION

For the reasons stated, the Commission's refusal to admit the additional evidence proffered by Claimants is reversed. Even without this evidence, however, there was sufficient credible testimony that Avni Grocers employed at least four (4) people so as to be subject to the Act, and the Commission's decision to the contrary is reversed. Finally, the Commission's conclusion on dependency lacks sufficient support in the record or in the findings of fact and is also reversed.

In light of these rulings the Court does not need to address any additional issues raised or argued by the parties.

This matter is remanded to the Commission for further proceedings consistent with this Court's order.

SO ORDERED.

D. Garrison Hill
Circuit Court Judge

September 13, 2007
Greenville, South Carolina

The South Carolina Court of Appeals

Case No. 2007-CP-10-0013

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

v.

Avni Grocers, Employer, Defendants,

and

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

Case No: 2007-CP-10-0014

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased, Claimant,

v.

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

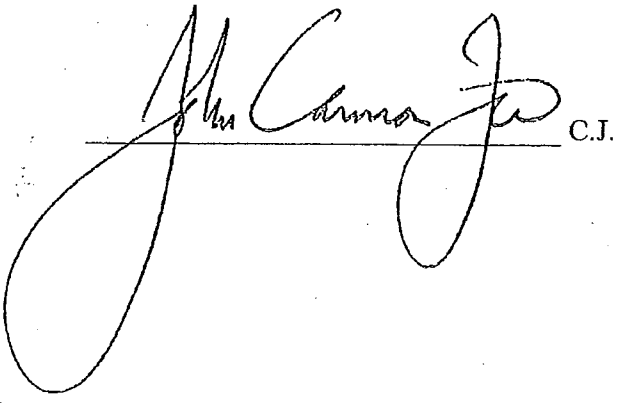
The Honorable D. Garrison Hill
Charleston County
Trial Court Case No. 2007-CP-10-00013

ORDER

These are workers' compensation cases. During oral argument, an issue arose concerning the immediate appealability of the circuit court order. Counsel requested the opportunity to brief the issue.

The appellant shall serve upon respondents a copy of a memorandum addressing appealability within twenty days from the date of this order. At the same time, appellant shall file an original and six copies of the memorandum with the Court. The respondents shall serve a copy of a memorandum addressing appealability upon appellant within twenty days from the date of service of the appellant's memorandum. At the same time, respondents shall file an original and six copies of their memorandum with the Court. Should the appellant choose to prepare a reply, a copy of the reply shall be served upon respondents within ten days of the date of service of the respondents' memorandum. Concurrently, the appellant shall file an original and six copies of the reply with the Court.

IT IS SO ORDERED.



C.J.

Columbia, South Carolina
March 5, 2010

cc: Latonya Dilligard Edwards, Esquire
Terri Morrill Lynch, Esquire
Matthew J. Story, Esquire
Margaret M. Urbanic, Esquire
Jarrel L. Wigger, Esquire
John S. Nichols, Esquire

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 2007-CP-10-0013

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

v.

Avni Grocers, Employer, Defendants,

and

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

Case No. 2007-CP-10-0014

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased, Claimant,

v.

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

Appeal From Charleston County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2010-UP-338
Heard March 2, 2010 – Filed June 29, 2010

APPEAL DISMISSED

Latonya Dilligard Edwards, S.C. Second Injury Fund, of Columbia, Terri Morrill Lynch, Matthew J. Story, Margaret M. Urbanic, of Charleston, for Appellant.

Jarrel L. Wigger of N. Charleston, John S. Nichols, of Columbia, for Respondents.

PER CURIAM: The South Carolina Uninsured Employers' Fund (Fund) appeals the order of the circuit court, which reversed the decision of the South Carolina Workers' Compensation Commission (Commission) denying benefits to Rajkumari Puniyani, mother of deceased employee Virendra Puniyani, and remanded the case to the Commission. We find the order on appeal is not immediately appealable and therefore dismiss.

FACTS/PROCEDURAL HISTORY

On November 14, 2002, Virendra Puniyani was killed by a co-worker while working at the Fast Point Gas Station. Mrs. Puniyani brought this action seeking workers' compensation benefits. As the Employer, Avni Grocers, did not have workers' compensation insurance, the Fund defended

the action. The single commissioner held Mrs. Puniyani failed to prove Avni Grocers regularly employed four or more employees as required by section 42-1-150 of the South Carolina Code (1985) to be subject to the jurisdiction of the Commission. The Appellate Panel of the Commission affirmed. The circuit court, however, reversed and remanded the matter to the Commission for further proceedings consistent with its order. This appeal followed.

LAW/ANALYSIS

Mrs. Puniyani argues the order of the circuit court is not immediately appealable. We agree.

Our courts "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994). The South Carolina Supreme Court recently reiterated that appeals from administrative agencies may only be from final decisions. Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, S.C. Sup. Ct. Order dated April 8, 2010 (Shearouse Adv. Sh. No. 14 at 85). It explained the general appealability statute, section 14-3-330 of the South Carolina Code (1976 & Supp. 2009), does not apply to appeals from administrative agencies. Id. at 87. The court overruled this court's opinion Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) to the extent it relied on section 14-3-330 to permit the appeal of interlocutory orders of the administrative law court or an administrative agency.[1] Id.

A judgment is not final when there is some further act that must be done by the court prior to a determination of the rights of the parties or when the judgment determines the applicable law while leaving open questions of fact. Id. at 88. "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." Id.

[1] It also overruled Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009).

The order on appeal remands the matter to the Commission for further proceedings. It is not a final judgment. Thus, the order is not immediately appealable.

APPEAL DISMISSED.

FEW, C.J. and HUFF and THOMAS, JJ., concur.

DECISION AND ORDER
OF THE
SC WORKERS' COMPENSATION COMMISSION

WCC FILE NUMBER 0221897

Rajkumari Puniyani, mother of Virendra Puniyani, deceased
Employee/Claimant,

v.

Avni Grocers/Fast Point Amoco,
Employer,

and

WC Uninsured Employers Fund,
Defendant/Defendants.

HEARING:	Held in Summerville, South Carolina, on November 29, 2011, per notices served on all parties of interest.
APPEARANCES:	The Claimant was represented by Jarrel L. Wigger, Esquire, of Charleston, South Carolina. The Employer was present and unrepresented. Mr. Harendra Pal was the sole owner of the Employer, Avni International of S.C. Inc. The WC Uninsured Employers Fund was represented by Matthew J. Story, Esquire, of Charleston, South Carolina.
PURPOSE OF HEARING:	To determine issues as set forth on Forms 52 and 53.
DECISION AND ORDER:	The Honorable Avery B. Wilkerson, Jr.
FILED:	February 16, 2012

APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence without objection.

SUBMISSIONS

APA NO.	Date
CLAIMANT'S SUBMISSIONS:	
1. Certificate of Death	11/14/02
List of Exhibits	
1. J. Henry Stuhr, Inc. Funeral Expenses	11/15/02
2. Post & Courier Article "Five Arrested"	11/15/02
3. Post & Courier Article "Fates of 7"	12/15/02
4. Post & Courier Article "16-year-old girl"	12/15/02
5. Post & Courier Article "Prosecutor Weighs"	12/17/02
6. Post & Courier Article "Five Plead Guilty"	11/09/04
7. Incident Report	11/14/02
8. Deposition of Rajkumari Puniyani	05/01/03
9. SCWCC: Division of Coverage and Compliance	5/7/03 & 7/17/03
10. Charleston County Court of Common Pleas Order	9/18/07
11. South Carolina Court of Appeals Opinion	6/29/10

EMPLOYER'S/UNISURED FUND SUBMISSIONS:

APA NO.	Date
9. Letter from Coverage and Compliance	7/17/03
12. Transcript of Record	1/4/06
13. Transcript of Deposition of Dharmendra Chaudhari	4/14/03
14. Memo from Coverage & Compliance	7/15/03

STIPULATIONS

1. The Commission had jurisdiction to hear the matters presented;

2. All interested parties received notice of the hearing and venue was appropriate;

3. This matter came before the Commission on a Form 52 filed by the Claimant;

4. The Commission's File, Appeal to Charleston County Court of Common Pleas, Order of Court of Common Pleas, and Dependency Investigation are all a part of the record;

5. Claimant has an average weekly wage of $700.00 resulting in a compensation rate of $466.90;

6. Claimant suffered admitted injuries resulting in his death on November 14, 2002.

STATEMENT OF THE CASE

Claimant is the mother of Virendra Puniyani, deceased. Claimant alleges that her son was murdered by a co-worker during the course and scope of his job with Avni Grocers.

Avni Grocers and WC Uninsured Employers Fund denied that the South Carolina Workers' Compensation Act covers the death of Virendra Puniyani and asserted all defenses available under the Act. Avni Grocers and WC Uninsured Employers Fund deny responsibility for Virendra Puniyani's death on November 14, 2002. Both parties agree that Claimant was an employee of Avni Grocers at the time of his death.

The hearing proceeded with Jarrel L. Wigger, Esq. present for the Claimant and proper notice was given to Avni Grocers and the Uninsured Employers Fund. Matthew J. Story, Esq. appeared on behalf of the Fund. The Workers' Compensation File was made part of the record.

The case was initially heard on January 4, 2006. The case was then appealed to Circuit Court where the Honorable D. Garrison Hill ruled the Commission's decision was reversed and the matter was remanded to the Commission for proceedings consistent with his Order which allowed Harendra Pal's Affidavit into evidence, found that there was credible evidence before the Commission that Avni Grocers regularly employed more than four (4) employees, and ruled the Commission's conclusion on dependency lacked sufficient support in the record or in the findings of fact and was therefore reversed. The case was then appealed by the attorney for the Carrier to the Court of Appeals. The Court of Appeals found that Judge Hill's Order was not immediately appealable and therefore was dismissed.

Rajkumari Puniyani's testimony from her deposition taken on May 1, 2003 was adopted. Ms. Puniyani testified that Virendra Puniyani was single, with no children when he was shot and killed. She further testified that he provided for her and that she had no other source of income and that he had always provided her with support. She testified that Virendra Puniyani's father was deceased.

Mr. Harendra Pal was present and was called as a witness by the Claimant. Mr. Pal testified that he was the sole owner and shareholder of Avni Grocers. He ran two gas stations through Avni and although they had two different gas suppliers, the two stores ran under the same company. He testified the company was purchased just a short period of time before the murders and closed soon thereafter.

Mr. Pal was the owner of the Defendant Company. He was instructed he had the right to retain counsel. He elected not to retain counsel and proceed as the company closed down long ago. He was further informed he could be found personally responsible and still elected to proceed without an attorney.

Importantly, for the procedural posture of the case, Mr. Pal testified that in the five months preceding the initial hearing on the merits of the case on January 4, 2006, he was in India and was unavailable to be contacted or to testify. He stated had he known the hearing was being held, he would have come and testified. He came back to the United States shortly after the hearing.

Mr. Pal further testified that Virendra Puniyani was the manager of the North Charleston store and that Anita Chaudhari was the assistant manager. He paid Virendra Puniyani $2,800.00 per month. Mr. Pal also stated that the girl who murdered Virendra Puniyani was an employee at the Fast Point Amoco location for a total of 6 employees.

Mr. Pal testified that the business shut down shortly after the murders because he did not want to keep the business open based on what had happened.

Mr. Pal was cross-examined regarding his assets and the fact that as the owner, if the case is deemed compensable, the Uninsured Fund may look to Avni and Mr. Pal for reimbursement. He acknowledged being aware of that, but stated he was going to testify anyway.

Mr. Pal stated what records he had, he had given to Claimant's counsel. (Claimant's counsel indicated he believes any documents Mr. Pal had were not turned over to him, but in fact turned over to Joel Scott who conducted the Coverage and Compliance investigation).

Avni Grocers did not file taxes as they were only opened for a few months.

There was a dependency investigation conducted by the Second Injury Fund and SIU Services, Inc. The findings of the investigation concluded that the Claimant's only dependent would be his mother, Rajkumari Puniyani.

FINDINGS OF FACT

Based upon the testimony and evidence received and produced at the hearing, as well as the Commissioner's personal observations, the following facts are accordingly made based upon the preponderance of the evidence:

1. The Claimant sustained a compensable injury by accident resulting in death on November 14, 2002 when he was shot and killed at work;

2. Avni Grocers had four or more employees and was subject to the Act;

3. The Claimant's average weekly wage at the time of her injury was $700.00;

4. The Claimant's compensation rate was $466.90;

5. The Claimant's injuries resulted in death;

6. The Claimant's mother, Rajkumari Puniyani lived with the deceased at the at the time of his death and that she was dependent upon him for support.

7. Pursuant to the Act, the funds will be paid to his dependent, Rajkumari Puniyani.

8. That the Uninsured Fund also reimburse Rajkumari Puniyani for any out of pocket expenses associated with the funeral of the Claimant, Virendra Puniyani.

10. That at the time of the first hearing on the merits, the employer was out of the country and unavailable to testify.

CONCLUSIONS OF LAW

Accordingly, as provided by S.C. Code Ann. § 42-17-40, it is the determination and findings of this Commissioner:

1. That, pursuant to S.C. Code Ann. § 42-1-160, there is sufficient evidence to prove that Claimant suffered a compensable injury by accident arising out of and in the course of his employment on November 14, 2002;

2. That, pursuant to S.C. Code Ann. § 42-1-140, there is sufficient evidence to prove that Avni Grocers was an employer under the South Carolina Workers' Compensation Act;

3. That, pursuant to S.C. Code Ann. § 42-1-150, there is sufficient evidence to prove that there existed an employment relationship between Claimant and Avni Grocers;

4. That, pursuant to S.C. Code Ann. § 42-15-60, the Employer must pay for all causally-related medical care incurred to date associated with Claimant's injury of November 14, 2002;

5. That, pursuant to S.C. Code Ann. § 42-1-40 and 42-9-10, Claimant's compensation rate is $700.00 based on her average weekly wage of $466.90;

6. That, pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay $2,500.00 for burial expenses;

7. That, pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay compensation benefits for death. Weekly compensation benefits must be paid to persons wholly dependent in the amount of sixty-six and two thirds of the decedent's average weekly wages, in this case for the preceding fiscal year, for a period of up to 500 weeks from the date of injury.

8. The case was contested for purposes of determining an attorney fee.

9. That the Employer was out of the country at the time of the first hearing on the merits and unavailable to testify.

ORDER AND AWARD

IT IS, THEREFORE, ORDERED:

1. That the Claimant's injury is compensable;

2. That the Claimant is entitled to all appropriate benefits accordingly under the Act pursuant to § 42-9-10 and § 42-9-290;

3. That the Defendants shall pay for causally related medical treatment and funeral expenses;

4. That the Defendants shall pay to Claimant a lump sum representing the commuted value of 500 weeks of compensation.

5. That the Employer was out of the country and unavailable to testify at the time of the first hearing on the merits.

AND IT IS SO ORDERED.

SC WORKERS' COMPENSATION COMMISSION

BY: _____
THE HONORABLE AVERY B. WILKERSON, JR.

Columbia, South Carolina
This 6th day of February, 2012

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 16 day of February, 2012

By _____
Administrative Assistant to the Commissioner

JLW
Appeal
NTS

DECISION AND ORDER
OF THE APPELLATE PANEL OF THE
SC WORKERS' COMPENSATION COMMISSION

WCC FILE NUMBER 0221897

Rajkumari Puniyani, mother of Virendra Puniyani, deceased
Employee/Claimant,

versus

Avni Grocers/Fast Point Amoco,
Employer,

and

WC Uninsured Employers Fund,

Defendants.

Appellate Panel Review Held in Columbia, South Carolina
On June 19, 2012 Pursuant to Notices
Timely and Properly Served Upon all Parties in Interest

Appellate Panel Decision Filed 8/28, 2012

APPEARANCES:

Claimant represented by Jarrel L. Wigger, Esquire, Wigger Law Firm, Inc. 8086 Rivers Avenue, Suite A, North Charleston, SC 29406, and John S. Nichols, Esquire, Bluestein Nichols Thompson & Delgado, LLC, PO Box 7965, Columbia, SC 29202.

Employer was present and unrepresented. Mr. Harendra Pal was the sole owner of the Employer, Avni International of S.C. Inc. and appeared *pro se*.

Appellant SC Uninsured Employers Fund represented by Terri J. Morrill, Clawson and Staubes, LLC, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492.

STIPULATIONS

The attorneys representing the parties to this action stipulated the following:

1. The Commission had jurisdiction to hear the matters presented;
2. All interested parties received notice of the hearing and venue was appropriate;
3. This matter came before the Commission on a Form 52 filed by the Claimant;
4. The Commission's File, Commissioner's Notes, Appeal to Charleston County Court of Common Pleas, Order of Court of Common Pleas, and Dependency Investigation are all a part of the record;
5. Decedent has an average weekly wage of $700.00 resulting in a compensation rate of $466.90;
6. Decedent suffered admitted injuries resulting in his death on November 14, 2002.
7. At the Fund's request this appellate review was decided upon the parties' submissions.

APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence without objection.

SUBMISSIONS

CLAIMANT'S SUBMISSIONS:

APA NO.	Date
1. Certificate of Death	11/14/02
List of Exhibits	
1. J. Henry Stuhr, Inc. Funeral Expenses	11/15/02
2. Post & Courier Article "Five Arrested"	11/15/02
3. Post & Courier Article "Fates of 7"	12/15/02
4. Post & Courier Article "16-year-old girl"	12/15/02
5. Post & Courier Article "Prosecutor Weighs"	12/17/02
6. Post & Courier Article "Five Plead Guilty"	11/09/04

7. Incident Report	11/14/02
8. Deposition of Rajkumari Puniyani	05/01/03
9. SCWCC: Division of Coverage and Compliance	5/7/03 & 7/17/03
10. Charleston County Court of Common Pleas Order	9/18/07
11. South Carolina Court of Appeals Opinion	6/29/10

EMPLOYER'S/UNINSURED FUND SUBMISSIONS:

APA NO.	Date
9. Letter from Coverage and Compliance	7/17/03
12. Transcript of Record	1/4/06
13. Transcript of Deposition of Dharmendra Chaudhari	4/14/03
14. Memo from Coverage & Compliance	7/15/03

STATEMENT OF THE CASE

The Claimant is the mother of Virendra Punihani. The Claimant alleges that her son and his sister-in-law, Anita Chaudhari, were murdered on November 14, 2002, by a co-worker during the course and scope of their jobs with Avni Grocers. Mrs. Chaudhari's husband brought a separate case on behalf of her beneficiaries.

Avni Grocers and the South Carolina Uninsured Employers Fund (the Fund) denied that the South Carolina Workers' Compensation Act covers Virendra Punihani's death and asserted all defenses available under the Act. Avni Grocers and the Fund denied responsibility for Virendra Puniyani's death. Both parties agree that Claimant's decedent was an employee of Avni Grocers at the time of his death but the Fund maintained Avni Grocers did not have four (4) or more employees and was therefore not subject to the Act.

The case was initially heard on January 4, 2006, and the hearing commissioner found Claimant failed to establish Avni Grocers was subject to the Act. Claimant appealed and the

Appellate Panel affirmed. Claimant filed a petition for judicial review to the Circuit Court, and the Honorable D. Garrison Hill reversed the Commission's decision and remanded the matter to the Commission for proceedings consistent with his Order. The Circuit Court reversed the Commission's decision not to allow the affidavit of Avni's owner, Harendra Pal, into evidence, found that there was credible evidence before the Commission that Avni Grocers regularly employed four (4) or more employees, and ruled the Commission's conclusion on dependency lacked sufficient support in the record or in the findings of fact and was therefore reversed. The Fund appealed the Order to the Court of Appeals. The Court of Appeals found that Judge Hill's Order was not immediately appealable and therefore dismissed the appeal without prejudice. *Chaudhari v. Avni Grocers*, 2010-UP-338 (S.C. Ct. App. Filed June 29, 2010). The Court of Appeals remitted the matter to the Commission to proceed pursuant to Judge Hill's Order.

The case was consolidated with the companion case brought by Mrs. Chaudhari's personal representative. The hearing proceeded before Commissioner Avery Wilkerson on November 29, 2011. Jarrel L. Wigger, Esq. was present for the Claimant and proper notice was given to Avni Grocers and the Fund. Matthew J. Story, Esq. appeared on behalf of the Fund. The Workers' Compensation Commission's File was made part of the record.

Commissioner Wilkerson filed an order on February 16, 2012. The Commissioner concluded that the preponderance of the evidence, including the testimony and evidence received and produced at the hearing as well as the Commissioner's personal observations, supported the following findings of fact:

1. The Decedent sustained a compensable injury by accident resulting in death on November 14, 2002 when he was shot and killed at work;
2. Avni Grocers had four (4) or more employees and was subject to the Act;
3. The Decedent's average weekly wage at the time of his injury was $700.00;
4. The Decedent's compensation rate was $466.90;
5. The Decedent's injuries resulted in death;

6. The Decedent's mother, Rajkumari Puniyani, lived with the Decedent and was dependent upon him for support.

7. Pursuant to the Act, the funds will be paid to Decedent's dependent, Rajkumari Puniyani.

8. That the Uninsured Fund also reimburse Rajkumari Puniyani for any out of pocket expenses associated with the funeral of the Decedent, Virendra Puniyani.

10. That at the time of the first hearing on the merits, the employer was out of the country and unavailable to testify.

As provided by S.C. Code Ann. § 42-17-40, Commissioner Wilkerson stated the following findings and conclusions:

1. That, pursuant to S.C. Code Ann. § 42-1-160, there is sufficient evidence to prove that Decedent suffered a compensable injury by accident arising out of and in the course of his employment on November 14, 2002;

2. That, pursuant to S.C. Code Ann. § 42-1-140, there is sufficient evidence to prove that Avni Grocers was an employer under the South Carolina Workers' Compensation Act;

3. That, pursuant to S.C. Code Ann. § 42-1-150, there is sufficient evidence to prove that there existed an employment relationship between Decedent and Avni Grocers;

4. That, pursuant to S.C. Code Ann. § 42-15-60, the Employer must pay for all causally-related medical care incurred to date associated with Decedent's injury of November 14, 2002;

5. That, pursuant to S.C. Code Ann. § 42-1-40 and 42-9-10, Decedent's compensation rate is $700.00 based on [his] average weekly wage of $466.90;

6. That, pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay $2,500.00 for burial expenses;

7. That, pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay compensation benefits for death. Weekly compensation benefits must be paid to persons wholly dependent in the amount of sixty-six and two thirds (66 2/3) of the decedent's average weekly wages, in this case for the preceding fiscal year, for a period of up to 500 weeks from the date of injury.

8. The case was contested for purposes of determining an attorney fee.

9. That the Employer was out of the country at the time of the first hearing on the merits and unavailable to testify.

Based upon these findings of fact and conclusions of law, Commissioner Wilkerson issued the following order:

1. That the Decedent's injury is compensable;

2. That the Decedent is entitled to all appropriate benefits accordingly under the Act pursuant to § 42-9-10 and § 42-9-290;

3. That the Defendants shall pay for causally related medical treatment and funeral expenses;

4. That the Defendants shall pay to Claimant a lump sum representing the commuted value of 500 weeks of compensation.

5. That the Employer was out of the country and unavailable to testify at the time of the first hearing on the merits.

Within the statutory period, the Fund timely filed an application for Appellate Panel Review, copies of which were furnished to all interested parties. The Fund submitted the following grounds for review:

1. Did the hearing commissioner err in finding as a fact that Claimant's Decedent suffered a compensable injury the error being that there was not substantial evidence in the record to support a finding that the employer regularly employed four (4) or more employees, which is based upon an unappealable interlocutory Circuit Court order improperly allowing the submission of evidence not newly discovered as provided by Regulation 67-707?

2. Did the hearing commissioner err in finding as a fact that the employer regularly employed four (4) or more employees, the error being that this finding was based upon the unappealable interlocutory order of the Circuit Court allowing the submission of evidence, which was not properly newly discovered evidence under Regulation 67-707 of the Workers' Compensation Act?

3. Did the hearing commissioner err in finding as a fact that funds would be paid to a dependent, the error being that there is not proper evidence in the record to support a finding of four (4) or more employees, which was based upon the unappealable interlocutory order of the Circuit Court, which allowed evidence in the record, which was not proper under Regulation 67-707?

4. Did the hearing commissioner err in ordering that the Uninsured Employers Fund should reimburse the dependent for funeral expenses, the error being that there is not substantial evidence in the record to support a finding that the employer regularly employed four (4) or more employees, which was based upon the unappealable interlocutory order of the Circuit Court judge allowing evidence into the record, which was not proper under Regulation 67-707?

5. Did the hearing commissioner err in finding as a fact that, at the time of the first hearing on the merits, the employer was out of the country and unavailable to testify, the error being that this was not evidence introduced at the initial hearing; and any evidence upon this issue was improperly allowed by the unappealable interlocutory order of a Circuit Court judge as newly discovered evidence under Regulation 67-707?

6. Did the hearing commissioner err in concluding as a matter of law that there is sufficient evidence to prove that Avni Grocers was an employer and there was an employment relationship between the Decedent and Avni, the error being that this is an improper standard of evidence and the substantial evidence does not support a finding of four (4) or more employees, which is based upon the unappealable interlocutory order of the Circuit Court allowing evidence not proper under Regulation 67-707?

7. Did the hearing commissioner err in ordering that the Employer must pay for medical care related to the Decedent's death, funeral benefits and death benefits, the error being that there is not substantial evidence in the record to support a finding that the Workers' Compensation Commission had jurisdiction based upon four (4) or more employees, the error being that this is based upon the improper unappealable interlocutory order of the Circuit Court, which allowed evidence not properly allowed under Regulation 67-707?

8. Did the hearing commissioner err in concluding as a matter of law that the Employer was out of the country at the time of the first hearing on the merits and unavailable to testify, the error being that this evidence was not introduced at the first hearing, the parties had ample opportunity to move for a postponement or adjournment of the hearing, and the allowance of evidence was based upon an unappealable interlocutory order of the Circuit Court, which was not proper under Regulation 67-707?

9. Did the hearing commissioner err in ordering that the Claimant is entitled to all benefits under the Act; that the Defendant shall pay for related medical treatment and funeral expenses; and that the defendant shall pay a lump sum, the error being that a finding that there were four (4) or more employees is based upon an unappealable interlocutory order of the Circuit Court, which was improper as a matter of law as it allowed evidence in the record not properly submitted as newly discovered evidence under Regulation 67-707?

10. Did the hearing commissioner err in ordering as a matter of law that the employer was out of the country and unavailable to testify at the time of the first hearing, the error being that this was not submitted into evidence at the time of the first hearing and, further, is based upon the unappealable interlocutory Circuit Court Order which is not improper (sic), as a matter of law, in allowing additional evidence under Regulation 67-707?

Based upon these grounds for review the Fund argued two (2) issues in its Brief to the Appellate Panel:

A. That the Circuit Court judge erred and abused its discretion in reversing the Appellate Panel finding that the Pal Affidavit submitted after the hearing did not constitute after-discovered evidence, so that the hearing commissioner committed error in finding the Commission had jurisdiction over the matter because the Employer employed four (4) or more employees.

B. That the Circuit Court judge erred in reversing the Appellate Panel which had affirmed the Hearing Commissioner's finding that there was not substantial evidence in the record that Avni Grocers regularly employed four (4) or more Employees so as to be subject to the Act, so that it was error for the hearing commissioner in the second hearing to find that there was substantial evidence in the record to support a finding of jurisdiction.[1]

EVIDENCE OF THE CASE

The following testimony relevant to the issues before this Panel was presented to the hearing commissioner:

1. Defendant Harendra Pal by live testimony;
2. Rajkumari Puniyani by deposition;
3. Dharmendra Chaudhari by testimony from the prior hearing;
4. APA Submissions by all parties as noted above.

Claimant's Case in Chief

Mr. Chaudhari's testimony at the prior hearing of January 4, 2006 was admitted without objection. Mr. Chaudhari testified that Defendant's business had two (2) locations; one in Vance, South Carolina, and one in Charleston, South Carolina. Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, "Avni

[1] The Fund framed the issues in its brief to this Appellate Panel to assert error on the part of the Circuit Court in reversing the order emanating from the first hearing in this case and remanding the matter to the Commission. The Commission is bound, however, to follow the mandate in the Circuit Court's order. *See Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission."). Accordingly, inasmuch as the Fund's brief is a challenge to the Hearing Commissioner's rulings in accordance with the Circuit Court's order, this Commission must affirm.

Grocers." 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. Mr. Chaudhari also indicated that one of the stores sold a different type of gas - Citgo. He testified that the Decedent's employer had two locations and employed six (6) employees.

Claimant presented the live testimony of Mr. Pal, who owned Avni Grocers. (Tr. p. 17, ll. 8-10). Avni was a corporation that owned two gas stations/convenience stores at two (2) different locations. (Tr. p. 17, ll. 12-16). Both locations were under "the same corporate umbrella." (Tr. p. 17, ll. 17-19). One store was in Vance, South Carolina and the other store was in North Charleston. (Tr. p. 25, l. 20 - p. 26, l. 17). One store sold Amoco gasoline while the other store sold Citgo. (Tr. p. 26, l. 18 - p. 27, l. 4).

Mr. Pal stated that at various times Avni employed five (5) to seven (7) employees. (Tr. p. 17, ll. 20-23). Mr. Pal identified them as Anita Chaudhari, Virendra Puniyani, "the girl who was involved (Krista McDaniel, who murdered the others)...and there were the other two (2) employees and plus Mr. Dharmendra." (Tr. p. 18, ll. 3-6, 12-14; p. 27, ll. 6-8). He stated there were six (6) employees at Avni at the time of the murders. (Tr. p. 18, ll. 8-9). Both claimants were killed on the job. (Tr. p. 18, ll. 21-23).

On cross-examination, Mr. Pal stated he was "the main person" and the owner of Avni Grocers. (Tr. p. 19, ll. 11-24). There were no other corporate officers. (Tr. p. 19, l. 25 - p. 20, l. 1). Mr. Pal controlled everything for Avni – he wrote checks and received payments; Mr. Pal added that Mr. Chaudhari managed one of the stations. (Tr. p. 20, l. 10 - p. 21, l. 8). Mr. Pal would pay the bills for Avni and "everything that was left over" was his personal income. (Tr. p. 23, ll. 10-15). The company began in August 2002, and the murders occurred in November 2002. (Tr. p. 23, ll. 17-19). Mr. Pal closed the business immediately thereafter. (Tr. p. 23, l. 20).

Mr. Pal testified that Mr. Dharmendra Chaudhari mainly took care of the Vance store and that Mr. Pal "would normally used to go to Vance." (Tr. p. 27, ll. 13-15). At the North Charleston location Mr. Chaudhari, Mr. Puniyani, Krista McDaniel, worked with "two (2) other more - - two (2) girls, working on a part-time basis; I think they used to come and fill the cooler and sometimes come - - used to come and sweep in the job, you know, they were doing." (Tr. p. 27, ll. 16-23; p. 29, ll. 16-21). Mr. Pal did not recall the names of the other two employees because "most of the thing was run by Virendra; he was - - he was hiring and he was doing everything. He was like a manager." (Tr. p. 27, l. 25 - p. 28, l. 4). Mr. Pal stated he paid Decedent $2,800.00 per month. (Tr. p. 18, ll. 18-20).

Mr. Chaudhari worked nearly every evening at North Charleston after he left the Vance location. (Tr. p. 28, ll. 6-11). Anita Chaudhari and Virendra Puniyani worked six (6) days a week. (Tr. p. 28, ll. 12-15; p. 30, ll. 10-14). McDaniel was part-time and worked between 20-22 hours. (Tr. p. 28, ll. 17-19).

The Hearing Commissioner informed Mr. Pal that he had the right to have counsel present, but Mr. Pal declined. (Tr. p. 21, l. 24 - p. 22, l. 17).

Mr. Pal stated he moved to Pineville, North Carolina in 2003. (Tr. p. 32, ll. 23-24; p. 34, ll. 16-18). At the time of the hearing in 2006, Mr. Pal was out of the country. (Tr. p. 35, ll. 2-7, 18-21). He returned to South Carolina in 2006 to provide the affidavit for the first hearing. (Tr. p. 33, ll. 9-19).

FINDINGS OF FACT

Pursuant to Sections 42-3-20(C) and 42-17-50 of the South Carolina Code of Laws, the Appellate Panel finds the following facts based upon the preponderance of the evidence, the parties' stipulations, the testimony before the hearing commissioner, and the APA submissions:

1. The Commission has jurisdiction to hear the matters presented;
2. Decedent has an average weekly wage of $700.00 resulting in a compensation rate of $466.90[2];
3. Decedent suffered admitted injuries resulting in his death on November 14, 2002;
4. Avni Grocers had four (4) or more employees and was subject to the Act (Tr. p. 17, 18, 27, 28);
5. Decedent was living with his mother, Claimant Rajkumari Puniyani, at the time of his death and she was dependent upon him for support. (Rajkumari Puniyani deposition p. 3, l. 25 – p. p. 4, l. 4; p. 5, ll. 2-18; p. 6, ll. 10-12, 21-25; Dharmendra Chaudhari deposition testimony p. 7, ll. 7-13; p. 7, l. 22 – p. 8, l. 2; Tr. 1/4/06, p. 8, l. 5 – p. 9, l. 9; p. 9, ll. 22-25; p. 11, ll. 21-23; Tr. 11/29/11, p. 8, ll. 7-22; p. 10, ll. 9-14);
6. Pursuant to the Act, the funds will be paid to Claimant Rajkumari Puniyani, who is Decedent's sole dependent;
7. The Fund shall also reimburse Rajkumari Puniyani for any out of pocket expenses associated with the Decedent's funeral as permitted by the Act;
8. At the time of the first hearing on the merits the employer, Mr. Pal, was out of the country and was unavailable to testify. (Tr. 11/29/11, p. 35).
9. Mr. Pal returned to the United States and provided an affidavit which established Avni employed four (4) or more employees, but the first Appellate Panel rejected the evidence. The circuit court ruled that the Commission should have admitted Mr. Pal's affidavit in the prior appeal, and that ruling is binding upon the Commission. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been

[2] The hearing commissioner found "Claimant's compensation rate is $700.00 based on [his] average weekly wage of $446.90." (Order, p. 5, Conclusion of Law No. 5). This was an obvious scrivener's error as the average weekly wage was in fact $700.00, and the compensation rate was $466.90. Section 42-9-290. Although neither the Fund nor the Employer challenged this finding in the hearing commissioner's order, this Appellate Panel is the ultimate finder of the facts in a workers' compensation case. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As such, this Panel has the authority to reconsider the evidence and amend the award. Section 42-17-50. Accordingly, we make this correction under this authority.

appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission.").

10. Claimant also called Mr. Pal to testify at the hearing, and he was subject to cross-examination by the Fund. The Fund objected to the testimony (Tr. p. 12, ll. 16-22) but the hearing commissioner overruled the objection and permitted Mr. Pal to testify. The Fund did not raise any challenge before this Appellate Panel to the hearing commissioner's ruling permitting Mr. Pal to testify.
11. Mr. Pal's testimony at the hearing establishes that Avni Grocer's employed four (4) or more employees.
12. Even without Mr. Pal's live testimony, Mr. Pal's affidavit which the hearing commissioner admitted pursuant to the circuit court's order establishes that Avni Grocers employed four (4) or more employees.
13. Even without Mr. Pal's live testimony or his affidavit, Mr. Chaudhari's uncontradicted testimony establishes that Avni Grocers employed four (4) or more employees.
14. Lastly, even without Mr. Pal's live testimony or his affidavit, or this Panel's own review of the other evidence in the record, the circuit court found that other evidence in the record established that Avni Grocers employed four (4) or more employees, and that finding is binding upon the Commission. *Bobo v. Marshane Corp.*

CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. § 42-17-50, it is the determination and conclusions of this Commission that:

1. Pursuant to S.C. Code Ann. § 42-1-160, sufficient evidence establishes that Decedent suffered a compensable injury by accident arising out of and in the course of his employment on November 14, 2002;

2. Pursuant to S.C. Code Ann. § 42-1-140, sufficient evidence establishes that Avni Grocers was an employer for purposes of the Act;
3. Pursuant to S.C. Code Ann. § 42-1-150, sufficient evidence establishes an employment relationship between Decedent and Avni Grocers;
4. Pursuant to S.C. Code Ann. § 42-1-360(2), sufficient evidence establishes that Avni Grocers employed four (4) or more employees during all relevant time periods so as to be subject to the Act;
5. Pursuant to S.C. Code Ann. § 42-1-40 and S.C. Code Ann. § 42-9-290, Decedent's compensation rate is $466.90 based upon an average weekly wage of $700.00;
6. Pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay burial expenses in the amount of $2,500.00;
7. Pursuant to S.C. Code Ann. § 42-9-290 and § 42-17-60, the Employer must pay compensation for a period of five hundred (500) weeks from the date of injury, which was November 14, 2002, together with interest as permitted by law;
8. This case was contested for purposes of determining an attorney fee. See 25A S.C. Regs. 67-1205(C) (3).
9. The Employer, Mr. Pal, was out of the country at the time of the first hearing on the merits and was unavailable to testify. 25A S.C. Code Ann. Regs. 67-707.
10. The hearing commissioner properly considered Mr. Pal's affidavit pursuant to the circuit court's mandate.
11. The hearing commissioner's consideration of Mr. Pal's live testimony is unchallenged before this Appellate Panel and is therefore affirmed.

Accordingly, the hearing commissioner's decision is

AFFIRMED IN FULL.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

BY: _____
Derrick L. Williams
Commissioner

CONCUR: _____
T. Scott Beck
Commissioner

CONCUR: _____
Gene McCaskill
Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorneys or attorneys for said parties.

This 28 day of August, 2012

By Valerie D Butler

Administrative Assistant to the Commissioner

Jarrel L. Wigger
Avni Grocers/East Point Amoco (Reg & cert)
Terri J. Morrill

AMENDED

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 29 day of August, 2012

By Valerie D Butler

Administrative Assistant to the Commissioner

Terri J. Morrill
Jarrel L. Wigger
John S. Nichols
Avni Grocers/East Point Amoco (Reg & cert)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-6357

Puniyani
PLAINTIFF(S)

Avni Grocers
DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41, SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2013 JAN -9 PM 4:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Appeal is Denied

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2117
Judge Code

1/9/13
Date

For Clerk of Court Office Use Only

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED

CHARLESTON COUNTY
SOUTH CAROLINA

www3.charlestoncounty.org

Terri Jane Morrill
Clawson And Staubes.LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order/Order appeal is denied

CASE NO: 2012CP1006357
Rajkumari Puniyani VS Avni Grocers

This judgment was entered on the 09th day of January, 2013, and a copy mailed first class on Friday, January 11, 2013, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803)737-5700

WCC #
Carrier File #
Carrier Code #
Employer FEIN

Virendra Puniyani — Claimant's Name — SSN
Address — City — State — Zip
(843) 478-2035 — Home Phone # — Work Phone #

Avni Grocers — Employer's Name
1900 McMillan N. Charleston, SC 29405 — Address — City — State — Zip
Uninsured — Insurance Carrier
Jarrel L. Wigger — Preparer's Name
(843) 553-9800 — Phone #

Complete each information blank. To request a hearing, check box 12 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, and 8 and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

The claimant is Mother (relationship to employee) of Virendra Puniyani (employee's name)

1. The employee sustained an accidental injury to the Head, gunshot (part of body hurt) on 11/14/02 (month day year) in Charleston County, State of South Carolina
2. Both the employee and the employer were subject to the South Carolina Workers' Compensation Act at the time of the injury.
3. The relationship of employer and employee existed at the time of the injury.
4. At the time of the injury the employee was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 11/14/02 (month day year) in the following manner: Police called the corporate owners

☐ 6. Due to injury, the employee received medical examination and treatment which remains unpaid by the employer.

☐ Due to injury, the employee lost compensable time from work and wages for the periods of:

☒ 8. The employee died on 11/14/02 (month day year) as a result of the accidental injury, and death compensation is claimed.

9. At the time of injury the employee was paid weekly wages of To be determined The claimant demands an accounting of days worked and wages earned as provided by law.
10. Further grounds of claim:
11. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 12 a. **I am filing a claim. I am not requesting a hearing at this time.**

☒ 12 b. **I am requesting a hearing.**

Signature of Claimant/Representative — Date

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC Form # 52. Rev. Date 9/90 — 52 — **Employee's Notice of Claim and/or Request for Hearing, Death Case.**

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803)737-5700

WCC File #
Carrier File #
Carrier Code #
Employer FEIN

Rajkumari Puniyani
Claimant's Name SSN

Address City State Zip

(843) 478-2035
Home Phone # Work Phone #

Avni Grocers
Employer's Name

1900 McMillan N. Charleston, SC 29405
Address City State Zip

Uninsured
Insurance Carrier

Jarrel L. Wigger (843) 553-9800
Preparer's Name Phone #

Complete each information blank. To request a hearing, check box 12 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6, 7, and 8 and file this form in duplicate.

A claim for worker's compensation benefits is made based on the following grounds:

The claimant is Mother (relationship to employee) of Virendra Puniyani (employee's name)

1. The employee sustained an accidental injury to the Head, gunshot (part of body hurt) on 11/14/02 (month day year) in Charleston County, State of South Carolina
2. Both the employee and the employer were subject to the South Carolina Workers' Compensation Act at the time of the injury.
3. The relationship of employer and employee existed at the time of the injury.
4. At the time of the injury the employee was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the employer on 11/14/02 (month day year) in the following manner: Police called the corporate owners

☐ 6. Due to injury, the employee received medical examination and treatment which remains unpaid by the employer.

☐ 7. Due to injury, the employee lost compensable time from work and wages for the periods of:

☒ 8. The employee died on 11/14/02 (month day year) as a result of the accidental injury, and death compensation is claimed.

9. At the time of injury the employee was paid weekly wages of To be determined The claimant demands an accounting of days worked and wages earned as provided by law.

10. Further grounds of claim:

11. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 12 a. **I am filing a claim. I am not requesting a hearing at this time.**

☒ 12 b. **I am requesting a hearing.**

Jarrel L. Wigger
Signature of Claimant/Representative

SCWCC
FEB 24 '03

2/20/03
Date

INSURANCE & MEDICAL

Refer to R.67-205, R.67-206, R.67-207, and R.67-601 through R.67-615- Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC Form # 52. Rev. Date 9/90

52

Employee's Notice of Claim and/or Request for Hearing, Death Case.

Wigger Law Firm, Inc.

ATTORNEYS AT LAW

3086 Rivers Avenue, Suite A
North Charleston, SC 29406

JARREL L. WIGGER*
J. DAVID MURRELL

JOSEPH DUBOIS

*Board Certified Civil Trial Specialist
By National Board of Trial Advocacy

(843) 553-9800
(843) 553-1648 Fax

December 20, 2005

VIA CERTIFIED MAIL

DAVID W. HUFFSTETLER, Commissioner
SC Workers' Compensation Comm.
PO Box 1715
Columbia SC 29202-1715

RE:	CLAIMANT:	**RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI, DEC.**
	EMPLOYER:	**AVNI Grocers/Fast Point Amoco**
	D/LOSS:	**11/14/02**
	WCC #:	**0221897**

Dear Commissioner Huffstetler:

Please find enclosed Claimant's Pre-Hearing Brief (FORM 58) and Notice of Witnesses and Records in reference to the above-captioned matter. This hearing is scheduled before you on January 4, 2006 at 1:30 pm.

By copy of this letter, I am serving same upon Avni Grocers/Fast Point Amoco and the Uninsured Employers Fund. I have also served them with a copy of written medical evidence I intend to use at the hearing.

If you have any questions regarding this matter, please call. Thank you for your assistance.

Respectfully,

Jarrel L. Wigger

JLW/saj
Enclosures
cc: Brooks Shealy, Attorney for the Uninsured Employers Fund (via Certified Mail)
Avni Grocers/Fast Point Amoco (via Certified Mail)

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0221897
Carrier File #
Carrier Code #
Employer FEIN

RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI, DEC.
Claimant's Name SSN

Address City State Zip

( ) ( )
Home Phone # Work Phone #

AVNI Grocers/Fast Point Amoco
Employer's Name

1900 McMillan Avenue, N. Charleston, SC 29405
Address City State Zip

Uninsured Employers Fund
Insurance Carrier

JARREL L. WIGGER 8086 RIVERS AVENUE, N. CHARLESTON SC 29406 (843) 553-9800
Preparer's Name Address Phone #

Provide the information requested in the space provided. Use an additional sheet, if necessary. Type or print all information.

☒ Injury by Accident ☐ Occupational Disease ☐ Both Injury by Accident and Disease ☒ Other

1. Date of accident 11/14/2002 2. AWW: $ Comp. Rate: $

3. Type of injury and body part(s) Fatal gunshot wound to head

4. Facts in controversy: Compensation rate, heirs, burial expenses, etc.

5. Legal issues involved:

6. Unusual problems: Defendant is uninsured

7. Witnesses (designate if expert)* Dharmendra Chaudhari and RAJKUMARI PUNLYANI via deposition

8. Exhibits: SEE ATTACHED NOTICE.

9. Medical evidence: (Indicate report pursuant to R.67-612; deposition or appearance)
SEE ATTACHED NOTICE.

10. Name, address, and specialty, if any, of the treating physician: N/A

11. Impairment rating(s); body part(s); physician and date of opinion: N/A

SIGNATURE

DATE OF HEARING: 01/04/06 TIME OF HEARING: 1:30 p.m.

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.

WCC FORM # 58 REV. DATE 3/96

58

PRE-HEARING BRIEF

Forms On-A-Disk, Inc. · Dallas, Texas

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0221897
Carrier File #
Carrier Code #
Employer FEIN

R. Kumari Puniyani, mother of Virendra Puniyani, deceased.
Claimant's Name SSN

Avni Grocers
Employer's Name

1900 McMillan Ave., N. Chas., SC 29405
Address City State Zip

( ) ( )
Home Phone # Work Phone #

Uninsured Employer's Fund
Insurance Carrier

Jarrel L. Wigger, Esq. (843) 553-9800
Preparer's Name Phone #

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: 11/14/2002

The undersigned makes application for review of the findings of the Commissioner in the above captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages, if necessary).

See Attached.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Terri M. Lynch, Esq., on behalf of Unin. Employer's Fund, 1470 Ben Sawyer Blvd., Ste. 10, Mt. Pleasan SC 29464
Name Address

on the 28 day of Feb., 2006 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Jarrel L. Wigger/JRM Claimant's Attorney 2/28/06
Preparer's Signature Title Date

Check this box if you are not represented by an attorney. ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and 4 copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this from. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

Puniyani v. Avni Grocers
WCC No.: 0221897
D/Injury: November 14, 2002

Attachment to Form 30

1. The hearing commissioner erred in failing to accept the Commission's coverage and compliance ruling that Avni Grocers was the employer.

2. The hearing commissioner erred in failing to accept the Commission's coverage and compliance ruling that Avni Grocers had the requisite number of employees and was subject to the Act.

3. The hearing commissioner erred in failing to accept the uncontradicted and undisputed evidence that Avni Grocers was the owner of the business.

4. The hearing commissioner erred in faling to accept the uncontradicted and undisputed evidence that the deceased, Virenda Puniyani, was employed by Anvi Grocers.

5. The hearing commissioner's ruling was arbitrary and capricious and based upon speculation that there may have been some other unidentified and unnamed owner of the business.

6. The hearing commissioner erred in not interpreting the Act liberally and in favor of coverage.

7. The hearing commissioner erred in penalizing the Claimant at the hearing on January 4, 2006, for the Uninsured Employers Fund's failure to conduct dependency investigations, submit APA submissions, assign an attorney to the file and investigate the claim when the Uninsured Employers Fund had notice of the claim on January 24, 2005.

8. The hearing commissioner erred in penalizing the Claimant for proceeding with the hearing after traveling from Atlanta, Georgia, after waiting for twelve months for the hearing to be conducted.

9. The hearing commissioner erred in not ruling that since the Uninsured Employer's Fund failed to file a Form 51 after being properly served with the Form 50, they waived all affirmative defenses.

10. Whether the Statement of the Case misstated the facts regarding notice.

11. Whether the Statement of the Case was in error by the failure to note the service documents and notice documents provided by counsel to the hearing commissioner who based on the documents allowed the hearing to go forward.

12. Whether the Statement of the Case misstates the facts.

13. Whether the Statement of the Case leaves out certain undisputed testimony regarding Mr. Chaudhari working at both locations.

14. Whether the Uninsured Employers' Fund and Defendant Avni could contest the applicability of the Act as they failed to timely answer the Form 50 of the Claimant.

15. Whether the Findings of Fact leave out the undisputed fact that Dharmendra Chaudhari worked at both locations in question and indicated they were owned by the same person.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Virendra Puniyani, Deceased Employee, and Rajkumari Puniyani, Claimant/Appellant vs. AVNI Grocers/Fast Point Amoco, Employer/ Defendant, and The South Carolina Uninsured Employers' Fund, Carrier/Defendant/Respondent.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C.A. No.: 2007-CP-10-0013 **PETITION AND NOTICE OF APPEAL** (Non-Jury) W.C.C. FILE NO. 0221897

FILED
2007 JAN -2 PM 4:57
JULIE ARMSTRONG
CLERK OF COURT

TO: THE COURT OF COMMON PLEAS, COUNTY OF CHARLESTON, THE NINTH JUDICIAL CIRCUIT; THE SOUTH CAROLINA'S WORKERS' COMPENSATION COMMISSION AND TERRI M. LYNCH, ATTORNEY FOR DEFENDANTS.

YOU WILL PLEASE TAKE NOTICE that Claimant/Respondent, Virendra Puniyani, Deceased Employee, and Rajkumari Puniyani, by and through his undersigned attorney, hereby appeals from the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission filed November 30, 2006, pursuant to S.C. Code Ann. § 1-23-380 (1985 & Supp. 2006) and S.C. Code Ann. § 42-17-60 (1985 & Supp. 2006).

This Petition and Appeal is based on the following grounds and alleged errors:

(1) The findings of fact by the Hearing Commissioner and Appellate Panel were erroneous in that the evidence and Commission's file supports the following:

[a] Overwhelming testimony and evidence demonstrates that the Appellant sustained work-related injuries resulting in the death of the Claimant.

[b] Overwhelming testimony and evidence demonstrates that the Employer for the Appellant regularly employed four (4) or more employees and as such were subject to the Workers' Compensation Act, as investigated and opined by the Commission's Coverage and Compliance Department.

[c] Overwhelming testimony and evidence demonstrates that there was substantial evidence in the record that the Employer regularly employed four (4) or more employees.

[d] Overwhelming testimony and evidence demonstrates that the Claimant met his burden of proving entitlement to the benefits under the Workers' Compensation Act.

(2) As further grounds for this appeal, the rulings of law by the Appellate Panel were erroneous in that the record supports the following:

[a] Pursuant to S.C. Code Ann. § 42-1-160, the Appellant sustained injuries and resulting death due to the work-related accident on November 14, 2002.

[b] Pursuant to S.C. Code Ann. § 42-15-60, Appellant is entitled to compensation benefits due to the Claimant resulting from her injuries and resulting death due to the work related accident on November 14, 2002.

(3) Claimant also filed a Motion to Stay the Commissioner's Ruling from the Hearing until after the Commission ruled on the Motion to add Additional Evidence. The Order of the Full Commission dated July 14, 2006, denied Plaintiff's Motion to add Additional Evidence and ruled that the Motion to Stay was moot. The Full

Commission's denial was an error as a matter of law as the Claimant was not made aware of any issue contesting the applicability of the Act in this case as the Commission had already investigated and issued their opinion and the Employer/UEF failed to file a Form 51 Answer notifying the Claimant of their disagreement on that issue.

(4) The Commissioner erred in not interpreting the Act liberally and in favor of coverage.

(5) The Commission erred in not ruling that since the Uninsured Employer's Fund failed to file a Form 51 after being properly served with the Form 52, the Fund waived all affirmative defenses, and that failure prohibits the UEF from then contesting the applicability of the Act, as the Fund is deemed to have waived all defenses by its failure to Answer.

(6) Due to the erroneous findings of the South Carolina Workers' Compensation Commission, the substantial rights of the Appellant have been prejudiced and Appellant is thereby entitled to a rehearing, or a reversal of the Ruling of the Full Commission.

(7) Claimant-Appellant appeals from the Appellate Panel's Order in its entirety as it is unsupported substantial evidence of record and is contrary to law.

Respectfully submitted,

Jarrel L. Wigger
Wigger Law Firm
8086 Rivers Avenue, Ste. A
North Charleston, SC 29406
(843) 553-9800

JOHN S. NICHOLS
BLUESTEIN & NICHOLS, LLC
Post Office Box 7965
Columbia, SC 29202
Attorneys for Claimant/Appellant

Charleston, South Carolina
January 2, 2007

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Virendra Puniyani, Deceased Employee, and Rajkumari Puniyani, Claimant/Appellant vs. AVNI Grocers/Fast Point Amoco, Employer/ Defendant, and The South Carolina Uninsured Employers' Fund, Carrier/Defendant/Respondent.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C.A. No.: 2007-CP-10-0013 NOTICE OF APPEARANCE

FILED
2007 JAN 11 AM 11:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

To the Clerk of Court and all parties of record:

Please enter my appearance in this case as counsel for the Claimant/Appellant. I certify that I am admitted to practice in this Court.

Respectfully submitted,

John S. Nichols
BLUESTEIN & NICHOLS, LLC
~~Post~~ Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bnlaw.net

January 9, 2007

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0221896
Carrier File # UE4428
Carrier Code # N/A
Employer FEIN N/A

Rajkumari Puniyani In re: Virendra Puniyani, Deceased Employee
Claimant's Name SSN

Address City State Zip

Home Phone # Work Phone #

Fast Point Gas Station
Employer's Name
1900 McMillan Avenue, No. Charleston, SC 29405
Address City State Zip
N/A - No coverage located
Insurance Carrier

Terri Morrill Lynch (843) 577-2026
Preparer's Name Phone #

A claim for workers' compensation benefits is made based on the follow grounds:.

√ Injury ____ Illness ___ Repetitive Trauma

1. Compensation Rate: $Unknown - minimum wage 2. AWW: $_____ Date of Injury: November 14, 2002

3. Type of Injury and body part(s): Death from shooting incident.

4. Facts in Controversy: Whether deceased employee's death arose out of and in the course of employment? Whether Claimant proved Employer regularly employed four (4) or more employees? Whether Claimant is entitled to any benefits whatsoever under the Act?

5. Legal issues involved: §42-1-160 - Injury by accident must arise out of and in the course of employment. §42-1-100 and §42-1-40 - no documentation of any earnings of employee, no taxes paid, not in Commission's Order; §42-1-150 - employment only in which four or more employees are regularly employed.

6. Unusual aspects: Yes. This case is on remand. Claimant failed to prove entitlement to any benefits under the Act whatsoever due to failure to prove employer regularly employed four (4) or more employees. No new evidence under Regulation 67-707 – the evidence was known to the party (Claimant) and "by reasonable diligence" the new evidence could have been secured.

7. Witnesses (designate if expert)*: Dharmendra Chaudhari - by deposition and/or prior transcript; any witnesses called by Claimant.

8. Exhibits: Transcript of Hearing - Rajkumari Puniyani, p.11 - only three people working at location where he worked, paid in cash; p.12 - not aware of ownership papers of AVNI Grocers, not aware of relationship between Avni and Amoco, another location was Citgo; p.13 - no written documentation of what deceased employee was paid, did not pay taxes; Transcript of Deposition of Dharmendra Chaudhari, p.8 - $2,800 month ($646.14 per week); Memo of 7/15/03 - Claimant's attorney has been made aware that he bears the burden of proof in showing that the employer waw subject to the Act before the merits of the claim can be heard; Letter from Coverage & Compliance - 7/17/03 - the first issue is to prove the Employer was subject to the Act by regularly employing four (4) or more employees.

9. Medical evidence: (indicate report pursuant to R.67-612; deposition or appearance) N/A

10. Name, address, and specialty, if any, of the treating physician: N/A

11. Impairment rating(s); body part(s); physician and date of opinion: N/A - death claim

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. *Commissioners reserve the right to admit expert witnesses at hearings.

12. I am amending my Form 50/51 in the follow manner: Form 53 - Fast Point Gas Station did not regularly employ four (4) or more employees and there was no evidence presented to support a finding of jurisdiction.

I verify the contents of this form are accurate and true to the best of my knowledge.

Terri Morrill Lynch Email: tlynch@clawsonandstaubes.com
TERRI MORRILL LYNCH

Date of hearing: December 16, 2010 Time needed for hearing: ½ to 1 hour
On Behalf of: [ ] Claimant [ ] Employer [X] S.C.U.E.F.

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. *Commissioners reserve the right to admit expert witnesses at hearings.

CLAWSON AND STAUBES LLC

Terri J. Morrill
Of Counsel
tmorrill@clawsonandstaubes.com

October 31, 2011

File No.: 2009-0967 tjm

Commissioner Avery B. Wilkerson, Jr.
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

Re: Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee v. Avni Grocers and S.C. Uninsured Employers' Fund
WCC File No.: 0221897
Carrier File No.: 4429
Date of Injury: November 14, 2002

Dear Commissioner Wilkerson:

Please find enclosed the original and one (1) copy of the Form 58, Pre-Hearing Brief and Notice of APA submissions in the above-captioned matter, which is scheduled for a hearing to be held on November 10, 2011, at 1:15 pm, in Summerville, South Carolina. Thank you for filing the original Brief and Notice, and returning a clocked copy in the enclosed self-addressed stamped envelope.

I am providing the Pre-Hearing Brief and APA submissions, which will be submitted at the time of hearing, to Jarrel L. Wigger, the Claimant's attorney.

Your assistance and attention to this matter will be appreciated.

With kind regards,

Very truly yours,

CLAWSON AND STAUBES, LLC

Terri J. Morrill

Terri J. Morrill

Enclosures
cc: Jarrel L. Wigger, Esquire (w/enclosures)
Avni Grocers (w/enclosures)

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0221897
Carrier File # 4429
Carrier Code #
Employer FEIN

Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee	Avni Grocers/Amoco Fast Point
Claimant's Name SSN	Employer's Name
	1900 McMillan
Address City State Zip	Address City State Zip
843-572-9695	SC Uninsured Employer's Fund
Home Phone # Work Phone #	Insurance Carrier
Terri J. Morrill	(843) 577-2026
Preparer's Name	Phone #

A claim for workers' compensation benefits is made based on the follow grounds:.
√ Injury ____ Illness ___ Repetitive Trauma

1. Compensation Rate: $466.49 2. AWW: $700.00 Date of Injury: November 14, 2002
3. Type of Injury and body part(s): Death from shooting incident.
4. Facts in Controversy: Whether deceased employee's death arose out of and in the course of employment? Whether Claimant proved Employer regularly employed four (4) or more employees? Whether Claimant is entitled to any benefits whatsoever under the Act?
5. Legal issues involved: §42-1-160 - Injury by accident must arise out of and in the course of employment. §42-1-100 and §42-1-40 - no documentation of any earnings of employee, no taxes paid, not in Commission's Order; §42-1-150 - employment only in which four or more employees are regularly employed.
6. Unusual aspects: Yes. This case is on remand. Claimant failed to prove entitlement to any benefits under the Act whatsoever due to failure to prove employer regularly employed four (4) or more employees. No new evidence under Regulation 67-707 – the evidence was known to the party (Claimant) and "by reasonable diligence" the new evidence could have been secured. South Carolina Uninsured Employer's Fund objects to testimony or affidavit of Harendra Pal as not properly before the Commission. Claimant should be required to appear at hearing to pursue her claim. Further appeals pending final Order.
7. Witnesses (designate if expert)*: Dharmendra Chaudhari - by deposition and/or prior transcript; any witnesses called by Claimant.
8. Exhibits: Transcript of Hearing - Rajkumari Puniyani, p.11 - only three people working at location where he worked, paid in cash; p.12 - not aware of ownership papers of AVNI Grocers, not aware of relationship between Avni and Amoco, another location was Citgo; p.13 - no written documentation of what deceased employee was paid, did not pay taxes; Transcript of Deposition of Dharmendra Chaudhari, p.8 - $2,800 month ($646.14 per week); Memo of 7/15/03 - 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 of the claim can be heard; Letter from Coverage & Compliance - 7/17/03 - the first issue is to prove the Employer was subject to the Act by regularly employing four (4) or more employees.
9. Medical evidence: (indicate report pursuant to R.67-612; deposition or appearance) N/A
10. Name, address, and specialty, if any, of the treating physician: N/A
11. Impairment rating(s); body part(s); physician and date of opinion: N/A - death claim
12. I am amending my Form 50/51 in the follow manner: Form 53 - Fast Point Gas Station did not regularly employ four (4) or more employees and there was no evidence presented to support a finding of jurisdiction.

I verify the contents of this form are accurate and true to the best of my knowledge.

Terri J. Morrill
SIGNATURE

Email: tmorrill@clawsonandstaubes.com

Date of hearing: November 10, 2011
On Behalf of: [ ] Claimant [ ] Employer [X] S.C.U.E.F.

Time needed for hearing: ½ to 1 Hour

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. *Commissioners reserve the right to admit expert witnesses at hearings.

South Carolina Workers' Compensation Commission
P.O. Box 1715 ♦ 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File # 0221897
Carrier File # 4429
Carrier Code #
Employer FEIN

Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee		Avni Grocers	
Claimant's Name	SSN	Employer's Name	
		1900 McMillan Avenue, North Charleston, SC 29405	
Address	City State Zip	Address	City State Zip
843-572-9695		SC Uninsured Employer's Fund	
Home Phone #	Work Phone #	Insurance Carrier	
Terri J. Morrill	(803) 577-2026		
Preparer's Name	Phone #		

Request for Commission Review by [] claimant [X] employer [X] **South Carolina Uninsured Employer's Fund** (check one)

The undersigned makes application for review of the findings of the Commissioner in the above captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages, if necessary).

PLEASE SEE ATTACHED

(Check one) Oral argument [X] is [] is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to
Jarrel L. Wigger 8086 Rivers Avenue, Suite A, North Charleston, SC 29406

Name Address
on the 29th day of February, 2012 by [X] first class mail; [] personal service, [] certified mail.

Terri J. Morrill
Preparer's Signature

Attorney for South Carolina Unnsured Employer's Fund
Title

2/29/12
Date

Check this box if you are not represented by an attorney. [ ]

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and 8 copies of this form with the Judicial Department. The appeal must be postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-205D. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing pleading has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 8th day of March, 2012.

To: Jarrel L. Wigger, Esquire
Wigger Law Firm, Inc.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Cathy Todd

GROUNDS FOR REVIEW
FROM DECISION AND ORDER
OF COMMISSIONER, DATED FEBRUARY 16, 2012

W.C.C. FILE NO.: 0221897

1. The hearing commissioner erred in finding as a fact that the Claimant (sic) sustained a compensable injury, the error being that there was not substantial evidence in the record to support a finding that the employer regularly employed four (4) or more employees, which is based upon an unappealable interlocutory Circuit Court order improperly allowing the submission of evidence not newly discovered evidence as provided by regulation 67 – 707.

2. The hearing commissioner erred in finding as a fact that the employer regularly employed four (4) or more employees, the error being that this finding was based upon the unappealable interlocutory order of the Circuit Court allowing the submission of evidence, which was not properly newly discovered evidence under Regulation 67 – 707 of the Worker's Compensation act.

3. The hearing commissioner erred in finding as a fact that funds would be paid to a dependent, the error being that there is not proper evidence in the record to support a finding of four (4) or more employees, which was based upon the unappealable interlocutory order of the Circuit Court, which allowed evidence into the record, which was not proper under Regulation 67 – 707.

4. The hearing commissioner erred in ordering that the Uninsured Employers Fund should reimburse the dependent for funeral expenses, the error being that there is not substantial evidence in the record to support a finding that the employer regularly employed four (4) or more employees, which is based upon the unappealable interlocutory order of the Circuit Court judge allowing evidence into the record, which was not proper under Regulation 67 – 707.

5. The hearing commissioner erred in finding as a fact that, at the time of the first hearing on the merits, the employer was out of the country and unavailable to testify, the error being that this was not evidence introduced at the initial hearing; and any evidence upon this issue was improperly allowed by the unappealable interlocutory order of a Circuit Court judge as newly discovered evidence under Regulation 67 – 707.

6. The hearing commissioner erred in concluding as a matter of law that there is sufficient evidence to prove that Avni grocers was an employer and there was an employment relationship between the claimant and Avni, the error being that this is an improper standard of evidence and the substantial evidence does not support a finding of four (4) or more employees, which is based upon the unappealable interlocutory order of the Circuit Court allowing evidence not proper under Regulation 67 – 707.

7. The hearing commissioner erred in ordering that the employer must pay for medical care related to the claimant's death, funeral benefits and death benefits, the error being that there is not substantial evidence in the record to support a finding that the Worker's Compensation commission had jurisdiction based upon four (4) or more employees, the error being that this is based upon the improper unappealable interlocutory order of the Circuit Court, which allowed evidence not properly allowed under Regulation 67 – 707.

8. The hearing commissioner erred in concluding as a matter of law that the employee was out of the country at the time of the first hearing on the merits and unavailable to testify, the error being that this evidence was not introduced at the first hearing, the parties had ample opportunity to move for a postponement or adjournment of the hearing, and the allowance of evidence was based upon an unappealable interlocutory order of the Circuit Court, which was not proper under Regulation 67 – 707.

9. The hearing commissioner erred in Ordering that the claimant is entitled to all benefits under the act; that the defendant shall pay for related medical treatment and funeral expenses; and that the defendant shall pay a lump sum, the error being that a finding that there were four (4) or more employees is based upon an unappealable interlocutory order of the Circuit Court, which was improper as a matter of law as it allowed evidence in the record not properly submitted as newly discovered evidence under Regulation 67 – 707.

10. The hearing commissioner erred in ordering as a matter of law that the employer was out of the country and unavailable to testify at the time of the first hearing, the error being that this was not submitted into evidence at the time of the first hearing and, further, is based upon the unappealable interlocutory Circuit Court Order which is not improper, as a matter of law, in allowing additional evidence under Regulation 67 – 707.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)
)
Rajkumari Puniyani) CIVIL ACTION COVERSHEET
IN RE: Virendra Puniyani, Deceased Employee
Plaintiff(s))
) 2012-CP - 10- 0357
vs.)
)
AVRIL GROCERS,)
Employer,
SC UNINSURED EMPLOYERS FUND,
Defendant(s))

Submitted By: Terri J. Morrill, Esquire
Address: Clawson & Staubes, LLC,
126 Seven Farms Drive, Ste. 200,
Daniel Island, SC 29492

SC Bar #: 4091
Telephone #: (843) 577-2026
Fax #: (843) 722-2867
Other:
E-mail: tmorrill@clawsonandstaubes.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☒ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: Terri J. Morrill Date: 9/25/12

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	W.C.C. FILE NO. 0221897
Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee,	)	Case No: 2012-CP-10-6357
Appellee/Claimant,	)	
v.	)	PETITION FOR JUDICIAL REVIEW (Non-Jury)
Avni Grocers,	)	
Employer,	)	
SC Uninsured Employer's Fund,	)	
Appellant/Carrier	)	

FILED
2012 SEP 27 PM 4:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE COURT OF COMMON PLEAS AND JARREL WIGGER, ESQUIRE AND JOHN S. NICHOLS, ATTORNEYS FOR THE APPELLEE/CLAIMANT:

The Petitioner, the South Carolina Uninsured Employers Fund, by and through their undersigned attorneys, pray for review of the Order of the South Carolina Workers Compensation Commission filed August 28, 2012, pursuant to the provisions of Section 1-23-380, South Carolina Code of Laws, 1976, as amended commonly known as the Administrative Procedures Act, and Section 42-17-60, South Carolina Code of Laws 1976, as amended, commonly known as the South Carolina Workers Compensation Act, and would respectfully allege and show unto this Honorable Court as follows:

FIRST: The Full Commission erred in finding as a fact and concluding as a matter of law that Avni Grocers had four or more employees and was subject to the Act based upon an affidavit of Harendra Pal, which is error as a matter of law based upon a prior incorrect ruling of a Circuit Court Judge that evidence known at the time of a hearing, but not submitted, should be allowed, said interlocutory ruling constituting clear error as a matter of law which should be overturned.

SECOND: The Full Commission erred in finding as a fact and concluding as a matter of law that Harendra Pal was out of the country and unable to testify at the first hearing, the error being that this was known to the parties at the time of the first hearing and therefore, was not newly discovered evidence, which should be excluded as a matter of law contrary to the interlocutory order of the prior Circuit Court Judge.

THIRD: The Full Commission erred in finding as a fact and concluding as a matter of law that Mr. Pal returned to the country and produced an affidavit, the error being that his absence was known to the Claimants at the time of the first hearing and despite the Hearing Commissioner's suggestion that they request a postponement, they requested neither a postponement nor adjournment. The prior interlocutory Circuit Court Order allowing this was error as a matter of law.

FOURTH: The Full Commission erred in finding and concluding as a matter of law that the Uninsured Employer's Fund did not challenge the ruling that Mr. Pal testified at the hearing when, in fact, they objected to any additional evidence whatsoever being allowed in this case, based upon the prior interlocutory Circuit Court Order, which was error as a matter of law.

FIFTH: The Full Commission erred in finding as a fact and concluding as a matter of law that the testimony at the hearing and/or affidavit both supported findings of four (4) or more employees, the error being that no additional evidence should have been allowed by the prior interlocutory Circuit Court Order, which was error as a matter of law.

SIXTH: The Full Commission erred in finding as a fact and concluding as a matter of law, that the Circuit Court found other evidence in the case establishing four (4) or more employees, the error being that the interlocutory Circuit Court Order finding was based upon error as a matter of law, and not supported by substantial evidence.

SEVENTH: The Full Commission erred in finding as a fact and concluding as a matter of law that payment of workers' compensation benefits including out-of-pocket expenses, funeral expenses and death benefits should be made; the error being that the allowing of any additional evidence whatsoever by the interlocutory Order of a Circuit Court Judge was error as a matter of law, and there was not substantial evidence to support an award.

WHEREFORE, the Petitioners pray this Honorable Court review the Workers' Compensation Commission's Order filed August 28, 2012, reverse the Order of the Commission, and remand this matter to the Commission for a finding that, as there was

no evidence supporting a finding of four (4) or more employees, the Claimants are not entitled to any benefits whatsoever.

IT IS SO MOVED!

CLAWSON AND STAUBES, LLC

Terri J. Morrill

Terri J. Morrill, Esquire, SC Bar#4091
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
(843) 577-2026

Attorney for the Petitioners

Charleston, South Carolina
September 25 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing pleading has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 25 day of September, 2012.

To: Jarrel L. Wigger
Wigger Law Firm
8086 Rivers Avenue, Ste. A
N. Charleston, SC 29406

John S. Nichols
Bluestein Nichols Thompson Delgado, LLC
PO Box 7965
Columbia, SC 29202

FILED
2012 SEP 27 PM 4:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	W.C.C. FILE NO. 0221897
Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee,	)	2012-CP-10-_____
Appellee/Claimant,	)	**NOTICE OF INTENT TO APPEAL NON-JURY WORKERS' COMPENSATION APPEAL**
v.	)	
Avni Grocers,	)	
Employer,	)	
SC Uninsured Employer's Fund,	)	
Appellant/Carrier	)	

FILED
2012 SEP 27 PM 4:13
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE COURT OF COMMON PLEAS AND JARREL WIGGER, ESQUIRE AND JOHN S. NICHOLS, ATTORNEYS FOR THE APPELLEE/CLAIMANT:

YOU WILL PLEASE TAKE NOTICE, that the Petitioner, the South Carolina Uninsured Employers Fund, by and through their undersigned attorneys does hereby, file this Notice of Intent to Appeal from the Order of the South Carolina Workers' Compensation Commission filed August 28, 2012, upon the grounds as set forth in the Petitioner's Petition for Judicial Review, a copy of which is attached hereto and incorporated herein.

CLAWSON AND STAUBES, LLC

Terri J. Morrill

Terri J. Morrill
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
(843) 577-2026

Attorney for the Petitioners.

Charleston, South Carolina
September 25, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing pleading has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 25 day of September, 2012.

To: Jarrel L. Wigger
Wigger Law Firm
8086 Rivers Avenue, Ste. A
N. Charleston, SC 29406

John S. Nichols
Bluestein Nichols Thompson Delgado, LLC
PO Box 7965
Columbia, SC 29202

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2012 SEP 27 PM 4:13
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Catherine Ford

7. Incident Report	11/14/02
8. Deposition of Rajkumari Puniyani	05/01/03
9. SCWCC: Division of Coverage and Compliance	5/7/03 & 7/17/03
10. Charleston County Court of Common Pleas Order	9/18/07
11. South Carolina Court of Appeals Opinion	6/29/10

EMPLOYER'S/UNINSURED FUND SUBMISSIONS:

APA NO.	Date
9. Letter from Coverage and Compliance	7/17/03
12. Transcript of Record	1/4/06
13. Transcript of Deposition of Dharmendra Chaudhari	4/14/03
14. Memo from Coverage & Compliance	7/15/03

STATEMENT OF THE CASE

The Claimant is the mother of Virendra Punihani. The Claimant alleges that her son and his sister-in-law, Anita Chaudhari, were murdered on November 14, 2002, by a co-worker during the course and scope of their jobs with Avni Grocers. Mrs. Chaudhari's husband brought a separate case on behalf of her beneficiaries.

Avni Grocers and the South Carolina Uninsured Employers Fund (the Fund) denied that the South Carolina Workers' Compensation Act covers Virendra Punihani's death and asserted all defenses available under the Act. Avni Grocers and the Fund denied responsibility for Virendra Puniyani's death. Both parties agree that Claimant's decedent was an employee of Avni Grocers at the time of his death but the Fund maintained Avni Grocers did not have four (4) or more employees and was therefore not subject to the Act.

The case was initially heard on January 4, 2006, and the hearing commissioner found Claimant failed to establish Avni Grocers was subject to the Act. Claimant appealed and the

Appellate Panel affirmed. Claimant filed a petition for judicial review to the Circuit Court, and the Honorable D. Garrison Hill reversed the Commission's decision and remanded the matter to the Commission for proceedings consistent with his Order. The Circuit Court reversed the Commission's decision not to allow the affidavit of Avni's owner, Harendra Pal, into evidence, found that there was credible evidence before the Commission that Avni Grocers regularly employed four (4) or more employees, and ruled the Commission's conclusion on dependency lacked sufficient support in the record or in the findings of fact and was therefore reversed. The Fund appealed the Order to the Court of Appeals. The Court of Appeals found that Judge Hill's Order was not immediately appealable and therefore dismissed the appeal without prejudice. *Chaudhari v. Avni Grocers*, 2010-UP-338 (S.C. Ct. App. Filed June 29, 2010). The Court of Appeals remitted the matter to the Commission to proceed pursuant to Judge Hill's Order.

The case was consolidated with the companion case brought by Mrs. Chaudhari's personal representative. The hearing proceeded before Commissioner Avery Wilkerson on November 29, 2011. Jarrel L. Wigger, Esq. was present for the Claimant and proper notice was given to Avni Grocers and the Fund. Matthew J. Story, Esq. appeared on behalf of the Fund. The Workers' Compensation Commission's File was made part of the record.

Commissioner Wilkerson filed an order on February 16, 2012. The Commissioner concluded that the preponderance of the evidence, including the testimony and evidence received and produced at the hearing as well as the Commissioner's personal observations, supported the following findings of fact:

1. The Decedent sustained a compensable injury by accident resulting in death on November 14, 2002 when he was shot and killed at work;
2. Avni Grocers had four (4) or more employees and was subject to the Act;
3. The Decedent's average weekly wage at the time of his injury was $700.00;
4. The Decedent's compensation rate was $466.90;
5. The Decedent's injuries resulted in death;

6. The Decedent's mother, Rajkumari Puniyani, lived with the Decedent and was dependent upon him for support.

7. Pursuant to the Act, the funds will be paid to Decedent's dependent, Rajkumari Puniyani.

8. That the Uninsured Fund also reimburse Rajkumari Puniyani for any out of pocket expenses associated with the funeral of the Decedent, Virendra Puniyani.

10. That at the time of the first hearing on the merits, the employer was out of the country and unavailable to testify.

As provided by S.C. Code Ann. § 42-17-40, Commissioner Wilkerson stated the following findings and conclusions:

1. That, pursuant to S.C. Code Ann. § 42-1-160, there is sufficient evidence to prove that Decedent suffered a compensable injury by accident arising out of and in the course of his employment on November 14, 2002;

2. That, pursuant to S.C. Code Ann. § 42-1-140, there is sufficient evidence to prove that Avni Grocers was an employer under the South Carolina Workers' Compensation Act;

3. That, pursuant to S.C. Code Ann. § 42-1-150, there is sufficient evidence to prove that there existed an employment relationship between Decedent and Avni Grocers;

4. That, pursuant to S.C. Code Ann. § 42-15-60, the Employer must pay for all causally-related medical care incurred to date associated with Decedent's injury of November 14, 2002;

5. That, pursuant to S.C. Code Ann. § 42-1-40 and 42-9-10, Decedent's compensation rate is $700.00 based on [his] average weekly wage of $466.90;

6. That, pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay $2,500.00 for burial expenses;

7. That, pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay compensation benefits for death. Weekly compensation benefits must be paid to persons wholly dependent in the amount of sixty-six and two thirds (66 2/3) of the decedent's average weekly wages, in this case for the preceding fiscal year, for a period of up to 500 weeks from the date of injury.

8. The case was contested for purposes of determining an attorney fee.

9. That the Employer was out of the country at the time of the first hearing on the merits and unavailable to testify.

Based upon these findings of fact and conclusions of law, Commissioner Wilkerson issued the following order:

1. That the Decedent's injury is compensable;

2. That the Decedent is entitled to all appropriate benefits accordingly under the Act pursuant to § 42-9-10 and § 42-9-290;

3. That the Defendants shall pay for causally related medical treatment and funeral expenses;

4. That the Defendants shall pay to Claimant a lump sum representing the commuted value of 500 weeks of compensation.

5. That the Employer was out of the country and unavailable to testify at the time of the first hearing on the merits.

Within the statutory period, the Fund timely filed an application for Appellate Panel Review, copies of which were furnished to all interested parties. The Fund submitted the following grounds for review:

1. Did the hearing commissioner err in finding as a fact that Claimant's Decedent suffered a compensable injury the error being that there was not substantial evidence in the record to support a finding that the employer regularly employed four (4) or more employees, which is based upon an unappealable interlocutory Circuit Court order improperly allowing the submission of evidence not newly discovered as provided by Regulation 67-707?

2. Did the hearing commissioner err in finding as a fact that the employer regularly employed four (4) or more employees, the error being that this finding was based upon the unappealable interlocutory order of the Circuit Court allowing the submission of evidence, which was not properly newly discovered evidence under Regulation 67-707 of the Workers' Compensation Act?

3. Did the hearing commissioner err in finding as a fact that funds would be paid to a dependent, the error being that there is not proper evidence in the record to support a finding of four (4) or more employees, which was based upon the unappealable interlocutory order of the Circuit Court, which allowed evidence in the record, which was not proper under Regulation 67-707?

4. Did the hearing commissioner err in ordering that the Uninsured Employers Fund should reimburse the dependent for funeral expenses, the error being that there is not substantial evidence in the record to support a finding that the employer regularly employed four (4) or more employees, which was based upon the unappealable interlocutory order of the Circuit Court judge allowing evidence into the record, which was not proper under Regulation 67-707?

5. Did the hearing commissioner err in finding as a fact that, at the time of the first hearing on the merits, the employer was out of the country and unavailable to testify, the error being that this was not evidence introduced at the initial hearing; and any evidence upon this issue was improperly allowed by the unappealable interlocutory order of a Circuit Court judge as newly discovered evidence under Regulation 67-707?

6. Did the hearing commissioner err in concluding as a matter of law that there is sufficient evidence to prove that Avni Grocers was an employer and there was an employment relationship between the Decedent and Avni, the error being that this is an improper standard of evidence and the substantial evidence does not support a finding of four (4) or more employees, which is based upon the unappealable interlocutory order of the Circuit Court allowing evidence not proper under Regulation 67-707?

7. Did the hearing commissioner err in ordering that the Employer must pay for medical care related to the Decedent's death, funeral benefits and death benefits, the error being that there is not substantial evidence in the record to support a finding that the Workers' Compensation Commission had jurisdiction based upon four (4) or more employees, the error being that this is based upon the improper unappealable interlocutory order of the Circuit Court, which allowed evidence not properly allowed under Regulation 67-707?

8. Did the hearing commissioner err in concluding as a matter of law that the Employer was out of the country at the time of the first hearing on the merits and unavailable to testify, the error being that this evidence was not introduced at the first hearing, the parties had ample opportunity to move for a postponement or adjournment of the hearing, and the allowance of evidence was based upon an unappealable interlocutory order of the Circuit Court, which was not proper under Regulation 67-707?

9. Did the hearing commissioner err in ordering that the Claimant is entitled to all benefits under the Act; that the Defendant shall pay for related medical treatment and funeral expenses; and that the defendant shall pay a lump sum, the error being that a finding that there were four (4) or more employees is based upon an unappealable interlocutory order of the Circuit Court, which was improper as a matter of law as it allowed evidence in the record not properly submitted as newly discovered evidence under Regulation 67-707?

10. Did the hearing commissioner err in ordering as a matter of law that the employer was out of the country and unavailable to testify at the time of the first hearing, the error being that this was not submitted into evidence at the time of the first hearing and, further, is based upon the unappealable interlocutory Circuit Court Order which is not improper (sic), as a matter of law, in allowing additional evidence under Regulation 67-707?

Based upon these grounds for review the Fund argued two (2) issues in its Brief to the Appellate Panel:

A. That the Circuit Court judge erred and abused its discretion in reversing the Appellate Panel finding that the Pal Affidavit submitted after the hearing did not constitute after-discovered evidence, so that the hearing commissioner committed error in finding the Commission had jurisdiction over the matter because the Employer employed four (4) or more employees.

B. That the Circuit Court judge erred in reversing the Appellate Panel which had affirmed the Hearing Commissioner's finding that there was not substantial evidence in the record that Avni Grocers regularly employed four (4) or more Employees so as to be subject to the Act, so that it was error for the hearing commissioner in the second hearing to find that there was substantial evidence in the record to support a finding of jurisdiction.[1]

EVIDENCE OF THE CASE

The following testimony relevant to the issues before this Panel was presented to the hearing commissioner:

1. Defendant Harendra Pal by live testimony;
2. Rajkumari Puniyani by deposition;
3. Dharmendra Chaudhari by testimony from the prior hearing;
4. APA Submissions by all parties as noted above.

Claimant's Case in Chief

Mr. Chaudhari's testimony at the prior hearing of January 4, 2006 was admitted without objection. Mr. Chaudhari testified that Defendant's business had two (2) locations; one in Vance, South Carolina, and one in Charleston, South Carolina. Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, "Avni

[1] The Fund framed the issues in its brief to this Appellate Panel to assert error on the part of the Circuit Court in reversing the order emanating from the first hearing in this case and remanding the matter to the Commission. The Commission is bound, however, to follow the mandate in the Circuit Court's order. *See Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission."). Accordingly, inasmuch as the Fund's brief is a challenge to the Hearing Commissioner's rulings in accordance with the Circuit Court's order, this Commission must affirm.

Grocers." 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. Mr. Chaudhari also indicated that one of the stores sold a different type of gas - Citgo. He testified that the Decedent's employer had two locations and employed six (6) employees.

Claimant presented the live testimony of Mr. Pal, who owned Avni Grocers. (Tr. p. 17, ll. 8-10). Avni was a corporation that owned two gas stations/convenience stores at two (2) different locations. (Tr. p. 17, ll. 12-16). Both locations were under "the same corporate umbrella." (Tr. p. 17, ll. 17-19). One store was in Vance, South Carolina and the other store was in North Charleston. (Tr. p. 25, l. 20 - p. 26, l. 17). One store sold Amoco gasoline while the other store sold Citgo. (Tr. p. 26, l. 18 - p. 27, l. 4).

Mr. Pal stated that at various times Avni employed five (5) to seven (7) employees. (Tr. p. 17, ll. 20-23). Mr. Pal identified them as Anita Chaudhari, Virendra Puniyani, "the girl who was involved (Krista McDaniel, who murdered the others)...and there were the other two (2) employees and plus Mr. Dharmendra." (Tr. p. 18, ll. 3-6, 12-14; p. 27, ll. 6-8). He stated there were six (6) employees at Avni at the time of the murders. (Tr. p. 18, ll. 8-9). Both claimants were killed on the job. (Tr. p. 18, ll. 21-23).

On cross-examination, Mr. Pal stated he was "the main person" and the owner of Avni Grocers. (Tr. p. 19, ll. 11-24). There were no other corporate officers. (Tr. p. 19, l. 25 - p. 20, l. 1). Mr. Pal controlled everything for Avni – he wrote checks and received payments; Mr. Pal added that Mr. Chaudhari managed one of the stations. (Tr. p. 20, l. 10 - p. 21, l. 8). Mr. Pal would pay the bills for Avni and "everything that was left over" was his personal income. (Tr. p. 23, ll. 10-15). The company began in August 2002, and the murders occurred in November 2002. (Tr. p. 23, ll. 17-19). Mr. Pal closed the business immediately thereafter. (Tr. p. 23, l. 20).

Mr. Pal testified that Mr. Dharmendra Chaudhari mainly took care of the Vance store and that Mr. Pal "would normally used to go to Vance." (Tr. p. 27, ll. 13-15). At the North Charleston location Mr. Chaudhari, Mr. Puniyani, Krista McDaniel, worked with "two (2) other more - - two (2) girls, working on a part-time basis; I think they used to come and fill the cooler and sometimes come - - used to come and sweep in the job, you know, they were doing." (Tr. p. 27, ll. 16-23; p. 29, ll. 16-21). Mr. Pal did not recall the names of the other two employees because "most of the thing was run by Virendra; he was - - he was hiring and he was doing everything. He was like a manager." (Tr. p. 27, l. 25 - p. 28, l. 4). Mr. Pal stated he paid Decedent $2,800.00 per month. (Tr. p. 18, ll. 18-20).

Mr. Chaudhari worked nearly every evening at North Charleston after he left the Vance location. (Tr. p. 28, ll. 6-11). Anita Chaudhari and Virendra Puniyani worked six (6) days a week. (Tr. p. 28, ll. 12-15; p. 30, ll. 10-14). McDaniel was part-time and worked between 20-22 hours. (Tr. p. 28, ll. 17-19).

The Hearing Commissioner informed Mr. Pal that he had the right to have counsel present, but Mr. Pal declined. (Tr. p. 21, l. 24 - p. 22, l. 17).

Mr. Pal stated he moved to Pineville, North Carolina in 2003. (Tr. p. 32, ll. 23-24; p. 34, ll. 16-18). At the time of the hearing in 2006, Mr. Pal was out of the country. (Tr. p. 35, ll. 2-7, 18-21). He returned to South Carolina in 2006 to provide the affidavit for the first hearing. (Tr. p. 33, ll. 9-19).

FINDINGS OF FACT

Pursuant to Sections 42-3-20(C) and 42-17-50 of the South Carolina Code of Laws, the Appellate Panel finds the following facts based upon the preponderance of the evidence, the parties' stipulations, the testimony before the hearing commissioner, and the APA submissions:

1. The Commission has jurisdiction to hear the matters presented;
2. Decedent has an average weekly wage of $700.00 resulting in a compensation rate of $466.90[1];
3. Decedent suffered admitted injuries resulting in his death on November 14, 2002;
4. Avni Grocers had four (4) or more employees and was subject to the Act (Tr. p. 17, 18, 27, 28);
5. Decedent was living with his mother, Claimant Rajkumari Puniyani, at the time of his death and she was dependent upon him for support. (Rajkumari Puniyani deposition p. 3, l. 25 – p. p. 4, l. 4; p. 5, ll. 2-18; p. 6, ll. 10-12, 21-25; Dharmendra Chaudhari deposition testimony p. 7, ll. 7-13; p. 7, l. 22 – p. 8, l. 2; Tr. 1/4/06, p. 8, l. 5 – p. 9, l. 9; p. 9, ll. 22-25; p. 11, ll. 21-23; Tr. 11/29/11, p. 8, ll. 7-22; p. 10, ll. 9-14);
6. Pursuant to the Act, the funds will be paid to Claimant Rajkumari Puniyani, who is Decedent's sole dependent;
7. The Fund shall also reimburse Rajkumari Puniyani for any out of pocket expenses associated with the Decedent's funeral as permitted by the Act;
8. At the time of the first hearing on the merits the employer, Mr. Pal, was out of the country and was unavailable to testify. (Tr. 11/29/11, p. 35).
9. Mr. Pal returned to the United States and provided an affidavit which established Avni employed four (4) or more employees, but the first Appellate Panel rejected the evidence. The circuit court ruled that the Commission should have admitted Mr. Pal's affidavit in the prior appeal, and that ruling is binding upon the Commission. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been

[1] The hearing commissioner found "Claimant's compensation rate is $700.00 based on [his] average weekly wage of $446.90." (Order, p. 5, Conclusion of Law No. 5). This was an obvious scrivener's error as the average weekly wage was in fact $700.00, and the compensation rate was $466.90. Section 42-9-290. Although neither the Fund nor the Employer challenged this finding in the hearing commissioner's order, this Appellate Panel is the ultimate finder of the facts in a workers' compensation case. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As such, this Panel has the authority to reconsider the evidence and amend the award. Section 42-17-50. Accordingly, we make this correction under this authority.

appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission.").

10. Claimant also called Mr. Pal to testify at the hearing, and he was subject to cross-examination by the Fund. The Fund objected to the testimony (Tr. p. 12, ll. 16-22) but the hearing commissioner overruled the objection and permitted Mr. Pal to testify. The Fund did not raise any challenge before this Appellate Panel to the hearing commissioner's ruling permitting Mr. Pal to testify.
11. Mr. Pal's testimony at the hearing establishes that Avni Grocer's employed four (4) or more employees.
12. Even without Mr. Pal's live testimony, Mr. Pal's affidavit which the hearing commissioner admitted pursuant to the circuit court's order establishes that Avni Grocers employed four (4) or more employees.
13. Even without Mr. Pal's live testimony or his affidavit, Mr. Chaudhari's uncontradicted testimony establishes that Avni Grocers employed four (4) or more employees.
14. Lastly, even without Mr. Pal's live testimony or his affidavit, or this Panel's own review of the other evidence in the record, the circuit court found that other evidence in the record established that Avni Grocers employed four (4) or more employees, and that finding is binding upon the Commission. *Bobo v. Marshane Corp.*

CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. § 42-17-50, it is the determination and conclusions of this Commission that:

1. Pursuant to S.C. Code Ann. § 42-1-160, sufficient evidence establishes that Decedent suffered a compensable injury by accident arising out of and in the course of his employment on November 14, 2002;

2. Pursuant to S.C. Code Ann. § 42-1-140, sufficient evidence establishes that Avni Grocers was an employer for purposes of the Act;
3. Pursuant to S.C. Code Ann. § 42-1-150, sufficient evidence establishes an employment relationship between Decedent and Avni Grocers;
4. Pursuant to S.C. Code Ann. § 42-1-360(2), sufficient evidence establishes that Avni Grocers employed four (4) or more employees during all relevant time periods so as to be subject to the Act;
5. Pursuant to S.C. Code Ann. § 42-1-40 and S.C. Code Ann. § 42-9-290, Decedent's compensation rate is $466.90 based upon an average weekly wage of $700.00;
6. Pursuant to S.C. Code Ann. § 42-9-290, the Employer must pay burial expenses in the amount of $2,500.00;
7. Pursuant to S.C. Code Ann. § 42-9-290 and § 42-17-60, the Employer must pay compensation for a period of five hundred (500) weeks from the date of injury, which was November 14, 2002, together with interest as permitted by law;
8. This case was contested for purposes of determining an attorney fee. See 25A S.C. Regs. 67-1205(C) (3).
9. The Employer, Mr. Pal, was out of the country at the time of the first hearing on the merits and was unavailable to testify. 25A S.C. Code Ann. Regs. 67-707.
10. The hearing commissioner properly considered Mr. Pal's affidavit pursuant to the circuit court's mandate.
11. The hearing commissioner's consideration of Mr. Pal's live testimony is unchallenged before this Appellate Panel and is therefore affirmed.

Accordingly, the hearing commissioner's decision is

AFFIRMED IN FULL.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

BY: _____
Derrick L. Williams
Commissioner

CONCUR: _____
T. Scott Beck
Commissioner

CONCUR: _____
Gene McCaskill
Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 28 day of August, 2012.

By Valerie D Butler

Administrative Assistant to the Commissioner

Jamel L. Wigger
Avni Grocers/Fast Point Amoco (reg & cert)
Terri J. Morrill

AMENDED

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 29 day of August, 2012

By Valerie D Butler

Administrative Assistant to the Commissioner

Terri J. Morrill
Jamel L. Wigger
John S. Nichols
Avni Grocers/Fast Point Amoco (Reg & cert)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No.: 2012-CP-10-6357

Virendra Puniyani, Deceased Employee, and
Rajkumari Puniyani. . . . . Claimant/Respondent

v.

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

and

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

NOTICE OF APPEAL

The South Carolina Uninsured Employer's Fund appeals the judgement of the Honorable J. C. Nicholson, Jr. dated January 9, 2013. Appellant received written notice of entry of this judgment on January 16, 2013.

February 5, 2013

Terri J. Morrill
Clawson & Staubes, LLC
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Charleston, South 29492-8144
(843) 577-2026
Attorneys for SCUEF/Appellant

Other Counsel of Record:

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North Charleston, SC 29406
Attorney for Appellant

John S. Nichols, Esquire
Bluestein & Nichols, LLC
P.O. Box 7965
Columbia, SC 29202

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-6357

Puniyani
PLAINTIFF(S)

Avni Grocers
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41, SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Appeal is Denied

FILED
2013 JAN -9 PM 4:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2117
Judge Code

1/9/13
Date

For Clerk of Court Office Use Only

SCRCP Form 4C (10/2011)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Please

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

Case No.: 2012-CP-10-6357

Virendra Puniyani, Deceased Employee, and
Rajkumari Puniyani. . . . . Claimant/Respondent

v.

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

and

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

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Rajkumari Puniyani, Claimant/Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 5, 2013, addressed to the attorneys of record, Jarrel S. Wigger, 8086 Rivers Avenue, Suite A, North Charleston, SC 29406 and John S. Nichols, P.O. Box 7965, Columbia, SC 29202.

February 5, 2013

Terri J. Morrill

Terri J. Morrill
Clawson & Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, South 29492-8144
(843) 577-2026

Attorneys for SCUEF/Appellant

BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

VIRENDRA PUNIYANI (Deceased), Employee, Claimant, vs. ANVI GROCERS/FAST POINT AMOCO, Employer, and NONE OR UNKNOWN, Carrier, Defendants,	COPY TRANSCRIPT OF RECORD WCC NO. 0221897

Hearing held on January 4, 2006, in Charleston, South Carolina, before COMMISSIONER DAVID W. HUFFSTETLER.

APPEARANCES

FOR THE CLAIMANT:
JARRELL L. WIGGER, ESQUIRE
J. DAVID MURRELL, ESQUIRE
DAVIDSON, BENNETT& WIGGER
8086 Rivers Avenue
North Charleston, South Carolina 29406

FOR THE DEFENDANTS:
UNINSURED EMPLOYERS' FUND
TERRI MORRILL LYNCH, ESQUIRE
THE LYNCH LAW FIRM
1470 Ben Sawyer Boulevard, Suite 10
Mt. Pleasant, South Carolina 29464

PURPOSE

To determine the issues as set forth on Forms 52 and 53.

* * * * * * * * * * * * * * * * * *

*THIS IS AN OFFICIAL TRANSCRIPT GOVERNED BY 25A S.C. CODE ANN. REGS 67-615D (SUPP. 2000). THE UNAUTHORIZED COPYING OF THIS DOCUMENT IS DEEMED TO BE CONVERSION OF AN ASSET BELONGING TO THE COURT REPORTER.

KELLIE C. LINDLER, CERTIFIED COURT REPORTER
242 Catawba Trail
Lexington, South Carolina 29072

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KELLIE C. LINDLER, CERTIFIED COURT REPORTER
242 Catawba Trail
Lexington, South Carolina 29072

PROCEEDINGS

THE COURT: THIS IS WORKERS' COMPENSATION FILE NUMBER 0221897, THE CASE OF THE CLAIMANT, VIRENDRA PUNIYANI, WHO IS DECEASED, VERSUS THE EMPLOYER, AVNI GROCERS. THERE IS NO INSURANCE CARRIER. THE CASE IS BROUGHT ON BEHALF OF RAJKUMARI PUNIYANI, WHO IS REPRESENTED BY ATTORNEYS JARRELL L. WIGGER AND J. DAVID MURRELL. THE UNINSURED EMPLOYERS' FUND IS REPRESENTED BY ATTORNEY TERRI MORRILL LYNCH. THE CASE IS SET TO CONSIDER ISSUES OUTLINED IN FORM 52. THE CLAIMANT CITES AN AVERAGE WEEKLY WAGE OF $700, WITH A COMPENSATION RATE OF $466.69. THE DATE OF ACCIDENT IS NOVEMBER 14, 2002. ARE THERE ANY OBJECTIONS TO THOSE ITEMS, JURISDICTION, VENUE OR ANY OF THE APA SUBMISSIONS?

MR. MURRELL: NO OBJECTION FROM THE CLAIMANT.

MS. LYNCH: COMMISSIONER, ON BEHALF OF THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND, THERE IS OBJECTION TO BOTH JURISDICTION AND VENUE FOR SEVERAL REASONS. FIRSTLY, THE UNINSURED EMPLOYERS' FUND ASSERTS THAT IT DID NOT RECEIVE THE FORM 52 REQUESTING A HEARING IN THIS MATTER; SECONDLY, THE UNINSURED EMPLOYERS' FUND ASSERTS THAT IT DID NOT HAVE TIMELY NOTICE CONSTITUTING 30 DAYS OR MORE OF A HEARING AND IN FACT, THAT THEY DID NOT RECEIVE NOTICE OF A HEARING IN THIS MATTER UNTIL DECEMBER 28TH, 2005 THEY HAVE SENT ME WHAT LIMITED INFORMATION THEY COULD FAX TO ME TODAY FOR PURPOSES OF APPEARING AT THE HEARING TO OBJECT TO THE HEARING GOING FORWARD. ADDITIONALLY, COMMISSIONER, THE MOVING PARTY IN THIS CASE, VIRENDRA IS NOT HERE AND IS NOT PRESENT AS FAR AS I KNOW THERE HAS BEEN NO MOTION TO ALLOW THIS HEARING TO GO FORWARD UPON A DEPOSITION RATHER THAN

THE PARTY BEING PRESENT. WE WOULD ASSERT THAT THERE IS NO INTERESTED PARTY HERE AND THIS MATTER SHOULD NOT GO FORWARD ON THAT BASIS.

THE COURT: DO YOU HAVE A RESPONSE?

MR. MURRELL: OUR RESPONSE, COMMISSIONER, IS THAT THE MOVING PARTY IS RAJKUMARI PUNIYANI, THAT IS THE MOTHER OF VIRENDRA PUNIYANI, WHO IS DECEASED. SHE---

MS. LYNCH: I HAD IT BACKWARDS, LET ME – I HAD THAT BACKWARDS.

MR. MURRELL: THAT'S ALL RIGHT, AND THAT SHE HAS BEEN DEPOSED BY BROOKS SHEALY, THE ATTORNEY FOR THE UNINSURED FUND. THE UNINSURED FUND HAD PLENTY OF NOTICE REGARDING THE HEARING, THEY ARE CITED AS BEING GIVEN NOTICE OF THE HEARING BY THE COMMISSION, WE HAVE FORWARDED INFORMATION TO THEIR ATTORNEY AT THE TIME AND PROVIDED THEM WITH OUR APA AND FORM 58 AND MS. PUNIYANI'S SON IS HERE TODAY, DHARMENDRA, AND HE IS GOING TO PROVIDE TESTIMONY AS TO WHY SHE IS UNAVAILABLE AND HER DEPOSITION THAT W AS TAKEN ON MAY THE 1ST OF 2003 AND ATTENDED BY THE ATTORNEY FOR THE UNINSURED FUND IS MADE A PART OF OUR APA AND AGAIN, NOTICE OF THAT DEPOSITION WAS SENT TO THE UNINSURED EMPLOYERS' FUND WHEREIN WE INDICATED THAT THE PURPOSE OF THE DEPOSITION FOR WAS USE AT TRIAL WHEN IT WAS ORIGINALLY NOTICED AND ATTENDED BY BROOKS SHEALY, ATTORNEY FOR THE UNINSURED FUND, SO OUR POSITION IS THAT THE UNINSURED FUND HAS HAD AMPLE NOTICE OF THIS CASE AND THE ISSUES SURROUNDING IT AND THAT HER HEARING – THE HEARING FOR VIRENDRA WAS GOING TO PROCEED WITH THE DEPOSITION TESTIMONY OF THE MOTHER.

THE COURT: I AM GOING TO OVERRULE THE OBJECTION AND GO FORWARD WITH THE HEARING. THE FILE DOES INDICATE A FORM – THERE IS A CERTIFICATE OF SERVICE INDICATING A FORM 52 WAS FILED ON THE FUND AND THE HEARING NOTICE APPEARS TO HAVE BEEN SENT ACCORDING TO THE FILE.

WITHOUT OBJECTION, THE COMMISSION FILE BECOMES A PART OF THE RECORD WITH THE EXCEPTION OF SELF-SERVING DECLARATIONS AND UNSTIPULATED MEDICAL REPORTS. IT IS MY UNDERSTANDING FROM A DISCUSSION WITH THE PARTIES AT OUR PRE-HEARING CONFERENCE, THAT THE UNINSURED EMPLOYERS' FUND AGREES TO THE BENEFITS BEING SOUGHT, IF THE FUND IS RESPONSIBLE FOR PAYMENT OF THOSE, HOWEVER THEY TAKE THE POSITION THE EMPLOYER WAS NOT SUBJECT TO THE ACT AND THEY ALSO HAVE THE OBJECTION THAT WE NOTED EARLIER AS TO WHETHER THE HEARING SHOULD EVEN GO FORWARD; IS THAT CORRECT?

MS. LYNCH: THAT'S CORRECT, COMMISSIONER, IN ADDITION TO WHICH THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND WOULD SUBMIT THAT IT APPEARS THERE MAY BE AN ADDITIONAL PARTY WHO IS NECESSARY TO THIS MATTER, THAT BEING AMOCO, WHO IS SPECIFICALLY LISTED AS THE EMPLOYER IN THE HEADING "AVNI GROCERS/FAST POINT AMOCO", THERE IS NO NOTICE TO AMOCO, NOR HAVE THEY EVIDENTLY BEEN MADE A PARTY TO THIS CLAIM, WE BELIEVE THAT THEY MAY BE A NECESSARY AND ESSENTIAL PARTY TO THIS CASE. ADDITIONALLY, WE OBJECT TO THE HANDWRITTEN PURPORTED DEPENDENCY INVESTIGATION AND WOULD ASSERT THAT THAT IS NOT A COMPLETE AND THOROUGH DEPENDENCY INVESTIGATION AS IS NECESSARY UNDER THE WORKERS' COMPENSATION ACT AND AGAIN, WOULD POINT OUT THAT THERE IS NO INDICATION BY WHOM THAT WAS COMPLETED, WHEN IT WAS

COMPLETED AND NOTHING TO CONFIRM THE TRUTH AND VORACITY OF EVEN THE LIMITED INFORMATION THAT IT CONTAINS.

MR. MURRELL: THIS IS A COPY OF THE DEPENDENCY INVESTIGATION FOR VIRENDRA, YOUR HONOR..

THE COURT: I AM GOING TO OVERRULE THE OBJECTION CONCERNING THE ADMISSION OF THE DEPENDENCY INVESTIGATION, I WOULD NOTE THAT I BELIEVE THAT OBJECTION GOES MORE TO THE WEIGHT OF THE EVIDENCE THAN TO ITS ADMISSIBILITY, BUT I WILL BEAR YOUR OBJECTION IN MIND WHEN I WEIGH THE VALUE OF THE EVIDENCE AND THE FINDINGS OF FACT. SO AGAIN, IF YOU WILL BEAR WITH US FOR A MOMENT, WE WILL MARK IT AS A CLAIMANT'S EXHIBIT.

MS. LYNCH: WOULD THAT BE NUMBER 10, DAVID?

MR. MURRELL: THAT'S CORRECT.

MS. LYNCH: OKAY.

MR. MURRELL: COMMISSIONER, I WOULD ALSO—

THE COURT: WAIT, WE CAN ONLY DO ONE THING AT A TIME.

MR. MURRELL: SURE.

DO YOU HAVE THE---

MS. LYNCH: I DON'T HAVE ANYTHING – OH, NO, I HAVE YOUR APA'S AND THE HEARING NOTICE.

(WHEREUPON, CLAIMANT'S EXHIBIT NO. 10 WAS ADMITTED INTO EVIDENCE)

THE COURT: WE HAVE MARKED THE DEPENDENCY INVESTIGATION EXHIBIT 10, IT APPEARS TO BE SEVEN PAGES LONG.

SIR, WOULD YOU RAISE YOUR RIGHT HAND, PLEASE—

MR. MURRELL: EXCUSE ME, COMMISSIONER, I HAVE AN

ADDITIONAL EXHIBIT THAT WE WOULD LIKE TO MARK AS PART OF THE RECORD. THIS IS A LETTER THAT WE SENT TO THE UNINSURED EMPLOYERS' FUND ON APRIL THE 21ST, 2003, NOTIFYING THEM THAT WE WERE TAKING THE DE BENE ESSE DEPOSITION OF RAJKUMARI PUNIYANI FOR USE AT TRIAL RELATED TO THE HEARING OF VIRENDRA AND I WOULD ALLOW MS. LYNCH TO TAKE A LOOK AT THAT.

MS. LYNCH: I THINK, COMMISSIONER, OUR OBJECTION WOULD BE THIS WOULD BE PROOF ONLY THAT A DEPOSITION WAS TAKEN, NOT PROOF THAT THE UNINSURED EMPLOYERS' FUND AGAIN RECEIVED NOTICE EITHER OF A FILING OF A FORM 52 REQUESTING A HEARING OR NOTICE OF THE HEARING AND ADDITIONALLY, THIS DOES NOT INDICATE IN ANY WAY, SHAPE OR FORM THAT THAT INDIVIDUAL WOULD BE UNAVAILABLE AT THE HEARING IN WHICH SHE IS THE CLAIMANT AND THE NECESSARY PARTY.

THE COURT: OKAY, AGAIN, I AM GOING TO ALLOW IT INTO THE RECORD AND BEAR YOUR OBJECTION IN MIND CONCERNING THE VALUE OF THE EVIDENCE. WE WILL MAKE THAT EXHIBIT 11.

(WHEREUPON, CLAIMANT'S EXHIBIT NO. 11 WAS ADMITTED INTO EVIDENCE)

ALL RIGHT, SIR, WOULD YOU RAISE YOUR RIGHT HAND, PLEASE?

WHEREUPON,

DHARMENDRA CHAUDHARI,

HAVING BEEN FIRST DULY SWORN, DID DEPOSE AND TESTIFY AS FOLLOWS:

THE COURT: THANK YOU, IF YOU WOULD STATE YOUR FULL NAME, PLEASE?

THE WITNESS: DHARMENDRA CHAUDHARI.

THE COURT: THANK YOU.

GO AHEAD, SIR.

MR. MURRELL: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. MURRELL:

Q MR. CHAUDHARI, CAN YOU TELL US WHAT YOUR RELATIONSHIP IS TO VIRENDRA PUNIYANI?

A HE WAS MY YOUNGER BROTHER.

Q OKAY, YOU CAN PUT YOUR HAND DOWN, THAT'S OKAY. AND WHAT IS YOUR RELATIONSHIP TO RAJKUMARI PUNIYANI?

A SHE IS MY MOTHER.

Q OKAY, WHERE WAS MR. PUNIYANI WORKING IN NOVEMBER OF 2002?

A AVNI GROCERS.

Q OKAY, WHEN DID HE START WORKING THERE?

A JULY 25TH, 2002.

Q 2002? OKAY, AND WHAT WAS HIS JOB TITLE?

A MANAGER, CASHIER, COUNTER ATTENDANT.

Q AND HOW MANY DAYS A WEEK DID HE WORK?

A ALL SEVEN.

Q AND HOW MUCH DID HE MAKE WORKING FOR AVNI GROCERS?

A SEVEN HUNDRED PER WEEK.

Q WAS YOUR BROTHER, MR. PUNIYANI MARRIED?

A NO.

Q DID HE HAVE ANY CHILDREN?

A NO.

Q DID HE PROVIDE SUPPORT TO ANYONE?

A MOTHER.
Q OKAY, AND IS THAT RAJKUMARI PUNIYANI?
A RIGHT.
Q WHERE WAS SHE LIVING IN NOVEMBER OF 2002?
A IN THE SAME APARTMENT.
Q AS WHO?
A WITH MY BROTHER AND ME, ALL TOGETHER.
Q ALL RIGHT, AND SHE LIVED WITH VIRENDRA?
A YES.
Q OKAY, WHEN DID VIRENDRA COME TO THE UNITED STATES?
A JANUARY 14, 2002.
Q OKAY, WAS HE PLANNING TO LIVE HERE PERMANENTLY AT THAT TIME?
A YES, HE HAD APPLIED FOR A BUSINESS VISA TOO.
Q OKAY, WHERE DOES YOUR MOTHER LIVE NOW?
A WITH ME.
Q IS YOUR FATHER STILL ALIVE?
A NO.
Q OKAY, WAS HE ALIVE BACK IN NOVEMBER OF 2002?
A NO, HE DIED IN 1997.
Q HAD YOUR BROTHER EVER BEEN MARRIED?
A NO.
Q DURING THE TIME THAT YOUR MOTHER, RAJKUMARI, LIVED WITH YOUR BROTHER, VIRENDRA, DID HE PROVIDE SUPPORT TO HER THAT WHOLE TIME?
A YES.

Q WHY IS YOUR MOTHER NOT HERE TODAY?

A SHE'S SICK, SHE CANNOT TRAVEL. SHE HAD HEART SURGERY LAST YEAR, SHE WAS IN THE HOSPITAL FOR THREE MONTHS, SO NOW SHE CANNOT TRAVEL.

Q WHAT SORT OF ILLNESS DOES SHE HAVE?

A HUH?

Q WHAT SORT OF ILLNESS DOES SHE HAVE?

A I'M NOT GETTING YOU, CAN YOU REPEAT?

Q YOU SAID SHE WAS SICK, WHAT'S WRONG?

A YES, SHE HAD A HEART ATTACK—

Q HEART ATTACK?

A HEART SURGERY, OPEN HEART SURGERY.

MR. MURRELL: OKAY, THOSE ARE ALL THE QUESTIONS THAT I HAVE AT THIS TIME, COMMISSIONER.

THE COURT: MS. LYNCH?

MS. LYNCH: THANK YOU, COMMISSIONER.

CROSS-EXAMINATION

BY MS. LYNCH:

Q MR. CHAUDHARI, EXCUSE ME FOR THE PRONUNCIATION, I AM GOING TO ASK SOME QUESTIONS THAT MAY BE SENSITIVE, THEY ARE NOT MEANT TO OFFEND YOU, BUT THEY ARE NECESSARY UNDER THE LAW. FIRST OF ALL, DO YOU KNOW OF YOUR BROTHER HAVING ANY CHILDREN OR ANY RUMORS OF HIM HAVING CHILDREN?

A NO.

Q AND I BELIEVE YOU TESTIFIED THAT HE HAD NEVER BEEN MARRIED?

A YES.
Q DID HE HAVE A GIRLFRIEND AT THE TIME OF HIS DEATH?
A NO.
Q NOW, IN THE CASE INVOLVING YOUR WIFE, YOU HAD INDICATED THAT YOU DID NOT WORK AT THE SAME LOCATION AS YOUR BROTHER; IS THAT CORRECT?
A YES.
Q AND THERE WERE ONLY THREE PEOPLE AT THE LOCATION WHERE HE WORKED; IS THAT CORRECT?
A YES.
Q HE WAS PAID IN CASH?
A YES.
Q YOU WERE NOT THE PERSON WHO PAID HIM?
A NO.
Q AND HOW IS IT THAT YOU KNOW WHAT HE MADE?
A IT WAS THE SAME FAMILY, WE WERE LIVING IN THE SAME APARTMENT.
Q OKAY, THAT WAS MY NEXT QUESTION ACTUALLY, SO WHEN YOU SAY YOU WERE LIVING IN THE SAME APARTMENT, YOU, YOUR WIFE AND DAUGHTERS LIVED WITH YOUR BROTHER AND MOTHER?
A YES.
Q SO AS FAR AS YOUR MOTHER'S SUPPORT, DID YOU ALSO CONTRIBUTE TO HER SUPPORT?
A NOW, BUT BEFORE IT WAS MY BROTHER.
Q OKAY, WELL, DID YOU SPLIT THE RENT WITH YOUR BROTHER WHEN YOU WERE ALL LIVING TOGETHER?

A YES, LIKE THE RENT, IT WAS PAID BY MY WIFE, ALL OF THE EXPENSES WAS PAID BY HIM.

Q SO HIS CONTRIBUTION TO THE FAMILY AT THAT TIME WOULD HAVE BEEN EXPENSES IN ADDITION TO RENT ONLY?

A YES.

Q OKAY, AND AS I ASKED YOU EARLIER, THIS IS A DIFFERENT CASE, WERE YOU AWARE OF THE OWNERSHIP PAPERS OF AVNI GROCERS AT EITHER LOCATION? HAD YOU EVER SEEN ANY PAPERS INDICATING---

A NO.

Q —OWNERSHIP?

A NO.

Q OKAY, DO YOU KNOW THE RELATIONSHIP THAT EXISTED BETWEEN AVNI GROCERS AND AMOCO?

A AVNI GROCERS IS BUYING FROM THE – ANY WHOLESALERS WHO IS SELLING THE AMOCO GAS BRAND.

Q OKAY, YOU SAID THEY ARE BUYING FROM WHO SOLD THE GASOLINE?

A YES, AMOCO BRAND, MOST OF THE WHOLESALERS THEY HAVE ALL THE BRANDS.

Q OKAY, AND ISN'T IT TRUE THAT THEY ALSO – AVNI GROCERS ALSO TOOK AMOCO CREDIT CARDS?

A YES, AT ONE LOCATION, IT WAS AMOCO, ANOTHER LOCATION WAS CITGO.

Q OKAY, WAS THE LOCATION WHERE YOUR BROTHER WORKED AMOCO?

A THAT WAS AMOCO AND THE VANCE LOCATION WAS CITGO.

Q WHERE YOU WORKED WAS A DIFFERENT---

A YES.

Q —GAS COMPANY?

A THAT WAS – YES.

Q OKAY, IF YOU ARE NOT AWARE OF THAT RELATIONSHIP, DO YOU KNOW WHETHER AMOCO GOT ANY PERCENTAGE OF PROFITS OF THE GAS IT SOLD?

MR. MURRELL: OBJECTION.

THE WITNESS: I DON'T KNOW.

THE COURT: WHAT'S YOUR OBJECTION?

MR. MURRELL: HE IS NOT QUALIFIED TO ANSWER THE QUESTION, HE HAS ALREADY INDICATED HE DOESN'T KNOW.

MS. LYNCH: AND I THINK HIS ANSWER WAS "I DON'T KNOW."

MR. MURRELL: YES.

THE COURT: OKAY, HE DOESN'T KNOW.

BY MS. LYNCH:

Q DO YOU HAVE ANY WRITTEN DOCUMENTATION OF WHAT YOUR BROTHER EARNED WITH AVNI?

A NO.

Q AND I APOLOGIZE, I MAY HAVE ALREADY ASKED THIS, I DIDN'T CHECK IT OFF, DID HE PAY TAXES?

A NO.

Q DO YOU HAVE ANY DOCUMENTATION WITH YOU OF YOUR MOTHER'S INABILITY TO TRAVEL?

A I CAN BRING IT, BUT I DON'T HAVE IT NOW WITH ME.

Q NOT WITH YOU? OKAY, AND WHO IS WATCHING YOUR DAUGHTERS

TODAY?

A I HAVE MY AUNTIE AT HOME.

Q AN AUNTIE?

A YES.

Q WAS SHE LIVING WITH YOU AT THE TIME OF THIS INCIDENT?

A NO.

Q SO SHE HAS SINCE MOVED TO THE UNITED STATES?

A NO, SHE WAS LIVING IN CHICAGO, NOW SHE IS LIVING WITH US.

MS. LYNCH: OKAY, THAT'S ALL I HAVE, COMMISSIONER.

REDIRECT EXAMINATION

BY MR. MURRELL:

Q MR. CHAUDHARI, AT YOUR JOB LOCATION AT VANCE, DID YOU ALL ACCEPT ALL TYPES OF CREDIT CARDS FOR PAYMENTS FOR GAS AND GROCERIES?

A YES, MOST OF THE GAS STATIONS ACCEPT ALL TYPE OF CARDS.

Q AND AT THE OTHER LOCATION WHERE VIRENDRA PUNIYANI WORKED, DID THEY ACCEPT ALL TYPES OF CREDIT CARDS THERE?

A YES, SAME WAY.

MR. MURRELL: OKAY, THOSE ARE ALL THE QUESTIONS I HAVE, COMMISSIONER.

MS. LYNCH: NOTHING FURTHER, COMMISSIONER.

THE COURT: IF THERE'S NOTHING ELSE, THAT CONCLUDES THE HEARING.

(WHEREUPON, THE HEARING WAS CONCLUDED)

***REPORTED BY STYLET MORRIS, TRANSCRIBED BY KELLIE LINDLER

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA

SS:

COUNTY OF LEXINGTON

I, KELLIE C. LINDLER, CERTIFIED COURT REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE, DO HEREBY CERTIFY THAT THE ABOVE-ENTITLED CAUSE WAS HEARD AS HEREINAFTER SET OUT; THAT I WAS AUTHORIZED TO AND DID TRANSCRIBE THE SAID PROCEEDING AND EVIDENCE ADDUCED AND OFFERED IN THE SAID PROCEEDINGS, AND THAT THE FOREGOING AND ANNEXED PAGES, NUMBERED 1 THROUGH 14, INCLUSIVE, CONSTITUTE A TRUE AND ACCURATE TRANSCRIPTION OF THE SAID CAUSE TAKEN DURING THE SAID HEARING.

IN WITNESS WHEREOF, I HAVE HEREUNTO AFFIXED MY SIGNATURE THIS 2ND DAY OF FEBRUARY, 2006.

KELLIE C. LINDLER, CCR
MY COMMISSION EXPIRES 10/22/11

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April 16, 2012

Ms. Terri J. Morrill, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

Dear Ms. Morrill;

Please find enclosed a copy of the transcript ordered of the South Carolina Workers' Compensation Commission Hearing of Anita Chaudhari and Virendra Puniyani versus Avni Grocers, case number 0221896 and 0221897, taken on November 29, 2011, in Summerville. I am also sending the certified and sealed original of the transcript to the officiating Commissioner at the South Carolina Workers' Compensation Commission.

It was a pleasure seeing you at the hearing and working with your office regarding this transcript. Please keep in mind that Palmetto Court Reporting is a full service court reporting agency and we are happy to travel statewide to assist you in your court reporting needs.

Thank you for your business and please call (803) 358-0515 or visit our website at PalmettoCourtReporting.com should you need our services in the future.

Sincerely,
Gigi Davis
Palmetto Court Reporting

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #0221896 and 0221897

ANITA CHAUDHARI AND VIRENDRA PUNIYANI CLAIMANT, VS. AVNI GROCERS/FAST POINT AMOCO EMPLOYER, AND SC UEF CARRIER.	SC WORKERS' COMPENSATION COMMISSION HEARING OF ANITA CHAUDHARI AND VIRENDRA PUNIYANI VS AVNI GROCERS/FAST POINT AMOCO

This is the Transcript of the South Carolina Workers' Compensation Hearing of Anita Chaudhari and Virendra Puniyani versus Avni Grocers/Fast Point Amoco, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 2:56 P.M., Tuesday, November 29, 2011, at Summerville County Services Building, 500 North Main Street, Summerville, South Carolina.

COPY

REPORTED

BY

GLORIA DAVIS

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FOR THE EMPLOYER/CARRIER:
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126 Seven Farms Drive, Suite 200
Charleston, SC 29492

ALSO PRESENT:

Mr. Harendra Ramdatt Pal
Mr. Dharmendra Chaudhari

*Reporter's Note: -- Indicates incomplete thought or sentence, trailing off or interruption by speakers.

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I N D E X

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STIPULATIONS

Commissioner Wilkerson: Today's date -- if I mess any of this up, guys, you all just stop me, okay.

Mr. Wigger: Sure.

Commissioner Wilkerson: Today's date is the 29th day of November, 2011. We're here in reference to Workers' Comp files numbers 0221896 and 0221897. The 896 number is a Claimant, Anita Chaudhari. The file number 897 is -- I'm going to really mess this one up -- Virendra Pununi?

Mr. Wigger: Puniyani.

Commissioner Wilkerson: Puniyani, okay. Representing them on both of these is Jarrel L. Wigger. The Employer is A-V-N-I Grocers/Fast Point Amoco. The Carrier, I think, is the UEF as it was unknown at the time and I think that's where we are in reference to this. I see the South Carolina Second Injury Fund on these cases; is there any -- do we -- this goes back to 2002, and they may have put them on notice, I don't have a clue.

Mr. Wigger: They may have, Commissioner, but I don't --

Commissioner Wilkerson: '01, I'm sorry.

Mr. Wigger: -- know that there would be any

applicability because this wasn't a situation -- this is just --

Commissioner Wilkerson: I don't think so but I just saw them on here; so, I don't know why --

Mr. Story: You know, back in 2002, they might have been together.

Commissioner Wilkerson: -- oh, good point.

Mr. Story: Way back -- way back when they --

Commissioner Wilkerson: That's -- that is a good point.

Mr. Story: -- might have been in one (1) --

Mr. Wigger: Yes, that's true.

Commissioner Wilkerson: Yes, because they are both listed. Okay, very good point, thank you. So, representing the UEF today on both cases is Matt Story. My understanding is on the 896 file the -- the -- twenty-six hundred dollars a month ($2,600.00) applies to the average weekly wage; thus the comp rate would be corresponding to that divided by four (4). Respectfully, on the 897 case twenty-eight hundred dollars ($2,800.00) applies and seven hundred dollars ($700.00), that was already figured, would apply. We're here -- oh, excuse me -- date of accident on both of these is 11/14/2002. We're here to determine the issues

that are set forth on the forms 52 and 53. This is a remand back from the Court of Appeals; is that right?

Mr. Wigger: Yes, sir.

Mr. Story: Yes.

Commissioner Wilkerson: Circuit -- or is it Circuit Court?

Mr. Wigger: No, it's Court of Appeals.

Commissioner Wilkerson: Court of Appeals.

Mr. Story: Court of Appeals.

Commissioner Wilkerson: Court of Appeals. Okay, Court of Appeals and they have asked us to do certain issues that will -- I'm going to have the Claimant's Attorney so note what that is. I'll have the Defense Attorney for the UEF so note any and all objections to that as well. Are there any objections at this point in time to the APAs, jurisdiction, venue or any other items from Mr. Wigger's perspective?

Mr. Wigger: No, sir. And I think earlier I submitted just one (1) set; I'm submitting you the other set --

Commissioner Wilkerson: Oh.

Mr. Wigger: -- so you'll have both sets.

Commissioner Wilkerson: Both sets, one (1) for

each file --

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: -- is that correct? Okay. I'm fine with that. And I believe the indication was they needed two (2) orders on this -- we need one (1) order, respectfully, for each --

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: -- file?

Mr. Story: Yes, sir but we've agreed to hear the testimony --

Commissioner Wilkerson: Hear the testimony --

Mr. Story: -- together.

Commissioner Wilkerson: -- together?

Mr. Story: Yes, sir.

Commissioner Wilkerson: Okay.

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: That's my understanding, okay? I believe there was no objection; is that where I left it?

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: Except we -- and we're going to do the positions in a minute --

Mr. Story: Yes, sir.

Commissioner Wilkerson: -- and then we'll --

we'll get there, okay? And without objection the Commission's file becomes a part of the record with the exception of self-serving declarations and unstipulated medical reports. What I'm going to ask Mr. Wigger to do is put the position on the record for his clients, okay?

Mr. Wigger: Yes, sir. And, Commissioner, the only other thing that comes to mind is we talked the dependency investigation --

Commissioner Wilkerson: Oh, very good point.

Mr. Wigger: -- and that will be submitted; if it has not been submitted in the APAs we'll make sure that gets submitted to the Commission and then --

Commissioner Wilkerson: What I'm going to ask you to do is just submit it to me.

Mr. Wigger: -- yes, sir.

Commissioner Wilkerson: I don't know if it's in here. Just, I think it will be better. Matt, I guess I'll get you to do that.

Mr. Story: Sure.

Commissioner Wilkerson: Is that --

Mr. Story: Yes, sir.

Commissioner Wilkerson: -- and -- and that way I'll have it because it will probably beat me back to Columbia, is my guess, because I won't be back

until sometime late Thursday or Friday.

Mr. Story: I'll do that and I will copy everybody on that, Commissioner.

Commissioner Wilkerson: If you would, copy everybody on that. Thank you, sir. I appreciate that. Mr. Wigger?

Mr. Wigger: Yes, sir. Commissioner, this case involves the murder of two (2) employees for Avni Grocers; they were murdered by a co-worker. And it is our position that that took care of three (3) of the employees and Mr. Dharmendra Chaudhari was also an employee, which makes four (4); there were a couple more employees. Initially, when we first brought this case, Brooks Shealy was representing the UEF and we didn't -- we were under the understanding there was going to be no objection to any jurisdictional issues. Whatever happened Brooks Shealy got off the case and Ms. Lynch came in the case very late, raised those objections at the hearing. We proceeded with the hearing, lost at the hearing, we took it up -- went to Circuit Court. The Circuit Court entered an order outlining and demanding or directing that findings be made consistent with the order at the Circuit Court deeming that there was

compensability. Now, that order was based on an affidavit submitted by the employer, Mr. Pal, and in -- in abundance of caution we are -- we have Mr. Pal here present today to provide testimony to ensure the UEF has the opportunity to cross-examine and ask questions about any employees regarding the jurisdictional issues; whatever they want to ask him and to that extent the record will be supplemented. We've also done some dependency investigation or there has been a dependency investigation; it's been amended and completed, which we will submit and there have been two (2) orders for guardians appointed for the minor children of Anita Chaudhari. We can submit it so the insured situation and the situation is compensable because there are more than four (4) employees. We also submit that Ms. Chaudhari's average weekly wage is based on a salary of twenty-six hundred dollars ($2,600.00) per month and that Mr. Puniyani's average weekly wage and comp rate is based on a salary of twenty-eight hundred dollars ($2,800.00) per month. And it's a death case and it's been, obviously, contested. We're going to have Mr. Chaudhari adopt his prior testimony and other than

that I think we're ready to proceed.

Commissioner Wilkerson: Okay. I've done the figuring real quick while you were doing that. The average weekly wage on the 896 will be six hundred and fifty dollars ($650.00); thus the comp rate would be four thirty-three, thirty-six ($433.36). The comp rate -- excuse me -- the average weekly wage on the 897 case is seven hundred dollars ($700.00); thus the comp rate would be four sixty-six, forty-nine ($466.49). I'll get you all to check those to make sure that I'm correct in reference to that. Mr. Story, tell me the position of your client.

Mr. Story: Yes, sir. Commissioner, this case was originally heard January 4th, 2006, by Commissioner Huffstetler. At that time the only person who testified was Mr. Chaudhari and I believe Ms. Puniyani by deposition that was submitted --

Mr. Wigger: Correct.

Mr. Story: -- originally. After the hearing and after the order of Commissioner Huffstetler finding that there was no proof of four (4) or more employees the Claimant moved to allow additional evidence by a motion dated April the

19th of 2006. With that was an affidavit of Harendra Pal that was dated April 14th, 2006. My understanding is that the Full Commission did not allow that into evidence relying on 67-707, I believe, as not being after acquired evidence and that it was evidence that was available at the time at the original hearing. The case went up to the Circuit Court, was reversed. The -- it was appealed to the Court of Appeals and that was dismissed as an interlocutory appeal. The Circuit Court ordered the case to come back down to you here today. The position of the Uninsured Employer's Fund, number one (1), is that these are two (2) separate cases. The evidence was actually a little bit different in each one of them and we'd ask for those separate orders. We object to the consideration of Mr. Pal's affidavit and his testimony today given the fact that he was available back in 2006, and was not called as a witness. We will be cross-examining him on various issues but we would like to reserve that objection. Also, one of the arguments that has been raised throughout this case was a Coverage and Compliance letter of the Commission. Back around 2006, the Commission stopped having

hearings on Coverage and Compliance issues, Rule to Show Cause hearings, and in fact in this case the Coverage and Compliance Department issued a letter indicating that if a Claimant Attorney wanted to pursue this matter there would have to be a determination of whether there were -- whether the employer was subject to the Act. Back in the day the Commission would have a Rule to Show Cause hearing, they would determine that before we ever came to this type of hearing; they stopped doing that sometime before this. So, that issue was ripe back in 2006 for the hearing. Our position is that the Coverage and Compliance letter itself is a hearsay document; it's the opinion of the Coverage and Compliance Department. It is not evidence in and of itself and that an independent assessment would need to be made. As Mr. Pal is here we assume that he got notice of this hearing.

Mr. Pal: Yes.

Mr. Story: And reserving our objection, we're ready to proceed.

Commissioner Wilkerson: Okay. All right.

Mr. Wigger: I would say a couple of things based on that, Commissioner. There was a Coverage and

Compliance; I went to it. The Employer did not show up and they issued their -- their letter following that just basically saying what they said because since the Employer wasn't present they didn't proceed with the hearing but I was there; it was in Columbia. The other thing is the testimony of Mr. Pal will obviously speak to that anyway. And Ms. Puniyani, who is the mother of Virendra, has a heart issue; that's why we took her deposition. I think we outlined it in the deposition and that's why she isn't present. And then, but from what I understand there is not an objection to us just submitting her deposition again.

Commissioner Wilkerson: No --

Mr. Story: It would just be reaffirmation of previous testimony; I think that's appropriate.

Commissioner Wilkerson: -- do you have her deposition?

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: And it's been -- you have submitted it in your --

Mr. Wigger: It's -- it's one of the exhibits; yes, sir.

Commissioner Wilkerson: -- no, that -- no, I'm

fine with that. I just haven't looked at it all. I was trying to get my notes down on all of this.

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: -- Okay. And that's fine. If it's in there I'm fine with that, okay?

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: Anything else before we -- Mr. Story?

Mr. Story: With respect to the Coverage and Compliance letter, Commissioner, the Coverage -- Garry Smith indicated that cost preclude the Coverage and Compliance Division from serving by publication. They were unable to present our case at a Rule to Show Cause hearing. Garry states, "At 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 case would be just addressed". So, our position is that this letter by the Commission is not -- or by the Coverage and Compliance Department is not a finding on Rule to Show Cause; it is clearly a statement that that issue is still ripe.

Commissioner Wilkerson: Okay. I understand. I understand. That's fine. Okay. Anything else

before we take testimony?

Mr. Wigger: No, sir.

Commissioner Wilkerson: Mr. Pal -- I'm sorry?

Mr. Story: I will be happy to stipulate that Mr. Chaudhari would reaffirm his prior testimony.

Commissioner Wilkerson: Okay. Good. Thank you.

Mr. Wigger: That's what we were going to stipulate to.

Commissioner Wilkerson: That -- that -- okay, that's fine. And so, the only testimony we'll hear today is Mr. Pal?

Mr. Pal: Yes.

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: Sir, I'm going to get you to raise your right hand. My Court Reporter will swear you in and we'll take some testimony from you, okay? Thank you sir.

Whereupon;

HARENDRA RAMDATT PAL, being duly sworn and cautioned to speak the truth, the whole truth and nothing but the truth, testified as follows:

Court Reporter: Please state your full name for the record.

Commissioner Wilkerson: Your full name?

Court Reporter: State your full name for the

record, sir.

Witness: Harendra Ramdatt Pal.

Court Reporter: Thank you, sir.

DIRECT EXAMINATION

By Mr. Wigger:

Q. Mr. Pal, my name is Jerry Wigger and as you know I represent Dharmendra in the estates of Anita and -- I keep mispronouncing the name -- Virendra. Can you tell me, did you own a business named Avni Grocers?

A. Yes.

Q. What type of company was that?

A. Well, it was a -- it was a corporation and we owned two (2) gas stations and -- and we hired some people -- it was basically a gas station and convenience store.

Q. Okay. And you had two (2) different locations?

A. Yeah.

Q. And were both locations operated under the same corporate umbrella?

A. Yes.

Q. How many employees did you have working for Avni Grocers?

A. I think depending on the -- the time but sometimes five (5), sometimes six (6); it -- it goes up to seven (7).

Q. Okay. And we're talking about the time period immediately before Anita and Virendra were murdered.

Do you know who -- well, first of all, was Virendra -- was Anita working for you at that time?

A. Yeah, Anita was working. Virendra was also working. And the girl who was involved and she was working. And there were the other two (2) employees and plus Mr. Dharmendra.

Q. Okay.

A. I think there were only six (6) employees, yeah, at that time.

Q. Okay. And I know it's been a long time --

A. Yeah.

Q. -- but the girl that shot them she -- the murderer -- she was an employee also?

A. Yeah, she was an employee.

Q. Okay. How much did you pay Anita?

A. Anita I used to pay twenty-six hundred dollars ($2,600.00) a month.

Q. Okay. And how much did you pay Virendra?

A. Virendra I was paying twenty-eight hundred dollars ($2,800.00) a month.

Q. Okay. And were they both on the job the night that they were killed?

A. Yes.

Q. Okay. How did you find out that it had happened?

A. Well, I was out of town but Mr. Dharmendra he called me

-- I was in LA and he called me letting me know this thing had happened and I think after two (2) days I came back and, you know, because I attended the funeral.

Q. Okay. Okay, Mr. Pal, those are the questions I had. I'm sure Mr. Story has some questions for you.

A. Okay.

Commissioner Wilkerson: Mr. Story?

CROSS-EXAMINATION

By Mr. Story:

Q. Mr. Pal, I've got a couple of questions for you. What was -- what's the formal corporate name of the corporation?

A. Avni Grocers.

Q. A-V-N-I --

A. Yeah.

Q. -- Grocers?

A. Yeah, A-V-N-I Grocers.

Q. Incorporated?

A. Yeah, incorporated.

Q. Okay. Who are the officers of that corporation?

A. Well, I was a main -- main person; I was the owner.

Q. So, you are the President of the corporation?

A. Yeah.

Q. Are there any other corporate officers?

A. No.
Q. Did you all regularly keep corporate minutes?
A. Well, I haven't made any minutes or anything.
Q. Okay. You --
A. It was just myself only, you know, I was the only --
Q. -- okay. You were the sole --
A. -- yes.
Q. -- entity of the corporation?
A. Yes.
Q. You controlled it?
A. Yes, I controlled everything.
Q. You were in charge of everything?
A. Everything, yeah.
Q. Did you write the checks?
A. Yeah.
Q. Did you receive the payments?
A. Yeah.
Q. Did you ever have a corporate meeting where you took minutes, discussed the business of the corporation?
A. Well, I -- Virendra was like a Manager and the one (1) gas station I think he was taking care of mainly.
Q. Mr. Chaudhari, who is --
A. Chaudhari, yeah.
Q. -- here with us today?
A. Yeah.

Q. Okay.
A. And Mr. Virendra was mainly taking care of this gas station.
Q. Okay. Well, that's actually running the businesses.
A. Yeah.
Q. I'm talking about the corporation itself.
A. Well, the corporation, since I was alone, you know, so everything I was doing.
Q. Okay.

Commissioner Wilkerson: Let me ask him a quick question; I don't think it's going to matter. But it was incorporated as a C-Corp, S-Corp or what back in 2002?

A. Well, I don't remember now --

Commissioner Wilkerson: That -- that's okay.

A. -- it's been a long time.

Commissioner Wilkerson: But it was a corporation; is that correct?

A. It was a corporation, yeah.

Commissioner Wilkerson: Okay.

Mr. Story: Okay.

Commissioner Wilkerson: So --

A. Corporation for the company.

Commissioner Wilkerson: -- you do have the right to have an Attorney present here today, okay?

A. Yeah.

Commissioner Wilkerson: If you want to have an Attorney present. I think I need to get that on the record as well, okay?

Mr. Story: Yes, sir.

Commissioner Wilkerson: So, do you want to have an Attorney represent your interests as the Grocer -- Avni Grocer, Incorporated?

A. Not at the moment. I don't think I need any.

Commissioner Wilkerson: Okay. Well, I mean, you can speak on behalf of the corporation. So, if you wanted one I would stop but if you don't want one we'll proceed forward.

A. Yeah, that's fine; I think I don't have any problem.

Commissioner Wilkerson: Do you want to proceed forward?

A. Yeah.

Commissioner Wilkerson: Okay. That's fine. I just wanted to get that on the record, okay?

Mr. Story: Thank you, Commissioner.

Commissioner Wilkerson: I'm sorry.

Mr. Story: That's fine.

Commissioner Wilkerson: I'm sorry and I -- I don't know that we need it --

A. Yeah.

Commissioner Wilkerson: -- but just in case.

Q. What I don't understand though, is you conducted the business of the corporation?

A. Yeah.

Q. You told everybody what to do, you told them when to do it --

A. Yeah.

Q. -- and how to do it?

A. That's right.

Q. Okay. All the profits of the corporation went to you?

A. Yes.

Q. And you paid people out and you paid people that you owed but everything that was left over was yours personally?

A. Yes.

Q. Okay. Did you file separate corporate income taxes?

A. Well, I think we hardly ran for a few months and, you know, this thing happened. We started sometime in August and this thing is happening November. Immediately I just closed down the corporation.

Q. Okay. So, did the corporation ever file corporate taxes?

A. Yeah, we filed, you know, normal sales tax and everything we used to file regularly.

Q. Yes, sir. Corporate income taxes?

A. No. But there was no income; yeah, we just made losses. So, final tax, you know, I did it at -- in the end of 2002, and then I close this company.

Q. Okay. So, is it fair to say you were the alter ego of the corporation? What the corporation did, you did; what you did, the corporation did?

A. Yes.

Q. Okay. Do you have any records of your payments to any of your employees?

A. Well, I think I gave everything -- Matt, it was quite a long time and I think I must have given them to Mr. Jerry.

Q. You gave Mr. Wigger documents?

A. Yeah, I think at that time we had whatever the paperwork, you know, I had I gave it to him and then -- then I closed the shop, you know, it has been almost nine (9) years now.

Mr. Story: I guess I'd ask to see those, Commissioner; I've never seen them.

Commissioner Wilkerson: Do you have those? I mean, I --

Mr. Wigger: And to let you know, I think that was the copy of his corporate -- his incorporation documents.

Mr. Story: Right.

Mr. Wigger: I'd be happy to give them to you.

Mr. Story: Sure.

Mr. Wigger: I just -- I don't know. I'll check in my boxes.

Mr. Story: That's okay. No, that's okay.

Q. But the question I've got is, do you -- do you have records of payments where you'd do a payroll, keep track of what you paid somebody?

A. Generally, we had everything at that time --

Q. Okay.

A. -- yeah.

Q. Do you believe that you turned those over to Mr. Wigger or do you believe that they may not be around?

A. Well, I -- I -- I don't remember. It has been a long time. Whatever the -- the documents they asked me I must have given it to him.

Q. Okay. But if you didn't give them to him it's -- you don't have them anymore?

A. I don't think so.

Q. Okay. Tell me the locations of your two (2) stations.

A. Well, the one (1) was in Vence and the other one (1) was on the Hillside Drive of the -- the Charleston one?

Mr. Dharmendra Chaudhari: North Charleston.

A. North Charleston, yeah.

Q. And where was the first one (1) you said?

A. Vence.
Q. Spell that for me.
A. Vence, V-E -- V-E-N-C-E, Vance. It's a small town.
Commissioner Wilkerson: Vance, V-A-N-C-E.
Q. Vance?
A. Oh, Vance.
Commissioner Wilkerson: No, that's okay.
Q. Okay.
Commissioner Wilkerson: I just -- I thought -- okay, Vance, South Carolina.
Mr. Story: Okay. I've got you.
Commissioner Wilkerson: -- I'm fine with that.
Q. And one's in --
Commissioner Wilkerson: I was trying to --
Q. -- North Charleston on Riverside Drive?
Commissioner Wilkerson: -- right.
A. Yeah.
Q. One (1) store sold Amoco gas -- gasoline; is that correct?
A. Yeah.
Q. What did the other one sell?
A. It was Citgo.
Q. Okay. Why did you sell to two (2) different -- why did you have two (2) different gas jobbers?
A. Well, I think the first we started this one and then,

you know, we -- I was offered by one of their -- Mr. Woody, or I think Woody is the name, I don't -- that he wanted to sell that gas station and I thought he wanted me to expand because I had the man power.

Q. Okay. I just want to make sure I understand all the people involved. The girl who had been your employee; was she named Krista McDaniel?

A. Yes.

Q. Okay. You said that there was Anita, there was Virendra and there was Mr. Chaudhari --

A. Yeah.

Q. -- where did each one of them work?

A. Well, Mr. Dharmendra was mainly taking care of Vance.

Q. Okay.

A. And myself also; I would normally used to go to Vance. And here Anita, Virendra, this girl was working and there were two (2) other more -- two (2) girls, working on a part time basis; I think they used to come and fill the cooler and sometimes come -- used to come and sweep in the job, you know, they were doing.

Commissioner Wilkerson: And that's at the North Charleston location?

A. Yeah, it's North Charleston.

Commissioner Wilkerson: Okay.

Q. Okay. Well, tell me this. What are those two (2)

other people's names?

A. I don't remember because most of the thing was run by Virendra; he was -- he was hiring and he was doing everything. He was like a Manager.

Q. Okay. How often did Mr. Chaudhari work?

A. Oh, he used to go almost every evening I think; yeah, every evening. After from Vance, you know, he used to come here. You know, he was staying at -- in Charleston.

Q. Okay. So, he worked six (6), seven (7) days a week?

A. Between six (6) and -- I think, six (6) days week.

Q. Okay. How about Anita?

A. Anita was also seven (7) -- also six (6) days a week.

Q. Okay. And how about Virendra?

A. Virendra, he was working six (6) days a week.

Q. Okay. How about Krista McDaniel; was she part time?

A. She was a part time. So, I don't know, as few as maybe, twenty (20), twenty-two (22) hours. I'm not too sure.

Q. So, she -- so, she didn't work full time?

A. No, she didn't work full time.

Q. Okay. How long had she worked with you?

A. Oh, if I'm not mistaken it was hardly about a month, you know.

Q. I looked at some of the newspaper reports of this

tragedy and it indicated she had been there about two (2) weeks or so?

A. Two (2) weeks, maybe.

Q. Okay.

A. I'm not too -- it was -- it has been a long time and --

Q. Sure.

A. -- you know?

Q. I understand. These two (2) other people, how long did they work for you, the people who stocked the cooler?

A. Well, they were just part time people so I'm not too sure how often, you know, everyone does it. In gas stations the turn over is always there; it never stops --

Q. Okay.

A. -- so, it's --

Q. So, were these two (2) people, were they working regularly, were they working sometimes?

A. -- well, yeah. It -- it wasn't regularly but it was a part time. Some -- somebody comes for three (3) hours a day, somebody comes four (4) hours a day; something like that.

Q. And how long had both of them worked?

A. Well, that's -- and that's what I say, I'm not too sure that -- but it might be about a month, a month and a half.

Q. Okay. And what was your pay rate, how did you pay your employees; what did you base it on?
A. It was minimum wage and, you know, we used to pay -- I think we used to pay checks.
Q. Okay. Minimum wage back in 2002, was --
A. I don't know.
Q. -- six fifty ($6.50)?
A. Oh, I don't know. Maybe around six ($6.00), six-fifty ($6.50) at that time.
Q. Okay. And how many hours a week would, say, Ms. Anita work?
A. Oh, Anita was like a full time employee. She was -- she was -- she could work between forty (40) to fifty (50) hours, you know.
Q. Okay. Well, six, fifty ($6.50) times forty (40) hours is about two hundred and forty dollars ($240.00) a week.

Mr. Dharmendra Chaudhari: It is mistake.

Commissioner Wilkerson: Don't -- shhhhh.

Q. I'm trying to understand how much you paid Anita.
A. Anita I paid two hundred (200) -- twenty-six hundred dollars ($2,600.00) a month.
Q. Okay. Well, how did you do that; did you break it down?
A. No, it was a lump sum. She was like an Assistant

Manager, you know.

Q. Okay. Well, this is what confused -- you just said you paid her minimum wage?

A. No, minimum wage to other employees --

Q. Okay.

A. -- not to Anita.

Q. Well, that's what I want to understand.

A. Well, I didn't know. I misunderstood maybe --

Q. That's okay.

A. -- yeah.

Q. How much did you pay Anita? You paid her about twenty-six hundred dollars ($2,600.00)?

A. Twenty-six (26) -- yeah, twenty-six hundred dollars ($2,600.00).

Q. And how is that broken down; she was on salary?

A. Yeah, it was set on a weekly basis.

Q. And what were her expected work hours?

A. Fifty (50) to sixty (60) hours.

Q. Okay. So, she got straight salary; did you take any taxes out of that?

A. Yeah.

Q. Okay. Do you know what her net would be?

A. No, I have no idea.

Q. Okay. Did you provide her with a W-2?

A. Well, I don't have any paperwork at the moment; so, I

don't remember at the moment.
Q. Okay. And Mr. Virendra was paid the same way --
A. He was paid, yeah.
Q. -- he was paid a flat rate for the entire month?
A. Twenty-eight ($2,800.00), yeah.
Mr. Story: Give me just a second, Commissioner.
Commissioner Wilkerson: Yes. Okay, sure.
Q. Where did you live back in 2006, Mr. Pal?
A. I was in -- Pineville; the same address.
Q. Okay. How long have you been in Pineville?
A. It's about eight (8) years now.
Q. Okay. Have you kept up with Mr. Chaudhari since 2002?
A. Yeah, we often keep in touch.
Q. How often would you all talk, say, on a monthly basis?
A. Once in a while, I think, maybe once every two (2) or three (3) months.
Q. Okay. Is that true from since this tragedy occurred until now?
A. Yeah.
Q. And you all have continued to be friends?
A. Yeah, we talk to each other.
Q. Okay. Tell me -- I'm sorry, I might have just asked this. When did you actually move to Pineville?
A. 2003.
Q. Okay. And you've been there consistently ever since at

the same address you've given us?
A. Yes.
Q. And for the record that address is:

A. That's correct.
Q. And the cell number you've given us is: (704) 906-7679; is that correct?
A. That's correct.
Q. Okay. Do you remember signing an affidavit in this case?
A. I think so; yeah, I see it.
Q. Back in April of 2006?
A. Yes.
Q. Okay. Do you know where you were when you signed this affidavit?
A. Yeah. This is my signature.
Q. Yes, sir. Did you come down here to South Carolina to sign it?
A. I think so, yeah.
Q. Okay. So, you actually came into town to do this?
A. Yeah, I think -- I think so.
Q. Okay. How were you contacted about the initial -- about this affidavit, April 2006?
A. Mr. -- Mr. Wigger has been calling me --
Q. Okay.

A. -- yeah.
Q. And were you -- where were you in -- where were you in February of 2006?
A. I was here in the US. I was in North Carolina.
Q. Okay. You would have been in the Pineville address?
A. Yeah.
Q. Okay. You lived in Pineville while you ran the Avni Grocery Stores?
A. No.
Q. Okay. Where did you live when you did that?
A. I was in Orangeburg.
Q. Orangeburg?
A. Yeah.
Q. Okay. But you still had the place in Pineville?
A. No, no.
Q. Okay. Tell me -- I'm sorry, when did you move to Pineville?
A. 2003, July.
Q. Okay. 2003, okay. But come 2006, you were still in Pineville?
A. I was still in Pineville.
Q. Okay. Did you ever bet any notices of a hearing from the Workers' Comp Commission?
A. Yeah, whenever I -- whenever I go up to -- I think I came -- this is third (3rd) or fourth (4th) time I'm

coming.

Q. Okay. You did not appear at the hearing back in January of 2006, did you?

A. January of 2006, maybe I was not in the country that year.

Q. Okay.

A. I think I was out of the country.

Q. But shortly thereafter you returned?

A. Yeah.

Q. And you've been in the United States since then?

A. Yeah.

Q. Other than, say, a visit back?

A. No, I haven't gone back.

Q. So, you've been available since just after January 2006?

A. Yeah.

Q. Okay. You were available before January, 2006?

A. Yeah. I -- I -- I was out of the country from December 2005 to January 2006 --

Q. Okay.

A. -- and there was one and a half (1 ½) month I was out.

Q. But other than that you've been around. You've been around from 2002 when this happened until 2006?

A. Yeah.

Q. Okay. And you've been in contact with Mr. Chaudhari

during that time period?

A. Yeah.

Q. You went to the funerals?

A. Yeah, yeah.

Q. Okay. You consoled the family, you continued to --

A. Yes.

Q. -- to --

A. Yes.

Q. -- to stay in contact with them?

A. Yeah.

Mr. Story: Any documents?

Mr. Wigger: No.

Q. Do you have any other documents to this corporation anywhere?

A. No. This is -- it has been so long; so, I -- I must have them saved, you know, for quite a number of years but.

Mr. Story: Commissioner, I believe that's all I've got.

Commissioner Wilkerson: Anything from you, Mr. Wigger --

Mr. Wigger: No, sir.

Commissioner Wilkerson: -- in response? Okay. And I think we said -- okay. No other witnesses; is that correct?

Mr. Wigger: No, sir.

Commissioner Wilkerson: Okay. This concludes the hearing. I thank everybody for being here. Sir, thank you for being here and sorry for your loss so far back and you've got to go through this again but we just have to get some testimony in here based on what the Circuit Court as well as the Appeals Court has made it interlocutory and sent it back to us, okay? This concludes the hearing. Let me meet with the Attorneys for a few minutes. Thank you all.

(There being no further questions, the hearing concluded at 3:30 P.M.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

CERTIFICATE

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Hearing of Anita Chaudhari and Virendra Puniyani vs. Avni Grocers/Fast Point Amoco;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 37 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 13th Day of April, 2012.

Gloria Davis
Notary Public for South Carolina
My Commission Expires 12/21/21

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE #0221896 and 0221897

ANITA CHAUDHARI AND VIRENDRA PUNIYANI CLAIMANT, VS. AVNI GROCERS/FAST POINT AMOCO EMPLOYER AND SC UEF CARRIER.	SC WORKERS' COMPENSATION COMMISSION HEARING OF ANITA CHAUDHARI AND VIRENDRA PUNIYANI VS AVNI GROCERS/FAST POINT AMOCO

This is the Transcript of the South Carolina Workers' Compensation Hearing of Anita Chaudhari and Virendra Puniyani versus Avni Grocers/Fast Point Amoco, taken before Gloria Davis, a Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 2:56 P.M., Tuesday, November 29, 2011, at Summerville County Services Building, 500 North Main Street, Summerville, South Carolina.

COPY

REPORTED

BY

GLORIA DAVIS

APPEARANCES

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ALSO PRESENT:

Mr. Harendra Ramdatt Pal
Mr. Dharmendra Chaudhari

*Reporter's Note: -- indicates incomplete thought or sentence, trailing off or interruption by speakers.

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STIPULATIONS

Commissioner Wilkerson: Today's date -- if I mess any of this up, guys, you all just stop me, okay.

Mr. Wigger: Sure.

Commissioner Wilkerson: Today's date is the 29th day of November, 2011. We're here in reference to Workers' Comp files numbers 0221896 and 0221897. The 896 number is a Claimant, Anita Chaudhari. The file number 897 is -- I'm going to really mess this one up -- Virendra Pununi?

Mr. Wigger: Puniyani.

Commissioner Wilkerson: Puniyani, okay. Representing them on both of these is Jarrel L. Wigger. The Employer is A-V-N-I Grocers/Fast Point Amoco. The Carrier, I think, is the UEF as it was unknown at the time and I think that's where we are in reference to this. I see the South Carolina Second Injury Fund on these cases; is there any -- do we -- this goes back to 2002, and they may have put them on notice, I don't have a clue.

Mr. Wigger: They may have, Commissioner, but I don't --

Commissioner Wilkerson: '01, I'm sorry.

Mr. Wigger: -- know that there would be any

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applicability because this wasn't a situation -- this is just --

Commissioner Wilkerson: I don't think so but I just saw them on here; so, I don't know why --

Mr. Story: You know, back in 2002, they might have been together.

Commissioner Wilkerson: -- oh, good point.

Mr. Story: Way back -- way back when they --

Commissioner Wilkerson: That's -- that is a good point.

Mr. Story: -- might have been in one (1) --

Mr. Wigger: Yes, that's true.

Commissioner Wilkerson: Yes, because they are both listed. Okay, very good point, thank you. So, representing the UEF today on both cases is Matt Story. My understanding is on the 896 file the -- the -- twenty-six hundred dollars a month ($2,600.00) applies to the average weekly wage; thus the comp rate would be corresponding to that divided by four (4). Respectfully, on the 897 case twenty-eight hundred dollars ($2,800.00) applies and seven hundred dollars ($700.00), that was already figured, would apply. We're here -- oh, excuse me -- date of accident on both of these is 11/14/2002. We're here to determine the issues

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that are set forth on the forms 52 and 53. This is a remand back from the Court of Appeals; is that right?

Mr. Wigger: Yes, sir.

Mr. Story: Yes.

Commissioner Wilkerson: Circuit -- or is it Circuit Court?

Mr. Wigger: No, it's Court of Appeals.

Commissioner Wilkerson: Court of Appeals.

Mr. Story: Court of Appeals.

Commissioner Wilkerson: Court of Appeals. Okay, Court of Appeals and they have asked us to do certain issues that will -- I'm going to have the Claimant's Attorney so note what that is. I'll have the Defense Attorney for the UEF so note any and all objections to that as well. Are there any objections at this point in time to the APAs, jurisdiction, venue or any other items from Mr. Wigger's perspective?

Mr. Wigger: No, sir. And I think earlier I submitted just one (1) set; I'm submitting you the other set --

Commissioner Wilkerson: Oh.

Mr. Wigger: -- so you'll have both sets.

Commissioner Wilkerson: Both sets, one (1) for

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each file --

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: -- is that correct? Okay. I'm fine with that. And I believe the indication was they needed two (2) orders on this -- we need one (1) order, respectfully, for each --

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: -- file?

Mr. Story: Yes, sir but we've agreed to hear the testimony --

Commissioner Wilkerson: Hear the testimony --

Mr. Story: -- together.

Commissioner Wilkerson: -- together?

Mr. Story: Yes, sir.

Commissioner Wilkerson: Okay.

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: That's my understanding, okay? I believe there was no objection; is that where I left it?

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: Except we -- and we're going to do the positions in a minute --

Mr. Story: Yes, sir.

Commissioner Wilkerson: -- and then we'll --

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we'll get there, okay? And without objection the Commission's file becomes a part of the record with the exception of self-serving declarations and unstipulated medical reports. What I'm going to ask Mr. Wigger to do is put the position on the record for his clients, okay?

Mr. Wigger: Yes, sir. And, Commissioner, the only other thing that comes to mind is we talked the dependency investigation --

Commissioner Wilkerson: Oh, very good point.

Mr. Wigger: -- and that will be submitted; if it has not been submitted in the APAs we'll make sure that gets submitted to the Commission and then --

Commissioner Wilkerson: What I'm going to ask you to do is just submit it to me.

Mr. Wigger: -- yes, sir.

Commissioner Wilkerson: I don't know if it's in here. Just, I think it will be better. Matt, I guess I'll get you to do that.

Mr. Story: Sure.

Commissioner Wilkerson: Is that --

Mr. Story: Yes, sir.

Commissioner Wilkerson: -- and -- and that way I'll have it because it will probably beat me back to Columbia, is my guess, because I won't be back

until sometime late Thursday or Friday.

Mr. Story: I'll do that and I will copy everybody on that, Commissioner.

Commissioner Wilkerson: If you would, copy everybody on that. Thank you, sir. I appreciate that. Mr. Wigger?

Mr. Wigger: Yes, sir. Commissioner, this case involves the murder of two (2) employees for Avni Grocers; they were murdered by a co-worker. And it is our position that that took care of three (3) of the employees and Mr. Dharmendra Chaudhari was also an employee, which makes four (4); there were a couple more employees. Initially, when we first brought this case, Brooks Shealy was representing the UEF and we didn't -- we were under the understanding there was going to be no objection to any jurisdictional issues. Whatever happened Brooks Shealy got off the case and Ms. Lynch came in the case very late, raised those objections at the hearing. We proceeded with the hearing, lost at the hearing, we took it up -- went to Circuit Court. The Circuit Court entered an order outlining and demanding or directing that findings be made consistent with the order at the Circuit Court deeming that there was

compensability. Now, that order was based on an affidavit submitted by the employer, Mr. Pal, and in -- in abundance of caution we are -- we have Mr. Pal here present today to provide testimony to ensure the UEF has the opportunity to cross-examine and ask questions about any employees regarding the jurisdictional issues; whatever they want to ask him and to that extent the record will be supplemented. We've also done some dependency investigation or there has been a dependency investigation; it's been amended and completed, which we will submit and there have been two (2) orders for guardians appointed for the minor children of Anita Chaudhari. We can submit it so the insured situation and the situation is compensable because there are more than four (4) employees. We also submit that Ms. Chaudhari's average weekly wage is based on a salary of twenty-six hundred dollars ($2,600.00) per month and that Mr. Puniyani's average weekly wage and comp rate is based on a salary of twenty-eight hundred dollars ($2,800.00) per month. And it's a death case and it's been, obviously, contested. We're going to have Mr. Chaudhari adopt his prior testimony and other than

that I think we're ready to proceed.

Commissioner Wilkerson: Okay. I've done the figuring real quick while you were doing that. The average weekly wage on the 896 will be six hundred and fifty dollars ($650.00); thus the comp rate would be four thirty-three, thirty-six ($433.36). The comp rate -- excuse me -- the average weekly wage on the 897 case is seven hundred dollars ($700.00); thus the comp rate would be four sixty-six, forty-nine ($466.49). I'll get you all to check those to make sure that I'm correct in reference to that. Mr. Story, tell me the position of your client.

Mr. Story: Yes, sir. Commissioner, this case was originally heard January 4th, 2006, by Commissioner Huffstetler. At that time the only person who testified was Mr. Chaudhari and I believe Ms. Puniyani by deposition that was submitted --

Mr. Wigger: Correct.

Mr. Story: -- originally. After the hearing and after the order of Commissioner Huffstetler finding that there was no proof of four (4) or more employees the Claimant moved to allow additional evidence by a motion dated April the

19th of 2006. With that was an affidavit of Harendra Pal that was dated April 14th, 2006. My understanding is that the Full Commission did not allow that into evidence relying on 67-707, I believe, as not being after acquired evidence and that it was evidence that was available at the time of the original hearing. The case went up to the Circuit Court, was reversed. The -- it was appealed to the Court of Appeals and that was dismissed as an interlocutory appeal. The Circuit Court ordered the case to come back down to you here today. The position of the Uninsured Employer's Fund, number one (1), is that these are two (2) separate cases. The evidence was actually a little bit different in each one of them and we'd ask for those separate orders. We object to the consideration of Mr. Pal's affidavit and his testimony today given the fact that he was available back in 2006, and was not called as a witness. We will be cross-examining him on various issues but we would like to reserve that objection. Also, one of the arguments that has been raised throughout this case was a Coverage and Compliance letter of the Commission. Back around 2006, the Commission stopped having

hearings on Coverage and Compliance Issues, Rule to Show Cause hearings, and in fact in this case the Coverage and Compliance Department issued a letter indicating that if a Claimant Attorney wanted to pursue this matter there would have to be a determination of whether there were – whether the employer was subject to the Act. Back in the day the Commission would have a Rule to Show Cause hearing, they would determine that before we ever came to this type of hearing; they stopped doing that sometime before this. So, that issue was ripe back in 2006 for the hearing. Our position is that the Coverage and Compliance letter itself is a hearsay document; it's the opinion of the Coverage and Compliance Department. It is not evidence in and of itself and that an independent assessment would need to be made. As Mr. Pal is here we assume that he got notice of this hearing.

Mr. Pal: Yes.

Mr. Story: And reserving our objection, we're ready to proceed.

Commissioner Wilkerson: Okay. All right.

Mr. Wigger: I would say a couple of things based on that, Commissioner. There was a Coverage and

Compliance; I went to it. The Employer did not show up and they issued their – their letter following that just basically saying what they said because since the Employer wasn't present they didn't proceed with the hearing but I was there; it was in Columbia. The other thing is the testimony of Mr. Pal will obviously speak to that anyway. And Ms. Puniyani, who is the mother of Virendra, has a heart issue; that's why we took her deposition. I think we outlined it in the deposition and that's why she isn't present. And then, but from what I understand there is not an objection to us just submitting her deposition again.

Commissioner Wilkerson: No –

Mr. Story: It would just be reaffirmation of previous testimony; I think that's appropriate.

Commissioner Wilkerson: – do you have her deposition?

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: And it's been – you have submitted it in your –

Mr. Wigger: It's – it's one of the exhibits; yes, sir.

Commissioner Wilkerson: – no, that – no, I'm

fine with that. I just haven't looked at it all. I was trying to get my notes down on all of this.

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: – Okay. And that's fine. If it's in there I'm fine with that, okay?

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: Anything else before we – Mr. Story?

Mr. Story: With respect to the Coverage and Compliance letter, Commissioner, the Coverage – Garry Smith indicated that cost preclude the Coverage and Compliance Division from serving by publication. They were unable to present our case at a Rule to Show Cause hearing. Garry states, "At 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 case would be just addressed". So, our position is that this letter by the Commission is not -- or by the Coverage and Compliance Department is not a finding on Rule to Show Cause; it is clearly a statement that that issue is still ripe.

Commissioner Wilkerson: Okay. I understand. I understand. That's fine. Okay. Anything else

before we take testimony?

Mr. Wigger: No, sir.

Commissioner Wilkerson: Mr. Pal – I'm sorry?

Mr. Story: I will be happy to stipulate that Mr. Chaudhari would reaffirm his prior testimony.

Commissioner Wilkerson: Okay. Good. Thank you.

Mr. Wigger: That's what we were going to stipulate to.

Commissioner Wilkerson: That – that – okay, that's fine. And so, the only testimony we'll hear today is Mr. Pal?

Mr. Pal: Yes.

Mr. Wigger: Yes, sir.

Commissioner Wilkerson: Sir, I'm going to get you to raise your right hand. My Court Reporter will swear you in and we'll take some testimony from you, okay? Thank you sir.

Whereupon;

HARENDRA RAMDATT PAL, being duly sworn and cautioned to speak the truth, the whole truth and nothing but the truth, testified as follows:

Court Reporter: Please state your full name for the record.

Commissioner Wilkerson: Your full name?

Court Reporter: State your full name for the

record, sir.

Witness: Harendra Ramdatt Pal.

Court Reporter: Thank you, sir.

DIRECT EXAMINATION

By Mr. Wigger:

Q. Mr. Pal, my name is Jerry Wigger and as you know I represent Dharmendra in the estates of Anita and -- I keep mispronouncing the name -- Virendra. Can you tell me, did you own a business named Avni Grocers?

A. Yes.

Q. What type of company was that?

A. Well, it was a -- it was a corporation and we owned two (2) gas stations and -- and we hired some people -- it was basically a gas station and convenience store.

Q. Okay. And you had two (2) different locations?

A. Yeah.

Q. And were both locations operated under the same corporate umbrella?

A. Yes.

Q. How many employees did you have working for Avni Grocers?

A. I think depending on the -- the time but sometimes five (5), sometimes six (6); it -- it goes up to seven (7).

Q. Okay. And we're talking about the time period immediately before Anita and Virendra were murdered.

Do you know who -- well, first of all, was Virendra -- was Anita working for you at that time?

A. Yeah, Anita was working. Virendra was also working. And the girl who was involved and she was working. And there were the other two (2) employees and plus Mr. Dharmendra.

Q. Okay.

A. I think there were only six (6) employees, yeah, at that time.

Q. Okay. And I know it's been a long time --

A. Yeah.

Q. -- but the girl that shot them she -- the murderer -- she was an employee also?

A. Yeah, she was an employee.

Q. Okay. How much did you pay Anita?

A. Anita I used to pay twenty-six hundred dollars ($2,600.00) a month.

Q. Okay. And how much did you pay Virendra?

A. Virendra I was paying twenty-eight hundred dollars ($2,800.00) a month.

Q. Okay. And were they both on the job the night that they were killed?

A. Yes.

Q. Okay. How did you find out that it had happened?

A. Well, I was out of town but Mr. Dharmendra he called me

-- I was in LA and he called me letting me know this thing had happened and I think after two (2) days I came back and, you know, because I attended the funeral.

Q. Okay. Okay, Mr. Pal, those are the questions I had, I'm sure Mr. Story has some questions for you.

A. Okay.

Commissioner Wilkerson: Mr. Story?

CROSS-EXAMINATION

By Mr. Story:

Q. Mr. Pal, I've got a couple of questions for you. What was -- what's the formal corporate name of the corporation?

A. Avni Grocers.

Q. A-V-N-I --

A. Yeah.

Q. -- Grocers?

A. Yeah, A-V-N-I Grocers.

Q. Incorporated?

A. Yeah, incorporated.

Q. Okay. Who are the officers of that corporation?

A. Well, I was a main -- main person; I was the owner.

Q. So, you are the President of the corporation?

A. Yeah.

Q. Are there any other corporate officers?

A. No.

Q. Did you all regularly keep corporate minutes?

A. Well, I haven't made any minutes or anything.

Q. Okay. You --

A. It was just myself only, you know, I was the only --

Q. -- okay. You were the sole --

A. -- yes.

Q. -- entity of the corporation?

A. Yes.

Q. You controlled it?

A. Yes, I controlled everything.

Q. You were in charge of everything?

A. Everything, yeah.

Q. Did you write the checks?

A. Yeah.

Q. Did you receive the payments?

A. Yeah.

Q. Did you ever have a corporate meeting where you took minutes, discussed the business of the corporation?

A. Well, I -- Virendra was like a Manager and the one (1) gas station I think he was taking care of mainly.

Q. Mr. Chaudhari, who is --

A. Chaudhari, yeah.

Q. -- here with us today?

A. Yeah.

Q. Okay.
A. And Mr. Virendra was mainly taking care of this gas station.
Q. Okay. Well, that's actually running the businesses.
A. Yeah.
Q. I'm talking about the corporation itself.
A. Well, the corporation, since I was alone, you know, so everything I was doing.
Q. Okay.

Commissioner Wilkerson: Let me ask him a quick question; I don't think it's going to matter. But it was incorporated as a C-Corp, S-Corp or what back in 2002?

A. Well, I don't remember now --

Commissioner Wilkerson: That -- that's okay.

A. -- it's been a long time.

Commissioner Wilkerson: But it was a corporation; is that correct?

A. It was a corporation, yeah.

Commissioner Wilkerson: Okay.

Mr. Story: Okay.

Commissioner Wilkerson: So --

A. Corporation for the company.

Commissioner Wilkerson: -- you do have the right to have an Attorney present here today, okay?

A. Yeah.

Commissioner Wilkerson: If you want to have an Attorney present. I think I need to get that on the record as well, okay?

Mr. Story: Yes, sir.

Commissioner Wilkerson: So, do you want to have an Attorney represent your interests as the Grocer -- Avni Grocer, Incorporated?

A. Not at the moment. I don't think I need any.

Commissioner Wilkerson: Okay. Well, I mean, you can speak on behalf of the corporation. So, if you wanted one I would stop but if you don't want one we'll proceed forward.

A. Yeah, that's fine; I think I don't have any problem.

Commissioner Wilkerson: Do you want to proceed forward?

A. Yeah.

Commissioner Wilkerson: Okay. That's fine. I just wanted to get that on the record, okay?

Mr. Story: Thank you, Commissioner.

Commissioner Wilkerson: I'm sorry.

Mr. Story: That's fine.

Commissioner Wilkerson: I'm sorry and I -- I don't know that we need it --

A. Yeah.

Commissioner Wilkerson: -- but just in case.

Q. What I don't understand though, is you conducted the business of the corporation?
A. Yeah.
Q. You told everybody what to do, you told them when to do it --
A. Yeah.
Q. -- and how to do it?
A. That's right.
Q. Okay. All the profits of the corporation went to you?
A. Yes.
Q. And you paid people out and you paid people that you owed but everything that was left over was yours personally?
A. Yes.
Q. Okay. Did you file separate corporate income taxes?
A. Well, I think we hardly ran for a few months and, you know, this thing happened. We started sometime in August and this thing is happening November. Immediately I just closed down the corporation.
Q. Okay. So, did the corporation ever file corporate taxes?
A. Yeah, we filed, you know, normal sales tax and everything we used to file regularly.
Q. Yes, sir. Corporate income taxes?

A. No. But there was no income; yeah, we just made losses. So, final tax, you know, I did it at -- in the end of 2002, and then I close this company.
Q. Okay. So, is it fair to say you were the alter ego of the corporation? What the corporation did, you did; what you did, the corporation did?
A. Yes.
Q. Okay. Do you have any records of your payments to any of your employees?
A. Well, I think I gave everything -- Matt, it was quite a long time and I think I must have given them to Mr. Jerry.
Q. You gave Mr. Wigger documents?
A. Yeah, I think at that time we had whatever the paperwork, you know, I had I gave it to him and then -- then I closed the shop, you know, it has been almost nine (9) years now.

Mr. Story: I guess I'd ask to see those, Commissioner; I've never seen them.

Commissioner Wilkerson: Do you have those? I mean, I --

Mr. Wigger: And to let you know, I think that was the copy of his corporate -- his incorporation documents.

Mr. Story: Right.

Mr. Wigger: I'd be happy to give them to you.
Mr. Story: Sure.
Mr. Wigger: I just -- I don't know. I'll check in my boxes.
Mr. Story: That's okay. No, that's okay.
Q. But the question I've got is, do you -- do you have records of payments where you'd do a payroll, keep track of what you paid somebody?
A. Generally, we had everything at that time --
Q. Okay.
A. -- yeah.
Q. Do you believe that you turned those over to Mr. Wigger or do you believe that they may not be around?
A. Well, I -- I -- I don't remember. It has been a long time. Whatever the -- the documents they asked me I must have given it to him.
Q. Okay. But if you didn't give them to him it's -- you don't have them anymore?
A. I don't think so.
Q. Okay. Tell me the locations of your two (2) stations.
A. Well, the one (1) was in Vence and the other one (1) was on the Hillside Drive of the -- the Charleston one?
Mr. Dharmendra Chaudhari: North Charleston.
A. North Charleston, yeah.
Q. And where was the first one (1) you said?

A. Vence.
Q. Spell that for me.
A. Vence, V-E -- V-E-N-C-E, Vance. It's a small town.
Commissioner Wilkerson: Vance, V-A-N-C-E.
Q. Vance?
A. Oh, Vance.
Commissioner Wilkerson: No, that's okay.
Q. Okay.
Commissioner Wilkerson: I just -- I thought -- okay, Vance, South Carolina.
Mr. Story: Okay. I've got you.
Commissioner Wilkerson: -- I'm fine with that.
Q. And one's in --
Commissioner Wilkerson: I was trying to --
Q. -- North Charleston on Riverside Drive?
Commissioner Wilkerson: -- right.
A. Yeah.
Q. One (1) store sold Amoco gas -- gasoline; is that correct?
A. Yeah.
Q. What did the other one sell?
A. It was Citgo.
Q. Okay. Why did you sell to two (2) different -- why did you have two (2) different gas jobbers?
A. Well, I think the first we started this one and then,

you know, we -- I was offered by one of their -- Mr. Woody, or I think Woody is the name, I don't -- that he wanted to sell that gas station and I thought he wanted me to expand because I had the man power.
Q. Okay. I just want to make sure I understand all the people involved. The girl who had been your employee; was she named Krista McDaniel?
A. Yes.
Q. Okay. You said that there was Anita, there was Virendra and there was Mr. Chaudhari --
A. Yeah.
Q. -- where did each one of them work?
A. Well, Mr. Dharmendra was mainly taking care of Vance.
Q. Okay.
A. And myself also; I would normally used to go to Vance. And here Anita, Virendra, this girl was working and there were two (2) other more -- two (2) girls, working on a part time basis; I think they used to come and fill the cooler and sometimes come -- used to come and sweep in the job, you know, they were doing.
Commissioner Wilkerson: And that's at the North Charleston location?
A. Yeah, it's North Charleston.
Commissioner Wilkerson: Okay.
Q. Okay. Well, tell me this. What are those two (2)

other people's names?
A. I don't remember because most of the thing was run by Virendra; he was -- he was hiring and he was doing everything. He was like a Manager.
Q. Okay. How often did Mr. Chaudhari work?
A. Oh, he used to go almost every evening I think; yeah, every evening. After from Vance, you know, he used to come here. You know, he was staying at -- in Charleston.
Q. Okay. So, he worked six (6), seven (7) days a week?
A. Between six (6) and -- I think, six (6) days week.
Q. Okay. How about Anita?
A. Anita was also seven (7) -- also six (6) days a week.
Q. Okay. And how about Virendra?
A. Virendra, he was working six (6) days a week.
Q. Okay. How about Krista McDaniel; was she part time?
A. She was a part time. So, I don't know, as few as maybe, twenty (20), twenty-two (22) hours. I'm not too sure.
Q. So, she -- so, she didn't work full time?
A. No, she didn't work full time.
Q. Okay. How long had she worked with you?
A. Oh, if I'm not mistaken it was hardly about a month, you know.
Q. I looked at some of the newspaper reports of this

tragedy and it indicated she had been there about two (2) weeks or so?

A. Two (2) weeks, maybe.

Q. Okay.

A. I'm not too -- it was -- it has been a long time and --

Q. Sure.

A. -- you know?

Q. I understand. These two (2) other people, how long did they work for you, the people who stocked the cooler?

A. Well, they were just part time people so I'm not too sure how often, you know, everyone does it. In gas stations the turn over is always there; it never stops --

Q. Okay.

A. -- so, it's --

Q. So, were these two (2) people, were they working regularly, were they working sometimes?

A. -- well, yeah. It -- it wasn't regularly but it was a part time. Some -- somebody comes for three (3) hours a day, somebody comes four (4) hours a day; something like that.

Q. And how long had both of them worked?

A. Well, that's -- and that's what I say, I'm not too sure that -- but it might be about a month, a month and a half.

Q. Okay. And what was your pay rate, how did you pay your employees; what did you base it on?

A. It was minimum wage and, you know, we used to pay -- I think we used to pay checks.

Q. Okay. Minimum wage back in 2002, was --

A. I don't know.

Q. -- six fifty ($6.50)?

A. Oh, I don't know. Maybe around six ($6.00), six-fifty ($6.50) at that time.

Q. Okay. And how many hours a week would, say, Ms. Anita work?

A. Oh, Anita was like a full time employee. She was -- she was -- she could work between forty (40) to fifty (50) hours, you know.

Q. Okay. Well, six, fifty ($6.50) times forty (40) hours is about two hundred and forty dollars ($240.00) a week.

Mr. Dharmendra Chaudhari: It is mistake.

Commissioner Wilkerson: Don't -- shhhhh.

Q. I'm trying to understand how much you paid Anita.

A. Anita I paid two hundred (200) -- twenty-six hundred dollars ($2,600.00) a month.

Q. Okay. Well, how did you do that; did you break it down?

A. No, it was a lump sum. She was like an Assistant

Manager, you know.

Q. Okay. Well, this is what confused -- you just said you paid her minimum wage?

A. No, minimum wage to other employees --

Q. Okay.

A. -- not to Anita.

Q. Well, that's what I want to understand.

A. Well, I didn't know. I misunderstood maybe --

Q. That's okay.

A. -- yeah.

Q. How much did you pay Anita? You paid her about twenty-six hundred dollars ($2,600.00)?

A. Twenty-six (26) -- yeah, twenty-six hundred dollars ($2,600.00).

Q. And how is that broken down; she was on salary?

A. Yeah, it was set on a weekly basis.

Q. And what were her expected work hours?

A. Fifty (50) to sixty (60) hours.

Q. Okay. So, she got straight salary; did you take any taxes out of that?

A. Yeah.

Q. Okay. Do you know what her net would be?

A. No, I have no idea.

Q. Okay. Did you provide her with a W-2?

A. Well, I don't have any paperwork at the moment; so, I

don't remember at the moment.

Q. Okay. And Mr. Virendra was paid the same way --

A. He was paid, yeah.

Q. -- he was paid a flat rate for the entire month?

A. Twenty-eight ($2,800.00), yeah.

Mr. Story: Give me just a second, Commissioner.

Commissioner Wilkerson: Yes. Okay, sure.

Q. Where did you live back in 2008, Mr. Pal?

A. I was in -- Pineville; the same address.

Q. Okay. How long have you been in Pineville?

A. It's about eight (8) years now.

Q. Okay. Have you kept up with Mr. Chaudhari since 2002?

A. Yeah, we often keep in touch.

Q. How often would you all talk, say, on a monthly basis?

A. Once in a while, I think, maybe once every two (2) or three (3) months.

Q. Okay. Is that true from since this tragedy occurred until now?

A. Yeah.

Q. And you all have continued to be friends?

A. Yeah, we talk to each other.

Q. Okay. Tell me -- I'm sorry, I might have just asked this. When did you actually move to Pineville?

A. 2003.

Q. Okay. And you've been there consistently ever since at

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the same address you've given us?
A. Yes.
Q. And for the record that address is: 11949 Southcrest Lane, Pineville, North Carolina, 28134?
A. That's correct.
Q. And the cell number you've given us is: (704) 906-7879; is that correct?
A. That's correct.
Q. Okay. Do you remember signing an affidavit in this case?
A. I think so; yeah, I see it.
Q. Back in April of 2006?
A. Yes.
Q. Okay. Do you know where you were when you signed this affidavit?
A. Yeah. This is my signature.
Q. Yes, sir. Did you come down here to South Carolina to sign it?
A. I think so, yeah.
Q. Okay. So, you actually came into town to do this?
A. Yeah, I think -- I think so.
Q. Okay. How were you contacted about the initial -- about this affidavit, April 2006?
A. Mr. -- Mr. Wigger has been calling me --
Q. Okay.

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A. -- yeah.
Q. And were you -- where were you in -- where were you in February of 2006?
A. I was here in the US. I was in North Carolina.
Q. Okay. You would have been in the Pineville address?
A. Yeah.
Q. Okay. You lived in Pineville while you ran the Avni Grocery Stores?
A. No.
Q. Okay. Where did you live when you did that?
A. I was in Orangeburg.
Q. Orangeburg?
A. Yeah.
Q. Okay. But you still had the place in Pineville?
A. No, no.
Q. Okay. Tell me -- I'm sorry, when did you move to Pineville?
A. 2003, July.
Q. Okay. 2003, okay. But come 2006, you were still in Pineville?
A. I was still in Pineville.
Q. Okay. Did you ever bet any notices of a hearing from the Workers' Comp Commission?
A. Yeah, whenever I -- whenever I go up to -- I think I came -- this is third (3rd) or fourth (4th) time I'm

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coming.
Q. Okay. You did not appear at the hearing back in January of 2006, did you?
A. January of 2006, maybe I was not in the country that year.
Q. Okay.
A. I think I was out of the country.
Q. But shortly thereafter you returned?
A. Yeah.
Q. And you've been in the United States since then?
A. Yeah.
Q. Other than, say, a visit back?
A. No, I haven't gone back.
Q. So, you've been available since just after January 2006?
A. Yeah.
Q. Okay. You were available before January, 2006?
A. Yeah. I -- I -- I was out of the country from December 2005 to January 2006 --
Q. Okay.
A. -- and there was one and a half (1 ½) month I was out.
Q. But other than that you've been around. You've been around from 2002 when this happened until 2006?
A. Yeah.
Q. Okay. And you've been in contact with Mr. Chaudhari

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during that time period?
A. Yeah.
Q. You went to the funerals?
A. Yeah, yeah.
Q. Okay. You consoled the family, you continued to --
A. Yes.
Q. -- to --
A. Yes.
Q. -- to stay in contact with them?
A. Yeah.
Mr. Story: Any documents?
Mr. Wigger: No.
Q. Do you have any other documents to this corporation anywhere?
A. No. This is -- it has been so long; so, I -- I must have them saved, you know, for quite a number of years but.
Mr. Story: Commissioner, I believe that's all I've got.
Commissioner Wilkerson: Anything from you, Mr. Wigger --
Mr. Wigger: No, sir.
Commissioner Wilkerson: -- in response? Okay. And I think we said -- okay. No other witnesses; is that correct?

Mr. Wigger: No, sir.

Commissioner Wilkerson: Okay. This concludes the hearing. I thank everybody for being here. Sir, thank you for being here and sorry for your loss so far back and you've got to go through this again but we just have to get some testimony in here based on what the Circuit Court as well as the Appeals Court has made it interlocutory and sent it back to us, okay? This concludes the hearing. Let me meet with the Attorneys for a few minutes. Thank you all.

(There being no further questions, the hearing concluded at 3:30 P.M.)

STATE OF SOUTH CAROLINA }
COUNTY OF DORCHESTER }

CERTIFICATE

Be it known that I took the foregoing South Carolina Workers' Compensation Commission Hearing of Anita Chaudhari and Virendra Puniyani vs. Avni Grocers/Fast Point Amoco;

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was first duly sworn to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript of 37 typewritten pages represents a true, accurate and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action;

Witness my hand and seal this 13th Day of April, 2012.

Gloria Davis
Notary Public for South Carolina
My Commission Expires 12/21/21

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STATE OF SOUTH CAROLINA
CIRCUIT COURT
COUNTY OF CHARLESTON

DHARMENDRA CHAUDHARI, spouse of ANITA CHAUDHARI, deceased,
Claimant,
2012-CP-10-06355

-vs-

TRANSCRIPT OF RECORD

AVRIL GROCERS and the SOUTH CAROLINA UNINSURED EMPLOYERS' FUND,
Defendant.

-&-

RAJKUMARI PUNIYANI in re VIRENDRA PUNIYANI, deceased,
Claimant,
2012-CP-10-06357

-vs-

AVRIL GROCERS and the SOUTH CAROLINA UNINSURED EMPLOYERS' FUND,
Defendant.

Heard on Wednesday, January 9, 2013
Charleston, South Carolina

BEFORE:
THE HONORABLE J. C. NICHOLSON

APPEARANCES:

Counsel on Behalf of the Claimant:
John Nichols, Esq.

Counsel on Behalf of the Fund:
Terri J. Morrill, Esq.

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29803-5232

ON WEDNESDAY, JANUARY 2, 2013 AT 9:37 A.M.:

THE COURT: All right. I believe the -- what's the first case? Good morning.

MS. MORRILL: Good morning.

THE COURT: Sorry for all the confusion yesterday.

MS. MORRILL: And I apologize as well.

THE COURT: Well, apparently it wasn't your fault. It was lack of, I guess, clear and proper communication but thank you for being here this morning.

MS. MORRILL: Thank you, Your Honor.

THE COURT: I believe this is, what, a Worker's Compensation appeal; is that correct?

MS. MORRILL: That is correct.

THE COURT: Who's doing the appeal?

MS. MORRILL: I am. I'm the Appellant, Your Honor.

THE COURT: Okay.

MS. MORRILL: I'm Terry Morrill of Clawson and Staubes, LLC. And I'm here on behalf of the South Carolina Uninsured Employers' Fund. And if you hear me say SCUEF, I'm lapsing into the abbreviation that's most commonly used.

THE COURT: Okay.

MS. MORRILL: So you may hear me say that, SCUEF, instead of the Fund.

This case is an interesting case, Your Honor. We're

actually on our second round of appeals. And the primary issue up on appeal goes back to our first round of appeals which were filed by the Claimant.

This is -- by the way, this is a very tragic death claim and no one disputes that. And you'll see actually a finding made by the Hearing Commissioner as to the fact that this was very tragic, but nonetheless --

THE COURT: This is a second?

MS. MORRILL: This is our second go-round because --

THE COURT: What happened in the first go-round?

MS. MORRILL: The first go-round the -- well, let me give you a little bit more background.

The Work Comp Commission once they went into some budgetary constraints no longer had what they called a rule to show cause hearing in cases where there was allegedly not Worker's Compensation insurance to determine if, one, an alleged employer didn't have insurance and, two, to determine if they had jurisdiction to hear the case based upon a finding of four or more employees.

So the Commission stopped having those rule to show cause hearings. And when they did so they sent letters to the claimants' attorneys, as they did in this case, saying, this is what we've determined in our investigation; however this is not a ruling, this is not evidence. You have the burden of proving in the first

instance that any hearing before the Commission didn't have jurisdiction based upon a finding of four or more employers.

THE COURT: What was the dispute as far as jurisdiction?

MS. MORRILL: That there were not four or more employees.

THE COURT: Were not four or more employees?

MS. MORRILL: Exactly, Your Honor. The next step is because --

THE COURT: Why isn't this going to the Court of Appeals rather than here?

MS. MORRILL: Because it was on remand -- oh. Because it's a pre-2007 claim which is when the new statute went

into effect allowing it to go to the Court of Appeals.

THE COURT: Okay.

MS. MORRILL: So we're still back in that four-level appellate process. This is the second time, because the first time it was found that the Judge's remand was not a final order, just an interlocutory.

THE COURT: All right. What did the Hearing Commissioner rule on the four employees issue?

MS. MORRILL: As additional information of importance to Your Honor is that we got to the hearing. I represented the SCUEF at that hearing.

At the time of the hearing the Hearing Commissioner said to the counsel for Claimant: You realize you have to prove jurisdiction, are you prepared to go forward today? The response was: Yes, sir, we are prepared to go forward.

The Commissioner said: You know you bear the burden of proving jurisdiction. The Claimants were prepared to go forward.

The evidence in this case, the undisputed evidence in this --

THE COURT: Well, what did the Commissioner rule?

MS. MORRILL: The Commissioner ruled that there were not four or more employees and that the Claimant failed to --

THE COURT: And that went to the full Commission; right?

MS. MORRILL: Yes, the full Commission.

THE COURT: What did the full Commission do?

MS. MORRILL: The full Commission affirmed.

THE COURT: They affirmed. All right. And then it went to the Circuit Court?

MS. MORRILL: That's correct.

THE COURT: And what happened at the Circuit Court?

MS. MORRILL: Okay. One more detail you need to know about the full Commission hearing.

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THE COURT: Okay.

MS. MORRILL: Contemporaneously with the appeal to the full Commission, the Claimant moved to submit an affidavit of the alleged employer. And the full Commission denied that affidavit saying that under our regulations that is not newly-discovered evidence because newly-discovered evidence is evidence which is defined as evidence not discoverable by the party at the time of the hearing or could not have with due diligence been found.

THE COURT: As to, what, the regulation?

MS. MORRILL: As to the regulation. That's correct. What the Circuit Court Judge did is --

THE COURT: All right. And then I assume they affirmed the Hearing Commission?

MS. MORRILL: They affirmed the Hearing Commission. That's correct, Your Honor.

THE COURT: And then it went to the Circuit Court?

MS. MORRILL: Then it went to the Circuit Court on appeal by the Claimant.

THE COURT: What happened at the Circuit Court?

MS. MORRILL: At the Circuit Court the Judge found that Section 42-15 -- I'm sorry, 42-17-50 of the Worker's Compensation Act, which is the section that says: The Commission shall review the award and if good grounds be

shown therefore...

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The Circuit Court Judge found that that was at odds with Regulation 67-707 which is the regulation that defines newly-discovered evidence as evidence not known to the moving party at the time of the first hearing or by reasonable diligence new evidence could not have been secured. And the discovery has to be brought to the attention of the Commission immediately.

THE COURT: Okay.

MS. MORRILL: And you'll see --

THE COURT: So the Circuit Court Judge ruled that that statute --

MS. MORRILL: Was at odds with the regulations.

THE COURT: Okay.

MS. MORRILL: Okay.

THE COURT: And what happened? What did he do?

MS. MORRILL: He remanded it back to --

THE COURT: He remanded it back to the full Commission?

MS. MORRILL: Back to the full Commission and they automatically remand back to a hearing.

THE COURT: What did the full Commission do on the remand?

MS. MORRILL: On the remand they were under the order of the Circuit Court Judge to allow that evidence which they have denied. They then didn't consider it at that

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point. They remanded it back to the Hearing Commissioner.

THE COURT: Okay.

MS. MORRILL: In addition to allowing the affidavit at the hearing, the actual testimony of this individual was --

THE COURT: Well, when did it -- it went on up; didn't it? Or did it?

MS. MORRILL: It went to the Court of Appeals. It was ruled -- actually we both appeared at that time and the Court of Appeals concluded it was an interlocutory order and remanded --

THE COURT: You can't appeal remands; right?

MS. MORRILL: No.

THE COURT: But you appealed the remand?

MS. MORRILL: We did, making the argument that it was an issue of law that needed to be addressed and that as a result it did not need -- and it's a jurisdictional issue that the Court could consider it without considering the other underlying issues. But the Court said, no, we find -- we still find that's an --

THE COURT: The Court of Appeals remanded it back to the full Commission to follow the Circuit Court's order?

MS. MORRILL: That's -- well, they dismissed the appeal and, yeah, said it goes back now to the full

Commission. The full Commission remanded it back to a Hearing Commissioner.

THE COURT: And then what happened at that hearing?

MS. MORRILL: It went to a hearing. Now bear in mind that based on the Circuit Court order both the full Commission and the Hearing Commissioner were under order to allow this affidavit.

And bear in mind also that both the Hearing

Commissioner and the full Commission had concluded there was not substantial evidence --

THE COURT: Do you have a copy of the Circuit Court order?

MS. MORRILL: Pardon?

THE COURT: Do you have a copy of the Circuit Court order so I can take a look at it?

MS. MORRILL: I don't know. Let me see if I do, Your Honor. I've got the full Commission order.

THE COURT: I mean, did the order -- normally on remands you order them to take evidence or have another hearing. You don't order -- them to tell them what to do. I mean, did the Circuit Court actually tell them, hey, you got to accept this affidavit --

MS. MORRILL: Yes.

THE COURT: -- or are they just telling them that 42-17-50 applied, not the regulation?

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MS. MORRILL: I don't have the order. John, if you do, I have no problem with you handing it up. I'll read that portion of the order.

MR. NICHOLS: I brought a copy of the appellate --

THE COURT: Do you mind if I just take a look at the Circuit Court order? That's what I want to look at, the Circuit Court order.

MS. MORRILL: Sure. It's a very lengthy order, Your Honor.

(Document handed to the Judge.)

THE COURT: Okay. Thank you very much.

MS. MORRILL: You're welcome.

THE COURT: Is it attached?

MS. MORRILL: That is the order itself.
THE COURT: Oh, this is the order? Okay. This is the order. Let me see. (Pause.)
So he found that they did have four employees and reversed the Commission's refusal to admit. Okay.
So the only thing he did was just order that the affidavit was admissible; right?
MS. MORRILL: That's correct. And remanded it back for reconsideration.
THE COURT: And then remanded it back to have another hearing with that affidavit admitted; is that correct?
MS. MORRILL: That's correct, Your Honor.

THE COURT: Okay.
MS. MORRILL: Again, the basis --
THE COURT: Let me finish reading. I'll listen to you. Okay?
MS. MORRILL: I'm sorry, Your Honor.
THE COURT: I can't listen to you and read at the same time.
MS. MORRILL: Yes, sir.
THE COURT: I apologize. My wife says I've just got a one-track mind. I can't do two things at once like she does. (Pause.)
Remanded to the Commission for other -- consistent with this order. All right. Thank you very much. Be glad to hear you.
MS. MORRILL: Thank you, Your Honor. And the basis for appeal is that it was an error.
THE COURT: Let me see. It goes back to the Commission for a hearing.

MS. MORRILL: That's correct.
THE COURT: What did the Hearing Commissioner do?
MS. MORRILL: The Hearing Commissioner then ruled based on the affidavit as well as additional testimony of that individual --
THE COURT: So they offered additional testimony?
MS. MORRILL: Right. Of that individual who wasn't at

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the first hearing. They allowed the opportunity to --
THE COURT: So basically that's a new evidentiary hearing?
MS. MORRILL: Exactly.
THE COURT: For the Commission to make the evidentiary rule on whether it was four employees or not four employees?
MS. MORRILL: Exactly.
THE COURT: And then that got appealed to the full Commission?
MS. MORRILL: Exactly. And they just affirmed as directed by the Circuit --
THE COURT: So now you're here on the full Commission, the affirmation of the Hearing Commissioner?
MS. MORRILL: Exactly. With, continuing throughout the objection being made that this case should have never gone back to the Commission in the first place because the Hearing Commissioner's ruling, the full Commission ruling were correct and proper based upon the statute and the regulations and it was error for the Circuit Court Judge to remand.
So that's why I told you initially we're in that second round because the Court of Appeals would not

consider it just upon the jurisdictional issue, but required the remand and a final order.

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We now come back upon the same issue on appeal which is: Did the Circuit Court err in finding that that evidence should have been allowed and then remanded it? If it had been affirmed, the appeal would then have gone to the Court of Appeals. So --

THE COURT: Well --

MS. MORRILL: Let me give you, I'd like to --

THE COURT: -- you preserved that issue at the Hearing Commissioner level?

MS. MORRILL: Yes.

THE COURT: You preserved that at the full Commission?

MS. MORRILL: The issue was always, once it was remanded back it was error to have a hearing --

THE COURT: Whether the regulation applied or whether the statute applied?

MS. MORRILL: Yes -- I'm sorry?

THE COURT: So your objection was that you preserved your argument, the regulation applied versus the statute applied?

MS. MORRILL: No. That they are not inconsistent.

THE COURT: They're not inconsistent?

MS. MORRILL: Exactly. Which was our argument at the Circuit Court as well. The argument --

THE COURT: Well, assuming they aren't inconsistent,

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how does that affect the findings of the second Hearing

Commission, that they --

MS. MORRILL: There would have been no findings at the second Commission. It would not have been remanded. It would have never gotten back to a Hearing Commissioner.

At that point if the Judge had not found that they were inconsistent, he would have affirmed the order of the Hearing Commissioner and the full Commission.

THE COURT: Well, why -- I guess I'm just thinking, why isn't that moot at this point in time? I mean, you had two evidentiary hearings.

MS. MORRILL: That's correct.

THE COURT: You had the second evidentiary hearing and the Commissioner said, yes, there were four employees.

MS. MORRILL: Because --

THE COURT: And then the full Commission has affirmed that. Now you're trying to raise something that occurred at the first process --

MS. MORRILL: Because we have to --

THE COURT: -- in the first process.

MS. MORRILL: That's the only way we can get to the Court of Appeals on that issue, of the error of the initial Circuit Court Judge because, remember, before the Court of Appeals said, well, you can't appeal this order at this point because it's a remand order and everything

that occurred below again is based upon the Circuit Court Judge's reversal in what we submit as errors as a matter of law in his finding that the statute is inconsistent with the regulation.

Now, your Honor, let me give you a couple of the thoughts -- a couple of additional things.

THE COURT: I mean, the Hearing Commission still could've evidentially at the hearing said, I don't believe the employee. I don't believe --

MS. MORRILL: Right.

THE COURT: Was the affidavit admitted or was his testimony taken?

MS. MORRILL: No, well at the hearing there was additional testimony presented.

THE COURT: But was the affidavit admitted into evidence?

MS. MORRILL: Yes, it was as well.

THE COURT: All right. The Hearing Commissioner still could have taken the position: Hey, I don't believe the testimony, I don't believe the affidavit, there weren't four employees.

MS. MORRILL: Yes, they could have.

THE COURT: That was the purpose of the remand; right?

MS. MORRILL: Not exactly.

THE COURT: I mean, that's why he remanded it back.

MS. MORRILL: And the appeal. This is a very crucial issue.

The whole purpose of the remand was that the Judge found that the Commission's regulation was not proper so additional evidence should be allowed.

That goes to a very basic premise of procedure in presenting a case. And that's why I pointed out to you very early on that -- and there's some interesting things, statements in the prior Circuit Court Judge's order. He says: Well, the Claimants didn't know that jurisdiction was going to be an issue at the hearing. Well, in the

Form 52 which is the death claim --

THE COURT: All right. Put the mootness issue aside. What's your argument?

MS. MORRILL: The argument is that that Circuit Court order was improper as a matter of law. The Circuit Court Judge allowed evidence that was not presented and was available.

THE COURT: There's a whole history of cases that basically say that one Circuit Court Judge is not allowed to overrule another Circuit Court Judge. And there's a whole line of cases --

MS. MORRILL: And that's probably why you asked me about --

THE COURT: Why are you sitting here asking me to

overrule a Circuit Court Judge?

MS. MORRILL: Because I have to.

THE COURT: Pardon?

MS. MORRILL: I have to. I have to, Your Honor. And that's when you asked me why you weren't going straight to the Court of Appeals because this is a pre-2007 case. So the only way I can get back to the Court of Appeals --

THE COURT: I mean, I don't have the authority to reverse that Circuit Court order. The Court of Appeals does.

MS. MORRILL: That may be your ruling and at that point we then appeal to the Court of Appeals at that point. We're now appealing from a final order because, remember before they dismissed this as an interlocutory. But we can't get back to the Court of Appeals without coming to you because of this being a pre-2007 case.

17 THE COURT: Is this sort of a catch 22?
18 MS. MORRILL: It very may well be, Your Honor. And I
19 hadn't really thought about it that way but what I would
20 like you to look at is the --
21 THE COURT: I mean, I hate to shorten your argument
22 and I'll listen to the other side, but my position is that
23 if you're appealing the first Circuit Court order and
24 asking me now to reverse that.
25 MS. MORRILL: Right.

1 THE COURT: I don't have the authority to do that,
2 period.
3 MS. MORRILL: Right. And, Your Honor, that's a very
4 good question. And there should be a mechanism in place
5 and perhaps that's why they have now passed a law saying
6 that we go straight to the Court of Appeals. That kind of
7 thing can't happen anymore.
8 THE COURT: Well, I don't think that's the reason. I
9 think they had too many appeals involved in Worker's
10 Comp. It was taking years and years and years.
11 MS. MORRILL: That may be as well.
12 THE COURT: They wanted to short-circuit it.
13 MS. MORRILL: Right. A couple of other things that I
14 did want to bring to your attention is -- and the thing I
15 think that bothers me so very much about this case is this
16 Claimant or these, it's actually the same Claimant in both
17 of the death claims, had every opportunity to present and
18 prove his case.
19 The Work Comp Act -- and I only do Worker's
20 Compensation. The Work Comp Act is very clear
21 procedurally about what must be done at hearings, how you

file your pleadings, how you preserve your evidence, what evidence can be submitted in addition to a hearing on appeal.

And we come back to a very basic premise which is,

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this Claimant didn't prove his case.

THE COURT: Well, apparently he did the second time.

MS. MORRILL: Yes, based on evidence that was known to him by due diligence, discoverable by him and with failing to use two mechanisms in place that --

THE COURT: Well, wasn't that your argument at the evidentiary hearing level?

MS. MORRILL: Well, that's the argument throughout and --

THE COURT: That's the argument that you made and that was rejected; right?

MS. MORRILL: That's correct. And that's why we have to continue the appeal process to get that order back before the Court of Appeals to have it considered, that order, because that was the whole reason we even went back.

The whole reason we even went back to a new hearing was based on allowing evidence that we submit was discoverable by due diligence, was readily available at the time of the hearing. And basically what the Court was allowing is a party not to present and prove their case. You know, very, very basic.

And, in fact, that regulation is almost identical to the rule, I think it's 60-B, that says newly-discovery evidence is not evidence which could have been discovered

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by due diligence. I mean, it's a very basic premise. If this is allowed to stand this means the Claimants could go forward to a hearing, not prove their case, appeal it, present to the Commission evidence that they could have discovered at the first hearing but didn't present, and then have a different ruling.

I mean, it's just such a basic procedural premise that I'm very bothered by it. And obviously that's the whole basis that we want to get back to the Court of Appeals because that is a very serious issue; the failure to prepare and present the case and present the evidence upon which the Commission has ruled. And that simply did not occur.

THE COURT: Okay.

MS. MORRILL: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. NICHOLS: Judge.

THE COURT: Mr. Nichols?

MR. NICHOLS: If I told you everything that bothered me about this case, we'd be here all day but I'm not going to do that.

This case, these people we murdered over ten years ago. This should have been an admitted case. Let me clear up a couple of things on the record.

Counsel said they knew, they knew they would have to

come here. Well, let me tell you. The procedures under the Worker's Comp Act are very clear on other points as well that were not followed by the Fund here.

For example, when you want to file an answer and challenge the number of employees, what do you do? You

file an answer. They didn't do that here. When you want to file something else and challenge other things you file those and you put the other side on notice that you're going to make an issue out of this.

Mr. Wigger had the coverage and compliance report which said that this employer had two locations. They were related. And actually found that there were potentially as many as 15 employees at these two locations.

So Mr. Wigger shows up -- this case had been dragging and dragging and had been going on for over a year. Mr. Wigger shows up at the hearing and at that point without even filing a third document that the Fund could have filed at that time which is a pre-hearing brief under Rule 50-A, they didn't do that. They didn't put anybody on notice that they were going to challenge the number of employees in this case.

So Mr. Wigger has got his folks over from Atlanta. They're ready to go forward. And Commissioner Hufstetler says: I want you to pull your 50, I want you to delay

this. And Mr. Wigger said: No, we've been delayed, delayed, delayed. My folks have come over from Atlanta. There's really nothing undisputed. It's admitted as far as liability under the Act. It's admitted as far as the compensation because it's a death case.

And at that point is when the Fund first said, wait a minute. We're going to challenge the number of employees. You're going to have to prove jurisdiction under the Act.

And it was under those circumstances that this first

case first came before Commissioner Hufstetler who turned to Mr. Wigger and strongly urged him to pull his 50 and let them come back in and do what they should have done already.

And that's one of the things that bothers me about this --

THE COURT: Well, what does that do to their argument on the four employees? Did they waive it or what happened?

MR. NICHOLS: Well --

THE COURT: I mean, what's the consequences of that?

MR. NICHOLS: Well, that is up in the air because four employees or more, the Worker's Compensation Commission does not have jurisdiction to hear a case. There's --

THE COURT: Well, unless they got four employees.

MR. NICHOLS: Unless they have four or more employees, the employer is not subject --

THE COURT: Well, what kind of testimony was offered at that first hearing with Mr. Wiggers concerning the four employees?

MR. NICHOLS: Well, and let me clear up that. This is the second thing that bothers me. Judge Hill also --

THE COURT: Tell me what happened at the Worker's Comp hearing.

MR. NICHOLS: Mr. Chaudhari, whose wife was one of the murdered employees, testified that he also worked at both locations.

THE COURT: Okay.

MR. NICHOLS: So if you get the killer, who was one of the employees, the two employees who were murdered and

Mr. Chaudhari, you had four employees. But he also testified about other employees.

THE COURT: But Hufstetler just rejected that?

MR. NICHOLS: Hufstetler rejected that.

THE COURT: Okay.

MR. NICHOLS: The appellate panel summarily affirmed. But because it's a jurisdictional issue, Judge Hill had the authority -- and this is the second part of the order which was not presented to you. The second part of the order which -- if I can hand it up to you.

THE COURT: Yes, sir.

MR. NICHOLS: That's part two of the order. And this is critical in this case, Judge. Part two of the order, Judge Hill says: Even apart from Mr. Paul's affidavit, whether it should have been admitted or not, I find that the evidence supports a finding of four or more employees.

He made his own finding which he's allowed to do because this is a jurisdictional question. And I can quote you case law back from when the Act was first --

THE COURT: Well if he found that, why did he remand it?

MR. NICHOLS: Because the Commission did not -- the Commission has to make the award. He could not make the award. He has to remand and he actually remanded it all the way back to the Hearing Commissioner. That's where the award has to be made.

THE COURT: Well, why don't they have the right to appeal that issue, Judge Hill's order now?

MR. NICHOLS: Because the Supreme Court said in

Montjoy and more recently in the Bone case which they reheard now that where a Circuit Judge remands the matter is not a final order under the Administrative Procedures Act which controls the Worker's Comp Act.

THE COURT: But they still can preserve it and raise

that whenever they get to the Court of Appeals or the Supreme Court.

MR. NICHOLS: Yes, sir, they can. But it appears that --

THE COURT: What are y'all asking me to do? I'm not going to reverse Judge Hill's order.

MR. NICHOLS: That's right. You can't.

THE COURT: I can't. I'm not going to do that. So what do y'all want me to do?

MR. NICHOLS: I've got that in the brief. And by the way, these are two appeals but they're essentially the same case.

THE COURT: All right.

MR. NICHOLS: But there's a possibility that you could find that you're hearing this on different evidence. And I don't think you are because they make very clear here that they're only up here on Judge Hill's ruling of law that the statute --

THE COURT: That's the appeal issue. So, I mean, I don't know what I can do. My hands are sort of tied. I mean, all I can do is affirm his order and let y'all go on to the Court of Appeals. Tell me what else I can do.

MR. NICHOLS: You can make a finding apart from that that this issue is moot now that the Commission has gone ahead and allowed Mr. Paul's live testimony as well as his

affidavit which would make it based on different -- a presentation of a different set of facts.

THE COURT: Well, yeah. If she -- apparently at the hearing level, the second hearing level tried to preserve that and preserved it again at the full Commission, does that really make it moot?

MR. NICHOLS: Not as to that question of law. But I would actually say that it does, Judge, because what they're complaining about is the appellate panel denying Mr. Wigger's request that -- because they sandbagged him at that hearing. He found Mr. Paul. Mr. Paul had left the country, but he found him and he got an affidavit from him and he tried to present that affidavit and he tried to present it under 42-17-50.

THE COURT: Well, I mean, that's -- whether it's a statute or whether it's a regulation, whether they are the same, that's still a factual finding that the fact finder's going to determine, right, whether they're going to allow additional testimony or not.

MR. NICHOLS: If they find -- they have to make a finding of good cause, but Judge Hill was permitted to make that same finding because this is a jurisdictional issue.

THE COURT: Right. I understand. And he found that factually they should have allowed the affidavit under the

statute or the rule.

MR. NICHOLS: That's correct. You can't do anything about that.

THE COURT: There's nothing I can do about that.

MR. NICHOLS: You're correct. And I think we're -- I think we're here again --

THE COURT: Well, you're just here because you got to go here to get to the Court of Appeals is what it amounts to.

MR. NICHOLS: Because this is an old law case.

THE COURT: Right.

MR. NICHOLS: And we're stopping to visit on the way up.

THE COURT: I mean, that's the only issue she's appealing on is Judge Hill's order.

MR. NICHOLS: But that is the only issue that they have.

THE COURT: You're not appealing the issue that the second Hearing Commissioner and the full Commission made a error factually, and abused their discretion factually; are you?

MS. MORRILL: Your Honor, not based on the additional evidence that was presented but the objection is the additional evidence even being allowed. So we have to go back to that order of the Circuit Court Judge.

This case was over. The full Commission dismissed it. I mean, the Hearing Commissioner dismissed it, the full Commission dismissed it. It was only because the Circuit Court Judge --

THE COURT: Well, I'm going to shorten it for you. I'm going to deny your appeal. I'll do a Form Four order. You all have fun in Columbia.

MR. NICHOLS: You don't need a full order, Judge?

THE COURT: Unless you want to present one.
MR. NICHOLS: Well, I don't think --
THE COURT: I'd be happy if you want to present me with an order. I'm just trying to save you the trouble.
MR. NICHOLS: Form Four order works for me, Judge.
THE COURT: Do you want a Form Four?
MS. MORRILL: I think that's appropriate, Your Honor. I think that gives us what we need to appeal to the Court of Appeals.
THE COURT: You're asking me to reverse Judge Hill's order, and I don't have the authority to do it. So I might as well just deny it and y'all have fun.
MS.. MORRILL: Well, at least we gave you an interesting morning.
THE COURT: Right. It's an interesting question.
MR. NICHOLS: Thank you, Judge. Good to see you.
THE COURT: Nice to see you. Thank you very much.

END OF PROCEEDINGS: 10:03 A.M.

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing is a true, accurate and complete transcript of record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, on the 9th day of January, 2013.

I do further certify that I am neither of kin,

counsel, nor interest to any party hereto.

I have hereunder set my hand this 23rd day of March, 2013.

_____

Cheri L. Young, RPR
Official Court Reporter

WCC File No

Lindler, Kellie

From: Lindler, Kellie
Sent: Thursday, January 06, 2006 11:41 AM
To: 'dmurrell@wiggerlawfirm.com'; 'dmurrell@davidson-bennett.com'; 'tlynch@thelynchlawfirm.com'
Subject: Chaudhari - Punlyani 0221896 0221897.doc

WCC File No 0221896
Anita Chaudhari v. Avni Grocers/Fast Point Amoco

WCC File No 0221897
Virendra Punlyani v. Avni Grocers/Fast Point Amoco

To: Terri M. Lynch, Esq.

Cc: J. David Murrell, Esq.

Dear Ms. Lynch:

After reviewing the evidence I have reached a decision in the case captioned above, and I would appreciate your help in drawing a proposed order. Please see my notes below. **If you are unable to prepare the order within 25 days, or if my decision makes it uncomfortable for you to participate,** please let me know and I will draw the order myself

Please excuse any typographical errors.

Thank you for your help on this.

David W. Huffstetler
SC Workers' Compensation Commission

AWW = $650.00 $700.00 D/A : 11/14/02
CR = $433.36 $466.49

Obviously this will require two separate orders, but I thought I would address both of them with one order request. The parties agree that the deaths arose out of and in the course of the employment. The real questions center on dependency and whether the employer was subject to the Act. These are matters that must be proven.

This is a tragic, heart-rending case. However, I am bound to the facts and the law without emotion. As I said at the hearing, I think it was ill advised for the claimant to proceed with these hearings with so many procedural issues. I was close to, if not in fact, rude in questioning the claimant's decision to go forward. But they did proceed and I am limited to the evidence that was presented. It is clear to me that the UEF was served with the form 52 and received notice of the hearing. I know the Fund has been sorting its way through some recent changes, but the claimant produced registered mail receipts and certificates of service. So, the first finding of fact is that the Fund was served with both.

The dependency investigation falls well short of being compelling. It appears to be a 7-page document

from SIU Services. There is not evidence concerning who provided the information or even who filled it out. The document is not signed or dated. The affirmation line on page 7 is blank. Mr. Chaudhari testified concerning dependency. There is no evidence to refute his testimony his being the spouse of Mrs. Chaudhari or that they had two minor children. Further his testimony concerning the dependency of his mother on Mr. Punlyani is also un-refuted. However, there is insufficient evidence to make a finding of a good faith investigation. There does not appear to have been a search of court house records, interviews with co-workers or neighbors, etc.

The more critical question deals with whether the employer is subject to the Act. Mr. Chaudhari testified that there were 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 member with separate 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. One could assume that since the store is called Fast Point Amoco, but there is no proof. I cannot speculate on these issues.

The Fund made several requests to postpone these hearings to allow them to investigate these issues. The claimant objected to this and went forward with the evidence that was available. That evidence is just not enough to prove that the employer was subject to the Act. The Fund does not have the burden of proving that the employer is <u>not</u> subject to the Act. It is an affirmative duty for the moving party to demonstrate evidence that the employer <u>is</u> subject to the Act. The claimant falls short in carrying the burden of proof. The law is to be liberally applied to favor the claimant; however, facts cannot be liberally applied.

<u>Decision</u>

Benefits denied.

Court Reporter: Skylet Morris
811 Polo Road
Building 4, Apt. 428
Columbia, SC 29223
803-462-0074

1/11/06

WCC File No

Lindler, Kellie

From: Lindler, Kellie
Sent: Thursday, January 05, 2006 11:41 AM
To: 'dmurrell@wiggerlawfirm.com'; 'dmurrell@davidson-bennett.com'; 'tlynch@thelynchlawfirm.com'
Subject: Chaudhari - Punlyani 0221896 0221897.doc

WCC File No 0221896
Anita Chaudhari v. Avni Grocers/East Point Amoco

WCC File No 0221897
Virendra Punlyani v. Avni Grocers/East Point Amoco

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Cc: J. David Murrell, Esq.

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Please excuse any typographical errors.

Thank you for your help on this.

David W. Huffstetler
SC Workers' Compensation Commission

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CR = $433.36 $466.49

D/A : 11/14/02

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WCC File No

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<u>Decision</u>

Benefits denied.

Court Reporter: Skylet Morris
811 Polo Road
Building 4, Apt. 428
Columbia, SC 29223
803-462-0074

1/11/06

170

State of South Carolina

1612 Marion Street
P.O. Box 1715
Columbia, S.C. 29202-1715

TEL: (803) 737-5700
FAX: (803) 737-5768

Workers' Compensation Commission

May 7, 2003

Jarrel L. Wigger
Attorney at Law
8086 Rivers Avenue
North Charleston, SC 29406

RE: Anita Chaudhari vs. Avni Grocers
WCC File No. X030334

Virendra Puniyani vs. Avni Grocers
WCC File No. X030335

Date of accidents: 11/14/02

Dear Mr. Wigger,

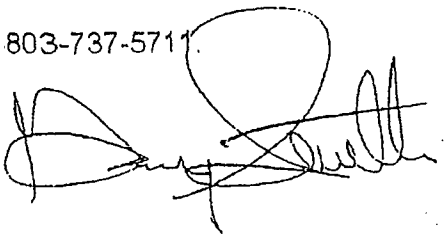
Thank you for returning the questionnaires. They were important. They showed the employer had 15 employees who were paid in cash. Only one employee was reported to the Employment Security Commission.

The opinion of Coverage and Compliance is that the employer is subject to the SC Workers' Compensation Act and in violation by being uninsured. Joel Scott, the investigator, has been sent the attached fourteen-day-violation letter. If the employer will execute the enclosed consent agreement and pay a modest fine, Mr. Joel Scott will turn your client's claim over to the SC Uninsured Employers' Fund to pay or defend. If the employer won't settle the compliance portion of the claim as suggested, Coverage and Compliance will most likely prosecute an uninsured action against the employer at a show-cause hearing. The objective would be to obtain an order from the Commission whereby the claim can be turned over to the Fund.

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 had four or more employees.

If you have questions or comments, please call Mr. Scott at 803-737-5711.

Sincerely,



Gary Smith, Director
Division of Coverage and Compliance

GS:s

Enclosure

May 7, 2003

Harendra Pall
1900 McMillian Drive
Charleston, SC 29405

RE: Anita Chaudhari v. Avni Grocers
WCC File No. X030334

Virendra Puniyani vs. Avni Grocers
WCC File No. X030335

Date of alleged accidents: 11/14/02

Dear Employer:

It is the opinion of the Division of Coverage and Compliance of the South Carolina Workers' Compensation Commission that **Avni International of S.C., Inc.** is subject to the South Carolina Workers' Compensation Act and in violation by being uninsured. This office has recommended that a rule-to-show-cause hearing be held to determine if the employer was in fact in violation, and if so, assessment of appropriate fines and penalties. If the employer does not desire a hearing in the matter of its compliance, the Workers' Compensation Commission will accept a signed, witnessed Consent Agreement indicating that from 7/16/2002 until such time as the employer complies with the Act, the above-named employer is operating as an unqualified self-insurer and in violation of the Act.

By executing the agreement, the uninsured employer is responsible for and agrees to make prompt payment of any claim found to be compensable, occurring during the period of violation. Executing the agreement in no way invalidates any defenses the employer may have, to include a defense that an injured worker did not suffer an injury by accident arising out of employment. Also, the agreement does not cause an uninsured employer to waive any claims or causes of action it may have against a third party, insurance company, agent or broker.

In addition to executing the Consent Agreement, it will be necessary for the employer to pay a fine of **$442.00** for violation of the Act, if paid within the next 14 days. Payment of fines should be by check or money order, made payable to the SC Workers' Compensation Commission. The fine was calculated at 295 days of noncompliance times $1.50 per day, which is our lowest fine-assessment rate for 15 employees.

We are enclosing a Consent Agreement with the request that the employer consider this matter carefully. If we do not hear from the employer within 14 days, a rule-to-show-cause hearing will be scheduled to resolve the matter. At compliance hearings Coverage and Compliance seeks maximum fines plus administrative expenses (the cost of using a

process server and other related expenses) and hearing costs. Hearing costs are presently $736.52.

If you have any questions or comments about the above, please call 803-737-5704 and request to speak with a Compliance Officer.

Sincerely,

Joel Scott, Compliance Officer
Division of Coverage & Compliance

JS/kj

Encl: Consent Agreement

Memo

July 10, 2003

To: Janet Griggs
Fm: Gary Smith

RE: SCWCC vs. Fast Point Amoco
WCC File No. X030335

This was on show-cause docket for July 31. Attached is information provided by claimant's attorney.

But there is another issue other than us proving four or more employees, which is service on the employer. Apparently we didn't get the registered agent of the corporation served. (Please see process server's affidavit of non service.) The business has been sold and the old owner/registered agent is not at the business address. We can't go forward if that's not done.

We may need to tell the attorney to serve his Form 52 by publication.

Tel: (803) 252-7715
Fax: (803) 252-2145
Capitol Center - Suite 1470
1201 Main Street
Columbia, South Carolina 29201

November 23, 2004

Mr. Brooks Shealy, Esq.
SC Uninsured Employers Fund
220 Executive Ctr. Drive
Koger Center, Suite 119
Columbia, SC 29210

Re: Virendra Puniyani (deceased) vs. Avni International of S.C., Inc.
WCC File #: 0221897

Dear Brooks:

As requested, a good faith dependency investigation was performed on Virendra Puniyani with the following results:

BACKGROUND

Virendra Puniyani was born in Ahmedabad, India. The extent of Mr. Puniyani's education in India is unknown but the investigation revealed that Mr. Puniyani did not attend school in the United States. Mr. Puniyani came to the United States to live in January 2002.

BIRTH

According to the South Carolina Death Certificate Virendra Ramprakash Puniyani was born February 19, 1967 to the parents of Ramprakash Puniyani and Rajkumari Pal.

DEATH

The South Carolina Death Certificate documents Virendra Puniyani died November 14, 2002 in Charleston County due to a single distant penetrating gunshot wound to the head. (Exhibit 1)

EMPLOYMENT

At the time of his death, the deceased was employed with Avni International of S.C., Inc. located at 1900 McMillan Drive, N. Charleston, S.C. 29405.

PROBATE

The records of the Charleston County Probate Court were searched and court records indicate that Virendra Puniyani died without leaving any Last Will and Testament.

CLERK OF COURT AND FAMILY COURT

A search of the records of the Family Court of Charleston County revealed no records of divorce or child support orders for the deceased.

VITAL RECORDS

The deposition of the deceased's mother revealed that Virendra Puniyani had never been married.

CHILDREN UNDER THE AGE OF 18 YEARS
(including biological, step, adopted, or foster children)

None

CHILDREN OVER THE AGE OF 18 YEARS
(including biological, step, adopted, or foster children)

None

FATHER/MOTHER

Rajkumari Puniyani
903 Goldendale Court
Greenville, SC 29607

Ramprakash Puniyani (deceased)

BROTHERS/SISTERS

Dharmendra Chaudhari – brother
Ash Varma – sister
Sngita Arora – sister
Nisha Madan – sister
Manisha Narang – sister
Smita Chachra – sister

RELEVANT INTERVIEWS

Jarrel L. Wigger, attorney for the deceased would not give permission for this investigator to interview the relative parties. Mr. Wigger did provide a copy of the deposition of Rajkumari Puniyani, the deceased's mother.

In the deposition, Rajkumari Puniyani stated that she and the deceased came to the United States in January 2002. Ms. Puniyani advised that she lived with the deceased and another son. Ms. Puniyani further advised that the deceased provided support for her and it was her only source of income. (Exhibit 2)

NEWSPAPER ARTICLES

The standard dependency investigation inquiry was placed in the legal notice section of *The Post and Courier* that ran August 7, 8, and 9, 2004 and *The Greenville News* that ran October 7, 8, and 9, 2004. The Affidavits of Publication are provided. (Exhibits 3 & 4)

FUNERAL STATEMENT

J. Henry Stuhr, Inc., 2180 Greenridge Road, No. Charleston, SC 29406 provided the funeral service for the deceased. Attached is a copy of the invoice from J. Henry Stuhr, Inc. (Exhibit 5)

CONCLUSION

Based on the available documentation and information, it appears that the deceased's only dependant would be his mother, Rajkumari Puniyani.

---------- **END OF REPORT** ----------

James D. Lyles
SIU Services, Inc.

ATTEST: This is a true copy of the Death Certificate on file in the Division of Vital Records, Public Health Statistics and Information Services of the South Carolina Department of Health and Environmental Control and is issued pursuant to Subpoena of the South Carolina Workers' Compensation Commission of Richland County, Case No. 0221897, dated August 26, 2004.

DATE: September 1, 2004

Angelia D. Poston
Division of Vital Records

EXHIBIT (4)

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

CERTIFICATE OF DEATH

STATE BIRTH NUMBER

STATE FILE NUMBER 02 030569

DECEDENT

1. DECEDENT'S NAME (First, Middle, Last): VIRENDRA RAMPRAKASH PUNIYANI
2. SEX: MALE
3. DATE OF DEATH (Month, Day, Year): NOVEMBER 14, 2002
4. SOCIAL SECURITY NUMBER: None
5a. AGE - Last Birthday (Years): 35
5b. UNDER 1 YEAR - Months / Days
5c. UNDER 1 DAY - Hours / Minutes
6. DATE OF BIRTH (Mo., Day, Year): FEB. 19, 1967
7. BIRTHPLACE (City and State or Foreign Country): AHMEDABAD, INDIA
8. WAS DECEDENT EVER IN U.S. ARMED FORCES? (Yes or No): NO
9a. PLACE OF DEATH (Check only one; see instructions on other side): HOSPITAL - X Inpatient; ER/Outpatient; DOA. OTHER - Nursing Home; Residence; X Other (Specify): WORK
9b. FACILITY NAME (If not institution, give street address): AMOCO STATION CMCMILLIAN & SPRUILL AVE
9c. CITY, TOWN, OR LOCATION OF DEATH: NO. CHARLESTON
9d. COUNTY OF DEATH: CHARLESTON
10. MARITAL STATUS - Married, Never Married, Widowed, Divorced (Specify): NEVER MARRIED
11. SURVIVING SPOUSE (If wife, give maiden name):
12a. DECEDENT'S USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired): MANAGER
12b. KIND OF BUSINESS/INDUSTRY: STATION
13a. RESIDENCE - STATE:
13b. COUNTY:
13c. CITY, TOWN, OR LOCATION:
13d. STREET AND NUMBER:
13e. INSIDE CITY LIMITS? (Yes or No): YES
13f. ZIP CODE: 29406
14. WAS DECEDENT HISPANIC ORIGIN? (Specify Yes or No - If Yes, specify Cuban, Mexican, Puerto Rican, etc.): Yes X No (Specify)
15. RACE - American Indian, Black, White, etc. (Specify): INDIAN
16. DECEDENT EDUCATION (Specify only highest grade completed): Elementary/Secondary (0-12): 12; College (1-4 or 5+): 4

PARENTS

17. FATHER'S NAME (First, Middle, Last): RAMPRAKASH PUNIYANI
18. MOTHER'S NAME (First, Middle, Maiden Surname): RAJKUMARI PAL
19a. INFORMANT'S NAME (Type/Print): DHARMENDRA CHAUDHARI
19b. MAILING ADDRESS (Street and Number or Rural Route Number, City or Town, State, Zip Code):

DISPOSITION

20a. METHOD OF DISPOSITION: Burial; X Cremation; Removal from State; Donation; Other (Specify):
20b. PLACE OF DISPOSITION (Name of cemetery, crematory, or other place): NORTHWOODS CREMATORY
20c. LOCATION - (City or Town, State): CHARLESTON, S.C.
21a. FUNERAL DIRECTOR OR PERSON ACTING AS SUCH (Signature): H.C. Reeves
21b. FUNERAL DIR. LICENSE NO.: 791
21c. NAME AND ADDRESS OF FACILITY:
22. LICENSE NUMBER (of facility): 67
21d. EMBALMER (Signature): H.C. Reeves
21e. EMBALMER LICENSE NO.: 1066

CAUSE OF DEATH

19. Complete items 23a-c only when certifying physician is not available at time of death to certify cause of death.
23a. To the best of my knowledge, death occurred at the time, date, and place stated. Signature and Title:
23b. LICENSE NUMBER:
23c. DATE SIGNED (Month, Day, Year):
24. TIME OF DEATH: APPROX 9:30 P.M.
25. DATE PRONOUNCED DEAD (Month, Day, Year):
26. WAS CASE REFERRED TO MEDICAL EXAMINER/CORONER? (Yes or No): YES

27. PART I. Enter the diseases, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line. Approximate Interval Between Onset and Death:

IMMEDIATE CAUSE (Final disease or condition resulting in death): a. Single distant penetrating gunshot wound — SECONDS
DUE TO (OR AS A CONSEQUENCE OF): b. to head
Sequentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (disease or injury that initiated events resulting in death) LAST: c.
DUE TO (OR AS A CONSEQUENCE OF): d.

PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I.
28a. AUTOPSY (Yes or No): YES
28b. IF YES, WERE AUTOPSY FINDINGS CONSIDERED IN DETERMINING CAUSE OF DEATH? (Yes or No):

CERTIFIER

29. MANNER OF DEATH: Natural; Accident; Suicide; Homicide; Pending Investigation; Could not be Determined
30a. DATE OF INJURY (Month, Day, Year): 11/14/02
30b. TIME OF INJURY: approx 9:30 P.M.
30c. INJURY AT WORK? (Yes or No): YES
30d. DESCRIBE HOW INJURY OCCURRED: shot by someone
30e. PLACE OF INJURY - (Home, Farm, Street, Factory, Office, etc.) (Specify): Gas station
30f. LOCATION (Street and Number or Rural Route Number, City or Town, State): McMillan Ave
31. CERTIFIER (Check only one): CERTIFYING PHYSICIAN (Physician certifying cause of death); MEDICAL EXAMINER; CORONER; PRONOUNCING AND CERTIFYING PHYSICIAN (Physician both pronouncing death and certifying to cause of death)
32. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER:
33a. SIGNATURE AND TITLE OF CERTIFIER - To the best of my knowledge, death occurred at the time, date and place, and due to the cause(s) and manner as stated: Robert A Chen
33b. LICENSE NUMBER:
33c. DATE SIGNED (Month, Day, Year): 11/18/02
34. NAME AND ADDRESS OF PERSON WHO SIGNED IN 33a (Type/Print): Susan J. Chewning, 410 Bonaventure Dr. N. Chas, SC 29464

REGISTRAR

35. REGISTRAR'S SIGNATURE: Kathleen B. Roberts
36. DATE FILED (Month, Day, Year): NOV 18, 2002

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

DHARMENDRA CHAUDHARI and RAJKUMARI PUNLYANI, Employee/Claimant, -vs- FAST POINT AMOCO, Employer, and SECOND INJURY FUND and WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND Carrier, Defendants.	WCC File No. XO30334 DEPOSITION OF: **MRS. RAJKUMARI PUNLYANI**

COPY

Given before Raymond E. Swartz, Notary Public and Certified Court Reporter, in the Law Offices of Messrs. Davidson, Bennett & Wigger, 8086 Rivers Avenue, North Charleston, South Carolina on Thursday, May the 1st, 2003, commencing at 11:15 o'clock, a. m.

EXHIBIT (2)

A P P E A R A N C E S

For the Claimant : Davidson, Bennett & Wigger,
By: Jarrell L. Wigger, Esquire
8086 Rivers Avenue
No. Charleston, SC 29406

For the SC Second Injury Fund & the Workers' Compensation Uninsured Employers' Fund : Brooks Shealy, Esquire
Deputy General Counsel
220 Executive Center Drive
Suite 119
Columbia, South Carolina 29210

INDEX TO EXAMINATIONS:

	Page
Direct Examination by Mr. Wigger	3
Cross Examination by Mr. Shealy	5

It was stipulated by and between counsel for the parties that this deposition is taken pursuant to notice and that all questions as to notice are waived; that all objections, save as to the form of the question, are reserved until the time of trial; that the deposition is taken pursuant to the South Carolina Rules of Civil Procedure for purposes of discovery; and that the deponent was explained her right to read and sign the deposition and waived that right.

(Mr. Divyesh Patel, the interpreter, was at this time duly sworn.)

(Mrs. Rajkumari Punlyani was duly sworn and testified through the interpreter as follows:)

DIRECT EXAMINATION BY MR. WIGGER:

Q If you would ask her to state her name for the record, please?

A Rajkumari.

Q And her last name?

A Punlyani.

Q And how old is she?

A Sixty-four years.

Q And how long has she been in the United States?

A January 20th, 2002.

Q Who did she live with?

A With Virendra, her younger son.

Q And that is Virendra Punlyani that we are here about today?

A Yes.

Q Would you ask her where Virendra worked?

A At the gas station he was working.

Q Ask her if he lost his life on November 14th, 2002?

A He got shot on November 14th.

Q Ask her if she knows if he was working that day?

A Yes, she knows that that day he was working.

Q Ask her if he helped provide support for her?

A Yes, her younger son was helping her.

Q Did she have any other source of income, other than Virendra?

A No.

Q Did Virendra work anywhere other than the store he was working at when he got shot?

A No.

Q Does she know when Virendra start working there, approximately?

A The 25th of July, 2002.

Q And did he work there the whole time from that date up until when he was killed?

A Yes.

Q Does she know anything about how he was paid?

A She says that he was working and when she needs money she got it from him.

Q And would he buy her food and the things that she needed to live with?

A Virendra was giving her money for whatever she needs.

Q Does she know who paid the funeral bill for Virendra?

A She doesn't know about that.

Q Did Virendra have any children alive when he passed away?

A No.

Q And was he married when he passed away?

A He was single.

Q And had he always provided his mother with support?

A Yes.

MR. WIGGER: Would you tell her those are all of the questions that I have. Mr. Shealy represents the Uninsured Fund. He may ask her some questions also and please answer those.

CROSS EXAMINATION BY MR. SHEALY:

Q Had Virendra ever been married?

A No.

Q How old was Virendra?
A Thirty-five years.
Q Is Virendra's father still alive?
A No.
Q What was his name and when did he die?
A His name Ranthrafas (ph) and he was ninety-seven, 15 August.
Q Does she know who shot her son?
A No.
Q Does she know anyone else who depended on Virendra for support?
A She was the only one.
Q Was anyone else living in the home with them, where they lived?
A Her son and her younger son.
Q Now, let's be sure. Younger sons of her, not sons of Virendra?
A No, no, not son of Virendra. Hers.
Q Her son?
A Her son.
Q Alright. Did any of those sons depend on Virendra for support?
A No. She was the only one.
Q The only one?
A Yes.

Q The younger sons had jobs also?

A Yes.

MR. SHEALY: That's all I have.

MR. WIGGER: I don't have any further questions. And let the record reflect that Mr. Shealy was given the opportunity to depose further Mr. Chaudhari and he declined to do so.

(The deposition concluded at 11:25 o'clock, a.m.)

STATE OF SOUTH CAROLINA)
: C-E-R-T-I-F-I-C-A-T-E
COUNTY OF CHARLESTON)

I, Raymond E. Swartz, Notary Public, certify that I did have Mrs. Rajkumari Punlyani to appear before me at 11:15 o'clock, a.m. on Thursday, May the 1st, 2003 in the Law Offices of Messrs. Davidson, Bennett & Wigger, 8086 Rivers Avenue, North Charleston, South Carolina; that the witness was duly sworn through the interpreter and cautioned to tell the truth, the whole truth and nothing but the truth; that the foregoing pages constitute a true and accurate transcript of her testimony given at that time and place through the interpreter.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand and seal this the 2nd day of May, 2003.

Notary Public for South Carolina.
My Commission Expires Nov 8, '10.

James D. Lyles
1201 Main Street., SUITE 1470
Columbia SC 29201

Number of Copies: 1

AFFIDAVIT OF PUBLICATION

The Post and Courier

State of South Carolina

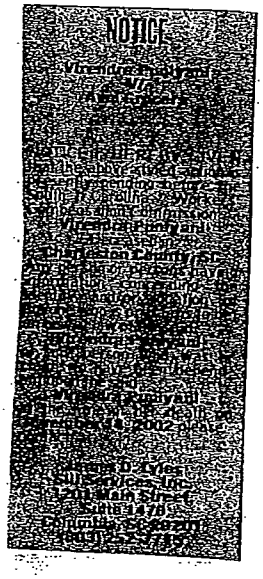
County of Charleston

Personally appeared before me the undersigned advertising Clerk of the above indicated newspaper published in the City of Charleston, County and State aforesaid, who, being duly sworn, says that the advertisement of

(Copy attached)

appeared in the issues of said newspaper on the following day(s):

08/07/2004, 08/08/2004, 08/09/2004


NOTICE

at a cost of **$ 197.18**
Account# **2527715JAM**
Order# **C220PPA2**
P.O. Number: **grocers**

Subscribed and sworn to before me this 23rd day of August A.D. 2004

Advertising Clerk

NOTARY PUBLIC, SC
My Commission expires
My Commission Expires 10/10/13

Form 3020

EXHIBIT (3)

The Greenville News
Post Office Box 1688
Greenville, South Carolina 29602

AFFIDAVIT

I, Susan Mullinax, being the legal advertising agent for *The Greenville News*, do hereby testify that the attached legal ad was published on 27 lines in The Greenville News on 10/7, 8 & 9, 2004.

Susan Mullinax

Susan Mullinax, Legal Advertising Representative

Notary Public for State of South Carolina
My Commission Expires April 4, 2013

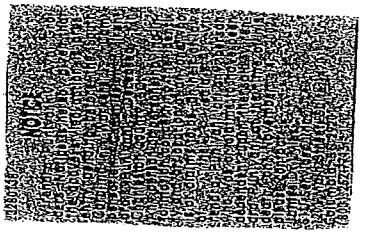


EXHIBIT (4)

Between:

J. Henry Stuhr, Inc.
2180 Greenridge Road
No. Charleston, South Carolina 29406

Contract #: CS 2000850

And: Name Mr. Dharmendra Chaudhari (the purchaser)
Address

Phone (843) 572 - 9695
Relation to deceased Brother

For: Name Mr. Virendra Ramprakash Puniyani (the deceased)
Address

Place of Death
Date of Death November 14, 2002

TATEMENT OF FUNERAL GOODS AND SERVICES SELECTED
Charges are only for those items that are selected or that are required by law or by a cemetery or crematory to use any items, we will explain the reasoning in writing below.)

Funeral Home Charges

A Professional Services

A1 Professional Services

Professional Services of FD & Staff	1,500.00
Embalming	625.00
Dressing, Casketing, and Cosmetology	200.00
Cremation	400.00
	2,725.00

A3 Automotive

Removal to Funeral Home	210.00
Total	2,935.00

B Merchandise

Casket: Sebring	395.00
Total Funeral Home Charges	**3,330.00**

Cash Advances

Cremation Certificate (Chas County)	10.00
Death Certificates (6)	27.00
Funeral Notices (Post & Courier)	125.00
Total Cash Advances	**162.00**

Summary of Charges

Funeral Service & Merchandise	3,330.00
Sales Tax	23.70
Cash Advances	162.00
Total for Funeral	**3,515.70**

Disclosures
Reason for embalming: Public Viewing
If any law, cemetery or crematory requirements have required the purchase of any items listed, the law or requirement is explained below:
N/A

Dated on: November 15, 2002

Dr. R Chaudhari
Purchaser

Co-Purchaser

For the Funeral Home

EXHIBIT (5)

PAID FUNERAL NOTICE

TO: THE POST & COURIER
CO 756040 CLASS 001 TERR. 21

FROM: J. HENRY STUHR, INC., GREENRIDGE ROAD CHAPEL
2180 Greenridge Road
North Charleston, SC 29406
PHONE : (843) 572-2339 FAX: (843) 553-7579

PLEASE RUN: SATURDAY, NOVEMBER 16, 2002

PUNIYANI, VIRENDRA RAMPRAKASH: Entered into eternal rest on Thursday evening, November 14, 2002, Virendra Ramprakash Puniyani. Residence, North Charleston, South Carolina. The relatives and friends of Virendra Ramprakash Puniyani are invited to attend his funeral services in **J. HENRY STUHR, INC., GREENRIDGE ROAD CHAPEL** on _____; November _____, 2002 at _____ o'clock. Burial will be private. Friends may call at Stuhr's Greenridge Road Chapel on _____, November _____, 2002 from 9:30 o'clock until time of service. In lieu of flowers, memorial may be made to Gujarati Samaj of Charleston, 8480 Rivers Avenue, North Charleston, SC 29406.

Mr. Puniyani, 35, was born on February 19, 1967 in Ahmedabad, India, a son of Ramprakash Puniyani and Rajkumari Pal Puniyani. Mr. Puniyani was a manager with a local convenience store.

Surviving are his mother of Charleston, SC; his brother, Dharmendra Chaudhari of North Charleston, SC and two nieces, Aashka Chaudhari and Avni Chaudhari both of North Charleston, SC

SCWCC
1612 Marion Street, P.O. Box 1715
Columbia, S.C. 29202-1715

4429
WCC File No. MW 0221897
Emp. Code No.
Carrier Code No.
Carrier File No.

NOTICE OF HEARING

DECEMBER 2,, 2005

ATTORNEYS OF RECORD

EMPLOYEE: VIRENDRA PUNIYANI, DEC.
RAIKUMARI PUNIYANI, MOTHER

PLAINTIFF:
JARRELL WIGGER

EMPLOYER: AVNI GROCERS/FAST POINT AMOCO

INSURER: AVNI GROCERS/FAST POINT AMOCO. NO COV
UNINSURED EMPLOYERS FUND
SECOND INJ. FUND

DEFENDANTS: NO REP. CH Reg

A hearing will be held CONFERENCE ROOM A, PERIMETER CENTER, 4050 BRIDGE VIEW DRIVE, NORTH CHARLESTON, SC

at 1:30 o'clock P.M., on JANUARY 4, 2006.

SUBJECT OF HEARING:
TO DETERMINE ISSUES AS SET FORTH ON FORMS 52 AND 53.

SC Code R.67.601 - - R.67.614 governs the conduct of hearings. The employee must attend when not represented by an attorney or when disfigurement is involved. An uninsured employer must attend. A corporation must be represented by an attorney. All witnesses must be present and available to testify. Attorneys must file Form 58 (Pre-hearing Brief) with proof of service pursuant to R.67-612. Notify the Commissioner's office listed below if the case is settled or to request a postponement. Postponements are granted only for grounds in R.67-613. The transcript of a hearing is prepared only when requested by a party. An appeal hearing may not be postponed due to failure to timely request the transcript.

Each party is responsible for his witnesses appearing at the hearing.

S.C. WORKERS' COMPENSATION COMMISSION
BY: DAVID W. HUFFSTETLER
Commissioner

Hand delivered on 12-30-2005

Wigger Law Firm, Inc.

ATTORNEYS AT LAW

3086 Rivers Avenue, Suite A
North Charleston, SC 29406

JARREL L. WIGGER*
J. DAVID MURRELL

JOSEPH DUBOIS

*Board Certified Civil Trial Specialist
By National Board of Trial Advocacy

(843) 553-9800
(843) 553-1648 Fax

December 20, 2005

VIA CERTIFIED MAIL

DAVID W. HUFFSTETLER, Commissioner
SC Workers' Compensation Comm.
PO Box 1715
Columbia SC 29202-1715

RE:	CLAIMANT:	**RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI, DEC.**
	EMPLOYER:	**AVNI Grocers/Fast Point Amoco**
	D/LOSS:	**11/14/02**
	WCC #:	**0221897**

Dear Commissioner Huffstetler:

Please find enclosed Claimant's Pre-Hearing Brief (FORM 58) and Notice of Witnesses and Records in reference to the above-captioned matter. This hearing is scheduled before you on January 4, 2006 at 1:30 pm.

By copy of this letter, I am serving same upon Avni Grocers/Fast Point Amoco and the Uninsured Employers Fund. I have also served them with a copy of written medical evidence I intend to use at the hearing.

If you have any questions regarding this matter, please call. Thank you for your assistance.

Respectfully,

Jarrel L. Wigger

JLW/saj
Enclosures
cc: Brooks Shealy, Attorney for the Uninsured Employers Fund (via Certified Mail)
Avni Grocers/Fast Point Amoco (via Certified Mail)

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

WCC File # 0221897
Carrier File #
Carrier Code #
Employer FEIN

RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI, DEC.
Claimant's Name SSN

AVNI Grocers/Fast Point Amoco
Employer's Name

Address City State Zip

Address City State Zip

( ) ( )
Home Phone # Work Phone #

Uninsured Employers Fund
Insurance Carrier

JARREL L. WIGGER 8086 RIVERS AVENUE, N. CHARLESTON SC 29406 (843) 553-9800
Preparer's Name Address Phone #

Provide the information requested in the space provided. Use an additional sheet, if necessary. Type or print all information.

☒ Injury by Accident ☐ Occupational Disease ☐ Both Injury by Accident and Disease ☒ Other

1. Date of accident 11/14/2002 2. AWW: $ Comp. Rate: $

3. Type of injury and body part(s) Fatal gunshot wound to head

4. Facts in controversy: Compensation rate, heirs, burial expenses, etc.

5. Legal issues involved:

6. Unusual problems: Defendant is uninsured

7. Witnesses (designate if expert)* Dharmendra Chaudhari and RAJKUMARI PUNLYANI via deposition

8. Exhibits: SEE ATTACHED NOTICE.

9. Medical evidence: (Indicate report pursuant to R.67-612; deposition or appearance)
SEE ATTACHED NOTICE.

10. Name, address, and specialty, if any, of the treating physician: N/A

11. Impairment rating(s); body part(s); physician and date of opinion: N/A

SIGNATURE

DATE OF HEARING: 01/04/06 TIME OF HEARING: 1:30 p.m.

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.

WCC FORM # 58 REV. DATE 3/96 58 PRE-HEARING BRIEF

Forms On-A-Disk, Inc. • Dallas, Texas

STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION

RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI , DEC. Claimant, v. AVNI GROCERS/FAST POINT AMOCO) Employer/Defendant,	**WCC FILE #0221897** **NOTICE OF WITNESSES AND RECORDS TO BE INTRODUCED AS DIRECT EVIDENCE ON BEHALF OF CLAIMANT**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND THE DEFENDANT AND UNINSURED EMPLOYERS FUND

YOU ARE HEREBY NOTIFIED, that the Claimant, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330 (1976, as amended), herewith submits the following medical records and exhibits as direct evidence on behalf of the Claimant, to wit:

Name of Document	Date of Record	# of Pages
1. Certificate of Death	11/14/02	1
LIST OF EXHIBITS		
1. J. Henry Stuhr, Inc. Funeral Expenses	11/15/02	2
2. Post & Courier Article "Five Arrested"	11/15/05	3
3. Post & Courier Article "Fates of 7"	12/15/02	4-7
4. Post & Courier Article "16-year-old girl"	12/15/02	8-10
5. Post & Courier Article "Prosecutor Weighs"	12/17/02	11

6. Post & Courier Article "Five Plead Guilty"	11/09/04	12-16
7. Deposition of Dharmendra Chaundhari	4/14/03	17-30
8. Incident Report	11/14/02	31-43
9. Deposition of Rajkumari Punlyani	05/01/03	44-51

YOU ARE FURTHER HEREBY NOTIFIED that you have the right to cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the depositions of any of person, whose reports are submitted, for the purposes of cross-examination.

YOUR ARE FURTHER NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission for insertion in the file of the South Carolina Workers' Compensation Commission and inclusion into evidence on behalf of the claimant.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Claimant:

DHARMENDRA CHAUDHARI
RAJKUMARI PUNLYANI (Via Deposition)

JARREL L. WIGGER
WIGGER LAW FIRM
Attorney for the Claimant
8086 Rivers Avenue
North Charleston SC 29406
(843) 553-9800

Charleston, South Carolina
20 day of December, 2005

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

CERTIFICATE OF SERVICE

The Undersigned Attorney for the Claimant, 8086 Rivers Avenue, Suite A, North Charleston, South Carolina, 29406, does hereby certify that she has served the following named individuals and\or companies with a copy of the pleading indicated below by mailing a copy of same to them in the United States certified mail, with sufficient postage affixed thereto and return address clearly marked, on the date indicated below:

PARTIES SERVED:

Brooks Shealy, Esq.
Deputy General Counsel
WC Uninsured Employers Fund
220 Executive Ctr. Dr. Ste 119
Koger Center
Columbia, SC 29210

Avni Grocers
1900 McMillan Avenue
N. Charleston, SC 29405

PLEADING:

RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI, DEC.v. AVNI Grocers/Fast Point Amoco

FORM 58 - Claimant's Pre-Hearing Brief (FORM 58) and Notice of Witnesses and Records

Dana Weinert

DANA WEINERT, PARALEGAL
WIGGER LAW FIRM, INC.
8086 Rivers Avenue, Suite A
North Charleston SC 29406
(843) 553-9800

THIS 20 DAY OF DECEMBER, 2005
CHARLESTON, SOUTH CAROLINA

UNAUTHORIZED COPY

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

CERTIFICATE OF DEATH

STATE BIRTH NUMBER

STATE FILE NUMBER 02 030569

DECEDENT

1. DECEDENT'S NAME (First, Middle, Last): VIRENDRA RAMPRAKASH PUNIVANI
2. SEX: MALE
3. DATE OF DEATH (Month, Day, Year): NOVEMBER 14, 2002
4. SOCIAL SECURITY NUMBER: None
5a. AGE - Last Birthday (Years): 35
5b. If UNDER 1 YEAR - Months
5c. If UNDER 1 DAY - Days / Hours / Minutes
6. DATE OF BIRTH (Mo., Day, Year): FEB. 19, 1967
7. BIRTHPLACE (City and State or Foreign Country): AHMEDABAD, INDIA
8a. WAS DECEDENT EVER IN U.S. ARMED FORCES? (Yes or No): NO
9a. PLACE OF DEATH (Check only one; see instructions on other side): OTHER (Specify): WORK
9b. FACILITY NAME (If not institution, give street and number): AMOCO STATION @ MCMILLIAN & SPRUILL AVE
9c. CITY, TOWN, OR LOCATION OF DEATH: NO. CHARLESTON
9d. COUNTY OF DEATH: CHARLESTON
10. MARITAL STATUS - Married, Never Married, Widowed, Divorced (Specify): NEVER MARRIED
11. SURVIVING SPOUSE (If wife, give maiden name): ++++++++++++++++
12. DECEDENT'S USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired.): MANAGER
12b. KIND OF BUSINESS/INDUSTRY: STATION
13. RESIDENCE - STATE / COUNTY / CITY, TOWN, OR LOCATION / STREET AND NUMBER / INSIDE CITY LIMITS? (Yes or No): YES
13a. ZIP CODE
14. Was Decedent of Hispanic Origin? (Specify Yes or No - If yes, specify Cuban, Mexican, Puerto Rican, etc.): Yes / X No (Specify)
15. RACE - American Indian, Asian, Black, White, etc. (Specify): INDIAN
16. DECEDENT'S EDUCATION (Specify only highest grade completed) - Elementary/Secondary (0-12): 12 / College (1-4 or 5+): 4

PARENTS

17. FATHER'S NAME (First, Middle, Last): RAMPRAKASH PUNIVANI
18. MOTHER'S NAME (First, Middle, Maiden Surname): RAJKUMARI PAL

19. INFORMANT'S NAME (Type/Print): DHARMENDRA CHAUDHARI
19a. MAILING ADDRESS (Street and Number or Rural Route Number, City or Town, State, Zip Code)

DISPOSITION

20a. METHOD OF DISPOSITION: ☐ Burial ☒ Cremation ☐ Removal from State / ☐ Donation ☐ Other (Specify)
20b. PLACE OF DISPOSITION (Name of cemetery, crematory, or other place): NORTHWOODS CREMATORY
20c. LOCATION - (City or Town, State): CHARLESTON, S.C.
21a. FUNERAL DIRECTOR OR PERSON ACTING AS SUCH (Signature): Eric Koehler
21b. FUNERAL DIR. LICENSE NO.: 647
21c. NAME AND ADDRESS OF FACILITY
22a. LICENSE NUMBER (of facility): 67
21d. EMBALMER (Signature): M C Reeves
21e. EMBALMER LICENSE NO.: 1066
22b.

CAUSE OF DEATH

23a-c. Complete items 23a-c only when certifying physician is not available at time of death to certify cause of death.
23a. To the best of my knowledge, death occurred at the time, date, and place stated. Signature and Title
23b. LICENSE NUMBER
23c. DATE SIGNED (Month, Day, Year)
24. TIME OF DEATH: APPROX 9:30 PM
25. DATE PRONOUNCED DEAD (Month, Day, Year)
26. WAS CASE REFERRED TO MEDICAL EXAMINER/CORONER? (Yes or No): YES

27. PART I. Enter the diseases, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line.

		Approximate Interval Between Onset and Death
IMMEDIATE CAUSE (Final disease or condition resulting in death)	a. Single distant penetration gunshot wound	seconds
DUE TO (OR AS A CONSEQUENCE OF)	b. N/A	
Sequentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (disease or injury that initiated events resulting in death) LAST	c. DUE TO (OR AS A CONSEQUENCE OF)	
	d. DUE TO (OR AS A CONSEQUENCE OF)	

PART II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I.

28. AUTOPSY (Yes or No): NO
28b. IF YES, WERE AUTOPSY FINDINGS CONSIDERED IN DETERMINING CAUSE OF DEATH? (Yes or No)

29. MANNER OF DEATH: ☐ Natural ☐ Pending Investigation ☐ Accident ☐ Suicide ☐ Could not be Determined ☐ Homicide
30a. DATE OF INJURY (Month, Day, Year): 11/14/02
30b. TIME OF INJURY: 9:30 PM
30c. INJURY AT WORK? (Yes or No): Yes
30d. DESCRIBE HOW INJURY OCCURRED: shot by someone
30e. PLACE OF INJURY - (Home, Farm, Street, Factory, Office, etc.) (Specify): GAS STATION
30f. LOCATION (Street and Number or Rural Route Number, City or Town, State): MCMILLAN & SPRUILL AVE

CERTIFIER

31. CERTIFIER (Check only one): ☐ CERTIFYING PHYSICIAN (Physician certifying cause of death) ☐ MEDICAL EXAMINER ☒ CORONER / ☐ PRONOUNCING AND CERTIFYING PHYSICIAN (Physician both pronouncing death and certifying to cause of death)
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33a. SIGNATURE AND TITLE OF CERTIFIER - To the best of my knowledge, death occurred at the time, date and place, and due to the cause(s) and manner as stated.
33b. LICENSE NUMBER
33c. DATE SIGNED (Month, Day, Year): 11/18/02
34. NAME AND ADDRESS OF PERSON WHO SIGNED IN 33a (Type/Print): KAREN BUSSIN, DR. @ MEDICAL UNIVERSITY OF SOUTH CAROLINA, CHARLESTON, SC

REGISTRAR

35. REGISTRAR'S SIGNATURE: Kathleen B. P.I.
36. DATE FILED (Month, Day, Year): NOV 18, 2002

J. Henry Stuhr, Inc.
2180 Greenridge Road
No. Charleston, South Carolina 29406

Contract #: C5 2000850

And: Name Mr. Dharmendra Chaudhari (the purchaser)
Address
Phone (843) 572 - 9695
Relation to deceased Brother

For: Name Mr. Virendra Ramprakash Puniyani (the deceased)
Address
Place of Death
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Dressing, Casketing, and Cosmetology	200.00
Cremation	400.00
	2,725.00

A3 Automotive

Removal to Funeral Home	210.00
Total	2,935.00

3 Merchandise

Casket: Sebring	395.00

Total Funeral Home Charges 3,330.00

Cash Advances

Cremation Certificate (Chas County)	10.00
Death Certificates (6)	27.00
Funeral Notices (Post & Courier)	125.00
Total Cash Advances	**162.00**

Summary of Charges

Funeral Service & Merchandise	3,330.00
Sales Tax	23.70
Cash Advances	162.00
Total for Funeral	**3,515.70**

Disclosures

Reason for embalming: Public Viewing
If any law, cemetery or crematory requirements have required the purchase of any items listed, the law or requirement is explained below:

N/A

Dated on: November 15, 2002

G & R Chaudhari
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Co-Purchaser

For the Funeral Home

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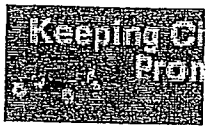
Five Arrested In Double Murder At North Cha Gas Station

Friday November 15, 2002 5:52pm Posted By: Steve Johnson

(AP) ABC News 4 Reporter Nick Salvucci filed this report on The Seven O'Clock News.

Police in North Charleston have arrested five suspects in connection with last night's brutal murder at a gas station. A man and a woman were found shot to death inside a convenience store at McMillan and Spruill Avenues. The victims were employees at the Amoco Fastpoint station.
One of the suspects arrested today is 16-year old Krista Lynn McDaniel, a runaway from George, who had been hired to work at the same station just days before her co-workers were murdered last night.
McDaniel is charged with two counts of murder and armed robbery along with three others, 27-year old John Harvey, 24-year old Jamar Hutchinson, and accused triggerman Robert Mitchell. A fifth suspect, Amy McIntyre, is not charged with murder, but is being held on $200,000 bond for her role in the crime.
The victims are identified as Virenda Puniayani and Anita Chauhardi, both 35-years old. Neighbors and regular customers remembered them today as friendly, kind and generous.

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Fates of 7 culminate on one violent night

Story of 5 suspects, 2 victims began long before November

BY KATHY STEVENS
Of The Post and Courier Staff

With two gunshots, the paths of seven people converged beneath the glare of fluorescent lights at a corner gas station one November night in North Charleston.

In what police call a cold and calculated crime, two of those people — convenience store workers who had moved to the United States for a better life — were shot dead. Five others are charged in connection with the killings. They include a husband who moved to North Charleston with his wife so one of his two stepdaughters could be treated for leukemia, a 16-year-old girl who had bounced from one home to the next, a 27-year-old mother of three, and two 27-year-old men with similar histories of small-time crimes, drug use and prison.

Their lives collided Nov. 14, police say, when a wife and mother of two, Anita D. Chaudhari, 35, and her brother-in-law, Virendra R. Puniyani, 35, were robbed and shot dead inside the family-owned gas station they had operated since the end of July.

A North Charleston police officer who stopped in for a drink found the bodies at 9:38 p.m. that day in the East Point Amoco at Spruill and McMillan avenues. One bullet

See FATES, Page 16A

FILE/PROVIDED

Anita D. Chaudhari, 35, was gunned down at a North Charleston Amoco in November.

FILE/PROVIDED

Chaudhari's brother-in-law, Virendra R. Puniyani, 35, also was killed in the robbery.

The Post and Courier

FROM 1A

Fates of 7 came together on a November night

North Charleston police officers look behind the counter of the Fast Point Amoco at Spruill and McMillan avenues, where Anita D. Chaudhari and her brother-in-law Virendra R. Puniyani were shot to death the night of Nov. 14.

FILE/ALAN HAWES/STAFF

FATES from Page 1A

had pierced Chaudhari's upper body, a second penetrated Puniyani's head.

Detectives swarmed the place within minutes. Hours later, five people were charged in connection with the crime, and investigators began the task of sorting through evidence to determine who played what role. Prosecutors stepped in to examine the facts and determine whether the responsibility was shared by each of the suspects.

The accused are Krista Lynn McDaniel, 16, her boyfriend, John William Harvey III, 17, Annie Renee McIntyre, 27, all formerly of Folkston, Ga., McIntyre's boyfriend, Jamaar Moshe Hutchinson, 27, of North Charleston, and Robby Mitchell, 24, formerly of Bluffton.

McDaniel, Harvey, Hutchinson and Mitchell are charged with armed robbery and two counts of murder; they remain jailed in lieu of $500,000 bail on robbery charges and await bail on murder charges. McIntyre is jailed in lieu of $200,000 bail; she is accused of withholding information from police and is charged with misprision of a felony. All five are scheduled to appear at a preliminary hearing on probable cause at 10 a.m. Monday at the Centralized Preliminary Hearing Court on Leeds Avenue.

As authorities continue building a case, friends and family of the accused question the roles they are said to have played. They sort through details of lives, each saying "She's saying it's got the better of her and she just can't deal with

program that, on completion, would wipe the drug arrest from his record, according to Camden

apartment. Robby Mitchell said he was going to the store, McDaniel said she needed a shower, and McIntyre opted to stay with Nicola Mitchell until the men returned.

"He gave me a kiss and said, 'I'll be right back,'" Mitchell said of her husband. "I thought (McDaniel) had gone to her house to take a shower."

When Robby Mitchell returned, he cuddled up with Nicola Mitchell and watched an ER rerun before going to bed. The next morning, Nicola Mitchell heard voices. A SWAT team was outside her apartment.

"They busted in the door. I didn't know what was going on," she said. "I didn't know (McDaniel) was 16 until then. I didn't even know their real names. They all used aliases."

Instead of an errand-filled day and a night out with her daughters, Nicola Mitchell watched authorities handcuff her husband and learned of the robbery and double murder.

Robby Mitchell's mother, Ruby Mitchell, heard the same.

The single mother of two still can't believe her youngest son — the one who gave her no trouble, graduated from Hilton Head High School and hoped to join the Army — is accused of killing two people.

He was arrested in 1995 for shoplifting and convicted in 1998 of second-degree criminal sexual conduct after having consensual sex with a 12-year-old, according to SLED and Beaufort County Sheriff's Office records, but his mother was not prepared for this.

"The whole family is in shock. Nobody can believe that this has happened," Ruby Mitchell said. "I can't even describe how we feel. ... two innocent people lost their lives."

"I don't believe he did it. I just can't see it," she said.

North Charleston police officers look behind the counter of the Fast Point Amoco at Spruill and McMillan avenues, where Anita D. Chaudhari and her brother-in-law Virendra R. Puniyani were shot to death the night of Nov. 14.

John Harvey

Jamaar Hutchinson

Kristi L. McDaniel

Amie McIntyre

Robby Mitchell

inary Hearing Court on Leeds Avenue.

As authorities continue building a case, friends and family of the accused question the roles they are said to have played. They sort through details of lives leading their daughter, son, sister or friend would not have done something like this.

Questions remain about how these five people met. Mitchell was born and raised in Bluffton. Hutchinson appears to have been reared in the Charleston area. McIntyre, McDaniel and Harvey came from Folkston, a town of 2,100 residents several miles from the Florida state line.

SMALL-TOWN WOES

Folkston is the kind of place where almost everyone knows what everyone else is up to — and doesn't mind talking about it. McIntyre's situation is tough to explain to her 7-year-old daughter, Stasha McIntyre, who wanted to know whether Mom will make it home for Christmas as promised. Stasha lives with her paternal grandparents in a doublewide mobile home a couple miles north of Folkston.

Nell McIntyre, Amie McIntyre's ex-mother-in-law is one of a group of family members who help rear her three children, ages 4 to 10. One fall afternoon, Nell McIntyre, McIntyre's half-sister Erin Crews and paternal grandmother Margie Crews sat down to detail what they know of her life.

Amie McIntyre's mother was killed in a car crash 24 years ago, and Margie Crews stepped in to help rear her granddaughter. McIntyre was "kind of hyper" but little different than other children who find their share of trouble doing "normal things kids do," Crews said. McIntyre was "book smart," the kind of child who didn't have to study to make the grade.

She didn't talk much about what she wanted to do with her life. Events quickly overtook dreams. Pregnant at 16, McIntyre concentrated on three things: her GED, studying, her marriage to Dale Crews and her first child, Jacob Crews, now 10. The marriage had soured by the time she met Troy McIntyre at a party.

By February 1995, she had divorced Crews, said, "I do" to McIntyre, given birth to her second baby, Stasha, and relinquished custody of her son to his father.

The newlyweds lived for a time in a two-room apartment behind Troy McIntyre's parents' home. They fought much of the time, spending occasional nights in the Charlton County Jail.

Amie McIntyre moved from one job to the next — Phillips Auto isn't seem like she got enough love

THE YOUNGEST SUSPECT

Erin Crews doesn't know when or where McIntyre met McDaniel but believes McIntyre and Harvey were classmates at Charlton County High School. Others said the three likely met in Folkston's party circuit. Harvey's mother and sister, both reached at home, declined comment as did members of McDaniel's family, who were contacted through a family friend.

Erin Crews knows little about McDaniel but said she had a class with her at high school and had spoken with her several times. Crews said McDaniel struck her as a person that McIntyre might have taken under her wing. She probably felt sorry for Krista. She knew she didn't have anybody, Crews said.

McDaniel told Crews that she'd been a lot of places, lived with a lot of people and had run away from home several times.

McDaniel attended high school classes and did her work, but Crews, who saw McDaniel as an outgoing and friendly girl. But she was kinda thrown away. She didn't seem like she got enough love

Michigan

Chaudhari and her brother-in-law Virendra R. Puniyani were shot to death the night of Nov. 14

She's saying it's got the better of her and she just can't deal with

Strickland and his mother, Peggy Strickland, liked McIntyre but said they saw changes in her.

"She almost seemed lost in her life," Peggy Strickland said. "Like she didn't know what to do, where to go or who to turn to."

During the next couple of years, McIntyre had her third baby, got a third man. The Stricklands saw her now and then but she had begun hanging with a bad crowd, according to the Stricklands, Crewses and McIntyres.

Police Chief Wesley Green, who has policed the town for nearly 17 years, considered McIntyre part of Folkston's crack-cocaine crowd.

Some residents said the young people do drugs out of boredom. Others said dealers find the most lucrative business available in town, where employment choices include three manufacturers, a lumber company, the city and the county. Minimum-wage jobs at fast-food joints, gas stations and bargain stores are available but limited.

McIntyre always managed to work, but seemed to have run through her choices with her life spiraling down. She left town but she didn't make a clean break.

THE NEW LIFE

About the time McDaniel left Folkston to make better lives for themselves, Amie McIntyre prepared to leave town. She had filed for a divorce from Troy McIntyre.

Margie and Erin Crews and McIntyre's first husband would care for her youngest daughter and son.

McIntyre made the trek north to Charleston and rented an apartment on Pine Ridge Drive in North Charleston that she came to share with McDaniel, Harvey and Hutchinson.

Whether McIntyre knew of her boyfriend's and friends' histories is unclear. Hutchinson's criminal record dates back to 1997 and includes convictions for marijuana and cocaine possession, possession of stolen goods, sale of a pistol, ac-

pened," Ruby Mitchell said. "I can't even describe how we feel. ... two innocent people lost their lives."

Program that, on completion, would wipe the drug arrest from his record, according to Camden County Clerk of Court records.

Harvey, Hutchinson, McDaniel and McIntyre seemed to share a taste for drugs, according to friends, family and law enforcement records. But as far as McIntyre's family knew, she had escaped the drug scene and was doing well. She'd returned to Folkston in October, taken her children trick-or-treating and told Margie and Erin Crews that she was working for a catering company and considering college. She promised her children she would see them at Christmas.

McIntyre returned to North Charleston, where a couple of weeks earlier she and her roommates had met Robby Mitchell, his 31-year-old wife, Nicola, and her two daughters, 9 and 6. The Mitchells recently had relocated from Beaufort County to St. Charles Place Apartments on Pine Ridge Drive to be closer to Medical University Hospital, where one of the girls was treated for leukemia, said Nicola Mitchell.

Robby Mitchell started working immediately, first at a carwash. The four ... only child, who is now in her mother's care, Green said.

McDaniel left home for good in July, taking her clothes and a few packages of frozen food. She later called her father to say she was living with a friend in South Carolina and doing well, Porter said. He asked if she needed anything, money or anything, he said. "I sent a letter to her at the address she gave but the letter came back, the address didn't exist. She didn't want to be found, I guess."

A DIFFERENT STORY

Before long, though, Nicola Mitchell began to wonder whether she wanted her husband around. She'd returned to Folkston in October, taken her children trick-or-treating and told Margie and Erin Crews that she was working for a catering company and considering college. She promised her children she would see them at Christmas.

McIntyre returned to North Charleston, where a couple of weeks earlier she and her roommates had met Robby Mitchell, his 31-year-old wife, Nicola, and her two daughters, 9 and 6. The Mitchells recently had relocated from Beaufort County to St. Charles Place Apartments on Pine Ridge Drive to be closer to Medical University Hospital, where one of the girls was treated for leukemia, said Nicola Mitchell.

Robby Mitchell started working immediately, first at a carwash. Then as a temporary laborer. By the first week of November, he had secured a full-time construction job in Mount Pleasant. They lived in the same apartment complex as McIntyre, Hutchinson, McDaniel and Harvey, and it wasn't long before Robby Mitchell met the four.

"He just started mentioning their names, and they started coming over," Nicola Mitchell said. They hung out. Police said the victims hired McDaniel to work in the convenience store days before they were killed.

Police have said she, Harvey, Hutchinson and Mitchell were good friends. ... thought they'd ... limed committing the robbery and that the tape-recorded Mitchell fitting the fatal shots into the victims, who had managed the store since their husband and brother bought it several months before.

News of their deaths came as a shock to Dharmendra Raju, who discovered the loss of his brother and wife — the mother of their two girls — around midnight. Chaudhari had last spoken to his wife around 9 p.m. She had stayed late that night because a second company had just installed surveillance system at the store and never wanted it around, my daughters, she said. But I figured, the clock approached midnight, she could pick and choose his own friends. If he was OK with them, so was I.

... and made the 45-minute drive to North Charleston, where

FROM 1A

16-year-old girl could face death penalty

BY HERB FRAZIER
Of The Post and Courier Staff

Because of her age, race and gender, 16-year-old Krista Lynn McDaniel is an unusual murder suspect — and an even more unusual candidate for execution.

Prosecutors say McDaniel is believed to be one of only a few white females ever charged with murder in South Carolina. And if prosecutors choose to seek the death penalty against her and win it, McDaniel would be the first white teenage girl to face execution since the death penalty was reinstated here in 1977.

"I doubt that in the history of South Carolina a 16-year-old female has had the death penalty imposed on her," said Solicitor Ralph Hoisington, who is weighing his sentencing options as he prepares the case against five people charged in connection with the Lowcountry's most recent double homicide.

McDaniel is one of four suspects charged with two slayings during a late-night robbery Nov. 14 at the East Point Amoco at Spruill and McMillan avenues in North Charleston.

McDaniel, who had been recently hired as a clerk in the store, is being held at the county juvenile detention center, charged with the shooting deaths of the store's assistant manager Anita D. Chaudhari, 35, and manager Virendra R. Puniyani, 35, both of North Charleston.

Although the Georgia teen with a history of running away from home is being held as a juvenile, McDaniel doesn't fit the profile of death-row inmates elsewhere in the United States. Since 1973, seven states have executed 21 death-row inmates who were teenagers at the time of their crimes, and 80 persons are currently on death rows nationwide for murders they committed when they were juveniles. None are teenage girls.

First Circuit Solicitor Walter Bailey, who prosecuted one of the cases that sent a juvenile to death row, said jurors do not take a defendant's age into consideration when recommending a death sentence. When deciding punishment, jurors tend to consider the facts and a possible justification for the crime, he said.

Jurors can consider age as a mitigating circumstance in a death-penalty case, said state Assistant Deputy Attorney General Donald Zelenka. But drawing a line where the death penalty can be applied based on age would prevent jurors from considering the brutality of a crime, he said. "We are sentencing them because of the crimes they commit," Zelenka said.

Age can influence a jury depending on how it is presented, said Fielding Pringle, executive director of S.C. Equal Justice Alliance, a Columbia-based advocacy group that supports abolishing the death penalty. "There is so much that distinguishes juveniles from adults," she said. "Juveniles think differently and they don't anticipate consequences."

Kathy Stevens of The Post and Courier staff contributed to this report.

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hari, 35, and manager Virendra R. Puniyani, 31, both of North Charleston.

Although the Georgia teen with a history of running away from home is being held as a juvenile, McDaniel faces murder charges as an adult, the solicitor said.

Hoisington said he will decide within weeks whether he will seek the death penalty against McDaniel and her co-defendants Jamaar Hutchinson, 24, John Harvey, 27, and Robby Mitchell, 24, all of North Charleston. The three men are all black. McDaniel and a fifth person, 27-year-old Amie McIntyre, who is charged with a lesser crime, are white.

To win a capital murder case, South Carolina prosecutors must show the existence of aggravating circumstances, which are separate, serious crimes described in state law.

In this case, Hoisington said the two aggravating circumstances are the killings of two people during an armed robbery.

"It very likely will be a death penalty case as to the trigger man," the solicitor said. "But that has not been decided. If the co-defendants anticipated the murders, they also could be exposed to the death penalty."

North Charleston police have said they believe McDaniel, Hutchinson, Harvey and Mitchell planned the robbery. Police believe Mitchell was the gunman. McIntyre is charged with misprision of a felony on accusations of withholding information from police.

State law would allow Hoisington to pursue a death sentence against McDaniel. The South Carolina Supreme Court has ruled that the state can execute convicted killers who were at least 16 at the time of their crime. But the state can't seek the death penalty against 15-year-olds.

McDaniel's father, Darren Porter, said he is a death-penalty supporter, but he hopes prosecutors do not seek the sentence against her. "If my daughter did this and the evidence is there, she'll have to be

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to pursue a death sentence against McDaniel. The South Carolina Supreme Court has ruled that the state can execute convicted killers who were at least 16 at the time of their crime. But the state can't seek the death penalty against 15-year-olds.

McDaniel's father, Darren Porter, said he is a death-penalty supporter, but he hopes prosecutors do not seek the sentence against her. "If my daughter did this and the evidence is there, she'll have to be punished. She'll have to pay her debt to society," he said. "But because of her circumstance, the hard life she's had and her age, I'd hate to see that happen."

Porter, who works for an insurance company in Detroit and last spoke with McDaniel in July, heard about his daughter's arrest a few weeks afterward. Even then, it took him two days to find out if it was true.

Porter said he still has a tough time coming to terms with his daughter's alleged involvement in the crime. He apologized to Chaudri's two children and husband, who also is Puniyani's brother.

"This was a terrible, tragic thing," he said. "I feel terrible for them."

From 1912 to 1951, South Carolina executed 40 inmates who were teenagers when they were put to death. All but two of them were black males, according to the S.C. Department of Corrections. The youngest to die was 14-year-old George Stinney Jr., the youngest person put to death in the United States in the past 60 years. Stinney, who was black, was convicted of murder in Clarendon County and executed in 1944.

Since the death penalty was reinstated in 1977, South Carolina has sent six male juveniles to death row. Of the six, four were white. Three of them — including the two black inmates — have their cases on appeal. The sentence of one was commuted to life in prison, and another is waiting for a new trial. One of them was executed. There are 72 inmates on South Carolina's death row today.

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Prosecutor weighs defendant's statements in dual-murder case

BY KATHY STEVENS
Of The Post and Courier Staff

Police say a 16-year-old confessed to devising a plan to rob and kill her employers at the Fast Point Amoco in North Charleston last month, but the prosecutor said Monday he must weigh other factors before deciding whether to seek the death penalty for her and three co-defendants.

Premeditation is one factor in considering the death penalty, said Solicitor Ralph Hoisington.

Sixteen-year-old Krista McDaniel and three others — Robby Mitchell, 24; Jamaar Moshe Hutchinson, 27; and John William Harvey III, 27 — are charged with murder and armed robbery in the robbery and double-slaying on Nov. 14 of Anita D. Chaudhari, 35, and her brother-in-law Virendra "Tony" R. Puniyani, 35. A fifth suspect, Amie Renee McIntyre, 27, is charged with withholding information from police.

"We're looking at whether there are aggravating circumstances. We're looking at the crime itself, the feelings of the victims (family) and the level of proof," Hoisington said.

Hoisington previously had said that the state likely would seek capital punishment for Mitchell, the accused shooter, but that the penalty he would seek for the others hinges on their involvement in planning the crimes.

In a hearing Monday to determine whether there is sufficient evidence for the case to proceed to trial, North Charleston police Detective Ted Stanfield testified that four of the five people charged in the case gave police written statements that they met outside the store just before the robbery. But the four statements gave conflicting accounts of how much advance planning went into the crime.

Statements varied as to when the scheme was devised, but Stanfield

See DEATH, Page 15A

Death penalty decision hinges on key factors

DEATH from Page 1A

said McDaniel told police that the plan started Nov. 12 with a conversation about overdue rent and utility payments between her and Hutchinson. Hutchinson approached Harvey, and the three enlisted help from Mitchell, Stanfield said.

Under questioning, Stanfield told Mitchell's attorney, Jennifer Shealy of the Charleston County Public Defender's Office, that Mitchell never discussed being coerced or pressured to participate.

"They met between the store and the car wash. Harvey gave (Mitchell) the gun, and someone said, 'You know what you've got to do,'" Stanfield said. Mitchell, at one point during the police interview, told officers that while he was shooting he "heard what he thought was a demon, someone saying, 'Shoot him,'" Stanfield said.

According to police, the four walked inside and spread out, some perusing coolers and others checking out various merchandise.


Harvey


Hutchinson


McDaniel


Mitchell


McIntyre

Mitchell approached the counter and fired several rounds, hitting Chaudhari twice in the head and Puniyani once in the head, police said.

Authorities found the bodies around 9:30 p.m. The cash drawers and a safe were empty and an office door had been forced open, Stanfield said. Subsequent interviews of witnesses, including two security guards and passers-by, led detectives to St. Charles Place apartments, which is a short walk from the Amoco at Spruill and McMillan avenues.

Further investigation revealed a surveillance camera video of the crimes in which one of the victims called one of the four accused by name. Police learned McDaniel had recently been hired at the store to mop, sweep and stock coolers and shelves. Detectives tracked McDaniel to an apartment she shared with her boyfriend, Harvey, and co-defendants McIntyre and Hutchinson.

Initial interviews with McDaniel and the others led police to Mitchell, 24, formerly of Bluffton, who lived in the complex with his wife and her two daughters. The four told police that Mitchell was the shooter, according to Stanfield.

Stanfield said that after the shooting, Mitchell went home to his wife and stepdaughters and the others to their apartment. McIntyre and Hutchinson were on a fast-food run by the time detectives knocked on the door of the apartment they shared with McDaniel and Harvey, Stanfield said. McDaniel told detectives she hadn't left the apartment and that she was unemployed, Stanfield said. While detectives were still there, Hutchinson and McIntyre arrived with Mexican food and sodas, Stanfield said. Authorities obtained a search warrant for the apartment and recovered more than $1,100 in small bills, including a bloodstained $10 bill, Stanfield said.

Harvey denies any involvement in the robbery and shooting, but Stanfield claimed Harvey supplied Mitchell with the murder weapon and later helped police recover the gun from a dumpster at the apartment complex.

McDaniel, Harvey, Hutchinson and Mitchell are charged with armed robbery and two counts each of murder; they remain at Charleston County Detention Center in lieu of $500,000 bail on robbery charges and await bail on murder charges. McIntyre is charged with withholding information from police. She is jailed on $200,000 bail.

Magistrate James B. Gosnell Jr. bound the cases of McDaniel, Harvey, Hutchinson and Mitchell for trial. McIntyre had been scheduled for a preliminary hearing Monday but was granted a continuance to enable her lawyer, Thomas B. Pritchard of Charleston, time to prepare.

Kathy Stevens *covers police and crime. Contact her at 745-5858 or kstevens@postandcourier.com.*

...resident Bush's swift appointment of ...ter, a ...lin...

...Mr. Kean, while no expert on ... affairs, has the right credentials for the friends ...

Green Wave takes state crown, 1B

The Post and Cou

Charleston • North Charleston, S.C. THE SOUTH'S OLDEST DAILY NEWSPAPER

TUESDAY

November 9, 2004

Partly sunny and cool
High 64
Low 38

State health ranking edges up to No. 47

South Carolina got a boost in the national rankings from residents who are losing weight and giving up smoking. But it is still one of the least healthy states in the nation. 1B

Ladson Road project $3M over budget

The state Department of Transportation must decide where to get the extra money for the widening project — either its own coffers or the pool of state money sent to the Charleston area for bridge work. 1B

Palestinians barred from Arafat visit

Aboud accused by Suha Arafat of trying to usurp her husband's role as head of the Palestinian Author- ...sair. 3A

Chief of staff stays with Bush team

...aw ...ed 12 teen ...cials who rushed to Paris to ...said ...on the critically ill leader ...accused by Suha Arafat of ...rrig to usurp her husband's role ...ead of the Palestinian Author-

Five plead guilty in gas station killings

Friends to serve long sentences for '02 crime



McDaniel



Mitchell

BY GLENN SMITH
Of The Post and Courier Staff

Four friends gathered Monday for what could be the last time to own up to a bloody November evening two years ago that claimed two lives, an admission that will rob them of what's left of their youth.

Shackled before a judge, three young men and an 18-year-old girl pleaded guilty to killing Anita D. Ghaudhari, 35, and her brother-in-law Virendra "Tony" R. Puniyani, 35, during a holdup at a North Charleston gas station.

The pair were immigrants from India trying to make a new start running the Fast Point Amoco at Spruill and McMillan avenues. They were gunned down on Nov. 14, 2002, for about $2,000 that was in the till.

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A fifth suspect, Amie Renee McIntyre, 29, pleaded guilty to an accessory to murder charge for her role in helping to cover up the crime. Circuit Judge Perry Buckner handed her a 15-year sentence, suspended to five years in prison and five years parole.

See GUILTY, Page 11A

U.S. LAUNCHES MAIN GR

Fallujah echoes with heavy air, artillery barrages

BY JIM KRANE
Associated Press

NEAR FALLUJAH, IRAQ — U.S. troops backed by thunderous air

P. 12

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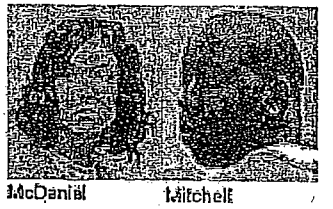
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TODAY'S TOP STORY Tuesday, November 9, 2004

Five plead guilty in gas station killings



McDaniel Mitchell

Friends to serve long sentences for '02 crime

Four friends gathered Monday for what could be the last time to own up to a bloody November evening two years ago that claimed two lives, an admission that will rob them of what's left of their youth. => MORE

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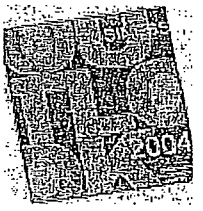
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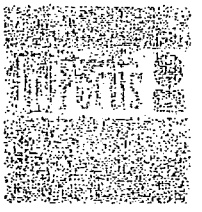
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Story last updated at 6:59 a.m. Tuesday, November 9, 2004

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parole. Flanked by their lawyers, the suspects stood in a semi-circle for nearly two hours as Buckner asked them a long series of questions to determine if they understood the ramifications of their guilty pleas. All but one then offered personal apologies to the victims' families, saying they wished they could take back the events of that night.

"I will think about that night every day for the rest of my life," Harvey told the judge. "If there is anything I could say to the family it would be: I'm sorry."

Dharmendra Chaudhari stood quietly in the courtroom, just a few feet away from the people who killed his wife and brother. A native of India, he doesn't speak English well and hired an attorney to convey to the judge how deeply the loss still affects his family.

His lawyer, Gaines Smith, said Chaudhari's daughters, ages 8 and 4, are left without a mother and his father-in-law, once a prominent businessman in India, is bedridden with grief and unable to function. Chaudhari's culture and beliefs dictate that nothing short of death sentences for the defendants will suffice, he said.

"He feels these people should be required to pay as dearly as possible," Smith said. "It is difficult for him to understand why each of these parties is not going to be sentenced to death."

Solicitor Ralph Hoisington said he respects Chaudhari's position, but seeking the death penalty for the suspects was not a viable option. He was concerned the state wouldn't be able to show who instigated and planned the crime and he was fairly confident it wasn't Mitchell, the most likely candidate for a capital murder trial, he said. He said he was satisfied with the sentences provided under the plea agreements.

Hoisington described the crime as a terrible tragedy committed by a group of people who had no significant criminal records.

"In the world of prior criminal records, there was nothing to indicate this sort of event would happen," he said.

McIntyre, McDaniel and Harvey had moved from rural Folkston, Ga., to North Charleston, where they came to share an apartment with Hutchinson. There, they befriended Mitchell, who lived in the same complex with his wife and two stepdaughters.

McDaniel, a teen mother with a history of running away from home, took a job as a stock clerk at the Fast Point about two weeks before the holdup.

On the night of Nov. 14, 2002, the four walked inside the business and spread out, some perusing coolers and others checking out various merchandise. Mitchell approached the counter and fired three rounds, hitting Chaudhari twice in the head and Puniyani once in the head, authorities said. He would later tell detectives that while he was shooting he heard what he thought was a demon saying, "Shoot him," police said.

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After their arrests, McDaniel drew the most outside attention in the case because of her age and gender. Her story was featured on the "Montel Williams Show," and she had a juvenile justice advocacy group waging a public relations campaign for her release.

On Monday, she calmly answered the judge's questions, her brunette hair in little-girl ringlets and shackles around her wrists and ankles. Her demeanor crumbled when her mother, Mary Carver, described how McDaniel had run away from home and left behind a daughter, now nearly 3, who she was ill-equipped to care for.

"I'm sorry for what happened to these people," Carver said, dabbing her eyes with tissue. "I lost my child, too."

McDaniel later turned, her eyes red and her lip trembling as she apologized to her mother, sister and daughter. "I love you very much," she said.

Mitchell's lawyer, public defender Jennifer Kneece Shealy, said her client was a decent man who committed an indecent act. Before that night, he was known as a solid husband, a good son and an excellent stepfather, she said. He doted on his wife's young girls, one of whom has leukemia, she said.

"The night before all of this happened, nobody would have used the term 'potential killer' to describe Robby Mitchell," she said.

Psychologist Harold Morgan told the judge that Mitchell is a man of limited intelligence who also has personality disorder. He is susceptible to suggestion and can be easily influenced, he said.

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EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED
1. 09A MURDER & NON-NEGLIGENT MANSLAUGHTER X 2	☒ YES ☐ NO	☐ YES ☒ NO	CONVENIENCE STORE	
2 120 ARMED ROBBERY	☒ YES ☐ NO	☐ YES ☒ NO	CONVENIENCE STORE	
3 90Z MISPRISON OF A FELONY	☒ YES ☐ NO	☐ YES ☒ NO	RESIDENCE/HOME	

TYPE VICTIM: ☒ Individual ☐ Business ☐ Financial Instn ☐ Government ☐ Relig. Organ ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.

INCIDENT LOCATION (OR NEAREST CROSS STREET NAME AND NUMBER) | ZIP CODE | WEAPON TYPE: FIREARM

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART TIME	LOCATION NO.
11/14/2002	21:52		11/14/2002	23:22	11/14/2002	22:50	22:50	23:24	

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE
GOULD, STEPHEN D									843-554-5700 X	843-554-5700 X

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO.

VICTIM NO. 1

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE
PUNIYANI, VIRENDRA R	ST	EE	ST	J	W	M	35	N	843-554-1386 X	

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
508	140	BLK	BRO	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO.: 002

VISIBLE INJURY (VCT. 1) ☐ YES NO ☒ EXPLAIN: Internal | COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☒

VICTIM (NO. 1) USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/PLAINCLOTHES ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ | J—This Jurisdiction, S—State, O—Out of State, U—Unknown

SUBJECT NO. 1

☒ SUBJECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☒ ARREST ☒ JAIL ☐ SUMMONS

NAME: (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
HUTCHINSON, JAMAAR MOSHE	B	M	24	N	04/29/1978	600	260	BLK	BRO

FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC | DAYTIME PHONE | EVENING PHONE

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO.: 002

SUBJECT(NO. 1) USING: ALCOHOL: ☐ YES NO ☒ UNK ☐ DRUGS: ☐ YES NO ☒ UNK ☐ TYPE: | ARRESTED NEAR OFFENSE SCENE ☒ YES NO ☐ TOTAL # ARRESTED 4 | DATE/TIME OF OFFENSE | DATE/TIME OF ARREST

NARRATIVE

****

Narrative Title:
Date Entered: 11/14/2002 11:49:06 PM

ON 11-14-2002 AT APPROXIMATELY 2250 HOURS I ENTERED THE FAST POINT GAS STATION AT 1900 MCMILLIAN AVE TO GET A DRINK. I ENTERED THE STORE AND WALKED TO THE BACK WHEN I NOTICED THAT THERE WAS NO ONE IN THE STORE. I PUT MY DRINK BACK AND WALKED TO THE FRONT TO LOOK OVER THE COUNTER WHEN I SAW A FEMALE LAYING ON THE GROUND IN A POOL OF BLOOD. I WALKED TO THE END OF THE COUNTER AND SAW THE MALE LAYING IN A POOL OF BLOOD ON THE FLOOR. I WALKED TO THE FRONT DOOR AND ADVISED DISPATCHED AND MY SUPERVISOR OF WHAT WAS FOUND. PRIOR TO .

PROPERTY EST.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY: SC0100800 | JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

	TYPE (GROUP)							TOTAL VALUE
STOLEN	MONEY/CASH	$800.00						$800.00
DAMAGED								
BURNED								
RECOVERED								
SEIZED								

ADMINISTRATIVE

SUBJECT IDENTIFIED ☒ YES NO ☐ | SUBJECT LOCATED ☒ YES NO ☐ | ☒ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
GOULD, STEPHEN	11/14/2002	221	JOHN MURDAUGH	11/15/2002	39
ZIMMER, GARY	11/15/2002	137	FOLLOW-UP INVESTIGATION ☒ YES NO ☐ OFFICER STANFIELD, EBEN	11/14/2002	207

ARRIVING AT THE FAST POINT I WAS ON A DOMESTIC DISTURBANCE AT THE STAY OVER LODGE WHEN I HEARD TWO MUFFLED GUN SHOTS. I THOUGHT IT WAS ONE OF THE MANY SHOTS FIRED CALLS WE HAD RECEIVED IN THE NIGHT. I LEFT THE STAY OVER LODGE AND ARRIVED IN THE PARKING LOT AND SAW A BURGUNDY IZUZU TROOPER OR MITSUBISHI MONTERO WITH TINTED WINDOWS LEAVING THE PARKING LOT FROM THE SECOND BAY OF THE CAR WASH, THE VEHICLE WAS OCCUPIED BY TWO BLACK MALES GOING TOWARDS RIVERS AVE.

****

Narrative Title: SUPPLEMENTAL (PFC GAMBA) 11/14/02
Date Entered: 11/15/2002 12:32:25 AM

ON ABOVE DATE AND TIME THIS OFFICER (PFC GAMBA) WAS AT THE TRAFFIC LIGHT AT SPRUILL AND MCMILLAN WHEN I HEARD PTL GOULD REQUEST ASSISTANCE AT THE FAST POINT STORE IN REFERENCE TO A SHOOTING. THIS OFFICER ENTERED THE PARKING LOT AND WAS INFORMED BY PTL GOULD THAT THERE WERE AT LEAST TWO SUBJECTS INSIDE WHO APPEARED TO HAVE BEEN SHOT IN THE HEAD. MYSELF AND PTL GOULD ENTERED THE BUSINESS IN ORDER TO MAKE SURE THAT THE SUSPECT OR SUSPECTS WERE NOT STILL INSIDE. ONCE INSIDE I OBSERVED THE FEMALE CLERK BEHIND THE COUNTER LAYING ON THE GROUND IN A LARGE PUDDLE OF BLOOD. I ALSO OBSERVED THE MALE CLERK LAYING JUST OUTSIDE THE COUNTER ALSO IN A LARGE PUDDLE OF BLOOD. MYSELF AND OFFICER GOULD THEN WENT TO THE REAR OF THE BUSINESS AND CLEARED THE RESTROOM AND THE OFFICE. I OBSERVED THAT THE DOOR TO THE OFFICE WAS SLIGHTLY AJAR AND INSIDE THERE WAS A CABINET WITH VIDEOTAPES OPEN. I ALSO OBSERVED THAT A DOOR MARKED "EMPLOYEES ONLY" WAS STILL LOCKED HOWEVER IT APPEARED THAT SOMEONE HAD ATTEMPTED TO FORCE IT OPEN.

****

Narrative Title: SUPPLEMENTAL (GUN RECOVERY) (PFC ZIMMER)
Date Entered: 11/18/2002 9:01:50 AM

"SUPPLEMENTAL ** SUPPLEMENTAL ** SUPPLEMENTAL ** SUPPLEMENTAL"

ON 11-15-2002 REPORTING OFFICER RESPONDED TO ST. CHARLES PLACE TO ASSIST DETECTIVE DISION PERSONNEL IN A SWEEP SEARCH OF THE AREA ATTEMPTING TO LOCATE THE FIREARM USED IN THIS CRIME. REPORTING OFFICER BEGAN TO SEARCH A GREEN IN COLOR "DIPSY SUMPSTER" AFTER RECIEVING INFORMATION FROM DETECTIVE CPL. S. DECKARD THAT THE GUN WAS LOCATED IN THE DUMPSTER. DETECTIVE CPL. J. JELLICO HAD ESCORTED SUSPECT "JUNIE" JOHN TO THE SCENE. "JUNIE" STATED THAT THE GUN WAS A "BLACK REVOLVER WITH A WHITE GRIP AND I (JUNIE) THREW IT IN HERE". SUSPECT ALSO STATED "HE DROPPED IT IN A BLACK TRASH BAG WE HAD IN THE HOUSE AND THEN I RAN OUT HERE AND THREW IT AWAY". DET. CPL JELLICO CONTACTED FENNEL CORP. AND THEY RESPONDED TO THE SCENE. FENNEL CORP. THEN TRANSPORTED THE DUMPSTER TO THEIR PROCESSING CENTER AT 141 FENNELL DR. REPORTING OFFICER, PFC T. SAD AND PFC C.

BULLARD ALL ESCORTED THE TRUCK TRANSPORTING THE DUMPSTER TO THE PROCESSING CENTER, AND MAINTAINED A VISUAL SURVELLIANCE OF THE DUMPSTER WHILE IN TRANSIT. THE DUMPSTER WAS OVERTURNED AT THE PROCESSING CENTER IN A CLEARED AREA AND REPORTING OFFICER, T. SAD AND C. BULLARD ALL BEGAN TO SIFT THROUGH THE TRASH. REPORTING OFFICER LOCATED A BLACK/BLUE IN COLOR REVOLVER WITH A WHITE GRIP (HANDLE) IN A WHITE IN COLOR "TACO BELL" BAG THAT WAS IN A BLACK IN COLOR TRASH BAG. UPON LOCATING THE REVOLVER ALL OFFICERS STOPPED THE SEARCH AND NCPD DETECTIVES AND CRIME SCENE WERE CONTACTED BY PFC. BULLARD. DET. SGT. K. HAGGE RESPONDED TO THE SCENE. FORENSICS SGT. H. POOLE RESPONDED AND THEN PHOTOGRAPHED THE SCENE. FORENSICS SGT. POOLE THEN TOOK CUSTODY OF THE FIREARM AND PLACED IT INTO EVIDENCE FOR PROCESSING AND FIREARMS TRACE. END OF SUPPLEMENTAL REPORT.

****

Narrative Title: DETECTIVE SUPPLEMENTAL - JOHN REYNOLDS
Date Entered: 11/22/2002 6:39:42 PM

INVESTIGATOR SUPPLEMENTAL
DETECTIVE JOHN REYNOLDS
NORTH CHARLESTON POLICE DEPARTMENT

CASE NUMBER - 2002038224
INCIDENT - MURDER
LOCATION - 1900 MCMILLAN AVENUE (FASTPOINT)
DATE - 11-14-02. 2152 HOURS
VICTIMS - ANITA CHAUDHARI/ VIRENDRA PUNIYANI
SUSPECTS - KRISTA MCDANIEL (SHERRY MCINTYRE), JAMAR HUTCHISON(JAY), ROBERT MITCHELL, JOHN HARVEY (KEVIN MOSES OR JUNE), AMIE MCINTYRE.
CASE OFFICER: DET. TED. STANFIELD
ASSISTED BY: DET. JOHN REYNOLDS

11-14-02. APPROXIMATELY 2152 HOURS. I WAS IN THE DETECTIVE OFFICE WHEN I HEARD OFFICER GOULD ON THE POLICE RADIO STATING THAT HE NEEDED EMS AT THE GAS STATION LOCATED AT SPRUILL AVENUE AND MCMILLAN AVENUE IN REFERENCE TO TWO PERSONS WITH GUNSHOT WOUNDS. MYSELF, CPL. HARDEE AND DET. SLOANE THEN WENT TO THAT LOCATION AND DET. MOORE ARRIVED ON SCENE. ONCE THERE, WE MADE CONTACT WITH OFFICER GOULD WHO STATED THAT HE HAD WENT INTO THE STORE TO GET A DRINK AND WHEN HE WENT UP TO THE COUNTER AREA HE OBSERVED THE TWO PERSONS ON THE FLOOR.

I THEN ENTERED THE STORE AND OBSERVED THE MALE VICTIM (VIRENDRA PUNIYANI) ON THE FLOOR ON THE OTHER SIDE OF THE COUNTER OPPOSITE FROM THE FRONT DOOR WITH WHAT APPEARED TO BE A GUNSHOT WOUND TO THE UPPER RIGHT SIDE OF HIS FOREHEAD. I THEN OBSERVED THE FEMALE VICTIM (ANITA CHAUDHARI) ON THE FLOOR BEHIND THE COUNTER BEHIND THE CASH REGISTER AREA. I ALSO OBSERVED THAT THE CASH/LOTTERY REGISTERS

BEHIND THE COUNTER. CHARLESTON COUNTY EMS ARRIVED ON SCENE AND AFTER PERFORMING THEIR TASK LEFT THE SCENE. CRIME SCENE OFFICER STANLEY ARRIVED AN SCENE AND I EXITED THE STORE.

I ALONG WITH DET. MOORE WERE THEN ASKED BY DET. CPL. HARDEE TO GO TO THE BAR ACROSS THE STREET AND ATTEMPT TO LOCATE ANY WITNESSES AS THERE HAD BEEN PEOPLE OUTSIDE. WE PERFORMED THIS TASK WITH NO RESULTS.

MYSELF AND DET. MOORE THEN BEGAN TO PERFORM A CANVASS OF THE AREA. WE MADE CONTACT WITH ONE JUDY RUFIN AND LARRY TRACY AND BOB GIONELLI (MAINTENANCE PERSON) WHO ARE EMPLOYEES AT ST. CHARLES PLACE AND WERE ON DUTY AT THE GUARD SHACK AT THE ENTRANCE TO THE COMPLEX WHICH IS ON MCMILLAN AVENUE NEAR THE FASTPOINT GAS STATION. I SPOKE WITH JUDY RUFIN WHO TOLD ME THAT A FEW MINUTES BEFORE THE POLICE CARS STARTED PULLING INTO THE GAS STATION, THE GIRL WHO WORKED AT THE STORE WHOM SHE KNEW AS SHERRY MCINTYRE (KRISTA MCDANIEL) CAME INTO THE COMPLEX FROM THE DIRECTION OF THE FASTPOINT ALONG WITH THREE BLACK MALES WHOM SHE KNEW AS KEVIN MOSES (JOHN HARVEY), A PERSON SHE KNEW AS JAMAL WHOM SHE THOUGHT WAS SHERRY MCINTYRE'S MOTHER'S BOYFRIEND AND THE THIRD PERSON WAS UNKNOWN TO HER. (IT SHOULD BE NOTED THAT THROUGH LATER INVESTIGATION IT WAS FOUND THAT AMIE MCINTYRE HAD PORTRAYED HERSELF AS MCDANIEL'S STEPMOTHER) SHE STATED TO ME THAT ALL FOUR OF THESE PERSONS HAD LEFT THE GATE TO ST. CHARLES PLACE AT APPROXIMATELY 2115 - 2120 HOURS ON FOOT AND HEADED IN THE DIRECTION OF THE FASTPOINT GAS STATION WHERE RUFIN THOUGHT SHE WORKED. THEY RETURNED SHORTLY BEFORE THE POLICE WENT TO THE GAS STATION AT ABOUT 2200 HOURS. AS THEY ENTERED THE COMPLEX THROUGH THE PEDESTRIAN GATE JAMAL HAD ASKED FOR A LIGHT FOR HIS CIGARETTE FROM BOB GIONELLI AND THEY CONTINUED ON THROUGH THE GATE. I TOOK A STATEMENT FROM JUDY RUFIN WHILE OTHER INVESTIGATORS TOOK STATEMENTS FROM THE OTHER EMPLOYEES. THIS INFORMATION WAS RELAYED TO SGT. HAGGE, CPL. HARDEE AND LT. TETANICH. RUFIN TOLD ME THAT MCINTYRE'S ADDRESS WAS 2093 PINE RIDGE #536.

AFTER TAKING THE STATEMENT FROM RUFIN, I THEN RESPONDED TO 2093 PINE RIDGE # 536 AND MET WITH SGT. HAGGE, CPL. HARDEE AND LT. TETANICH. I WAS ASKED TO OBTAIN TWO CONSENT TO SEARCH VEHICLE FORMS AND ALSO A CONSENT TO SEARCH RESIDENCE FORM. I WENT TO MY VEHICLE AND OBTAINED THESE FORMS AND UPON MY RETURN GAVE THE CONSENT TO SEARCH RESIDENCE FORM TO SGT. HAGGE. I WAS ASKED BY SGT. HAGGE TO SEARCH A VEHICLE THAT WAS IN THE POSSESSION OF DERRICK BENNETT AND A VEHICLE BELONGING TO AMIE MCINTYRE WHICH WERE PARKED OUT IN THE PARKING LOT OUTSIDE OF THE BUILDING. I OBTAINEDA WRITTEN CONSENT TO SEARCH A 1986 PONTIAC 6000 WHICH WAS OWNED BY VIVIAN BENNETT AND WAS IN THE POSSESSION OF DERRICK BENNETT. DET. MICHAEL MOORE AND MYSELF PERFORMED THE SEARCH AND FOUND NOTHING OF EVIDENTIARY VALUE. I THEN OBTAINED A WRITTEN CONSENT TO SEARCH; A 1992 OLDSMOBILE CUTLASS FROM AMIE MCINTYRE WHO WAS THE OWNER OF THAT VEHICLE. MYSELF AND DET. STANFIELD FOUND NOTHING OF EVIDENTIARY VALUE WAS FOUND IN THAT VEHICLE. IT ALSO APPEARED THAT THE VEHICLE HAD NOT BEEN DRIVEN IN SOMETIME AND MCINTYRE RELATED TO ME THAT THERE WERE SOME MECHANICAL PROBLEMS WITH THE VEHICLE.

I THEN RETURNED TO THE APARTMENT WHERE SGT. HAGGE AND CPL. HARDEE WERE SEARCHING THE RESIDENCE AND I STAYED ON THE GROUND FLOOR WITH AMIE MCINTYRE. WE MADE SMALL TALK AND SHORTLY THEREAFTER, I WAS ADVISED BY SGT. HAGGE THAT A

SEARCH WARRANT WAS BEING PREPARED DUE TO AN AMOUNT OF MONEY BEING LOCATED AND ONE OF WHICH HAD WHAT APPEARED TO BE BLOOD ON IT. DURING THAT TIME, SGT. HAGGE ASKED AMIE MCINTYRE IF SHE KNEW WHERE A BOY NAMED ROBERT LIVED DUE TO HIM COMING IN THE GATE ALSO AND SHE SAID YES. SHE THEN AGREED TO SHOW ME HIS RESIDENCE. I PLACED HER INTO MY CAR AND SHE BROUGHT ME TO 1992 PINE RIDGE CIRCLE AND POINTED OUT APT. 426 WHICH WAS ON THE STREET SIDE OF THE BUILDING AND STATED THAT HE LIVED THERE WITH HIS WIFE, NICOLE AND TWO KIDS. I THEN BROUGHT HER BACK TO HER RESIDENCE.

WE WAITED UNTIL DET. MOORE ARRIVED AT THE RESIDENCE AND I DROVE DET. MOORE TO JUDGE GUEDALIA'S RESIDENCE WHERE DET. MOORE MADE APPLICATION FOR THE SEARCH WARRANT. AFTER OBTAINING THE JUDGES SIGNATURE, WE THEN RETURNED TO WHERE SGT. HAGGE AND CPL. HARDEE WAS. THE SEARCH WARRANT WAS THEN EXECUTED AND I DID THE RETURN. ALL ITEMS ON THE RETURN WERE RECOVERED BY SGT. GARRISON AND RECORDED ON THE SEARCH WARRANT RETURN BY ME. AFTER THE SEARCH WARRANT WAS EXECUTED, I RETURNED TO THE POLICE STATION TO PREPARE A SEARCH WARRANT FOR ROBERT MITCHELL'S RESIDENCE AFTER HE WAS POSITIVELY IDENTIFIED BY AMIE MCINTYRE BY A PHOTOGRAPH AND HE HAD BEEN IMPLICATED BY CO-DEFENDANTS AS PARTICIPATING IN THIS CRIME AND THAT HE WAS IDENTIFIED AS THE SHOOTER. AN ARREST WARRANT WAS ALSO PREPARED FOR ROBERT MITCHELL. I THEN WENT TO JUDGE GUEDALIA'S RESIDENCE AND MADE APPLICATION TO JUDGE GUEDALIA FOR THE SEARCH WARRANT AND ARREST WARRANT. I RECEIVED ARREST WARRANT# H-193586 (MURDER) AND A SIGNED SEARCH WARRANT.

I RETURNED BACK TO THE POLICE STATION AND WAS ASKED BY SGT. HAGGE TO RIDE WITH THE SWAT TEAM IN THEIR VEHICLE TO SHOW THEM THE EXACT LOCATION OF ROBERT MITCHELL'S RESIDENCE. I DID SO AND THE SEARCH AND ARREST WARRANT WAS EXECUTED ON HIM AND HIS RESIDENCE. CPL. DECKARD DID THE SEARCH WARRANT RETURN AND ALL THE EVIDENCE WAS RECOVERED BY SGT. POOLE OF THE NCPD CRIME SCENE UNIT.

AFTER THE SEARCH WARRANT WAS EXECUTED I WAS TASKED WITH HELPING SEARCH THE DUMPSTERS IN THE COMPLEX FOR THE WEAPON. THE WEAPON WAS NOT LOCATED AT THAT TIME AND WAS LATER LOCATED AT FENNEL CONTAINER ON ASHLEY PHOSPHATE ROAD BY OTHER OFFICERS.

I THEN RETURNED TO THE POLICE STATION AND ASSISTED DET. STANFIELD IN PREPARING ARREST AFFIDAVITS FOR ALL THE SUSPECT'S INVOLVED.

I THEN SECURED FROM THE CASE.

****

Narrative Title: DETECTIVE SUPPLEMENTAL - STANFIELD
Date Entered: 12/16/2002 1:24:53 PM

Supplemental Criminal Investigations Report by Detective Eben T. (Ted) Stanfield.
Case
Officer

Incident Date: November 14, 2002
Case Number: 2002038224
Incident Type: Robbery/Homicide
Location: 1900 McMillan Avenue (Fast Point Amoco)

Victims: Verindra Puniyani
Anita Chaudhari
Fast Point Amoco

Defendants: Robert Livingston Mitchell (aka Robbie)
Krista Lynn McDaniel (aka Sherri McIntyre)
John William Harvey (aka June and Kevin Moses)
Jamaar Moshe Hutchinson (aka Jay)
Amie Renee McIntyre

On November 14, 2002 @ approximately 2152 hours (9:52 pm, I, Detective Eben T. (Ted) Stanfield, was in the North Charleston Police Department Detective Office with Detectives John Reynolds, Del Hardee, Laura Sloane and Mike Moore, when I heard NCPD Officer Stephen Gould contact NCPD dispatch on the radio and advise her that he had two people down with gunshot wounds at the Fast Point Amoco Station on McMillan Avenue, at Spruill Avenue, and needed EMS and his supervisor to respond.. Myself, along with the above-mentioned Detectives, responded immediately to the scene and made contact with Officer Gould. Officer Gould stated that he stopped at the store to get a drink and once inside, he observed two persons behind the counter with gunshot wounds and were not responding.

I entered the store, along with the other Detectives, and observed a male on the floor behind the far counter with what appeared to be a gunshot wound to the right forehead. I then observed the second victim, a female, behind the register counter on the floor with what appeared to be blood pooling beneath her and medium to high velocity blood splatters. Both victims appeared to be deceased and the two victims were later identified as Virendra Puniyani and Anita Chaudhari, owner/operators of the business. The register drawers were pulled open and no cash money was present and the safe door was open beneath the counter. The back office door had damage to the frame, but it was unknown if forced entry had been made. Several video cameras and a monitor were present inside the store, but a recorder was not in view and unknown if it was in the office. NCPD Crime Scene/ID Unit arrived to process the crime scene.

The parking area was checked for possible witnesses, including the car wash adjacent to the store. I was also instructed to check the club across Spruill Avenue where several individuals were congregating and Detective Reynolds and myself did so. Several people stated that everyone was inside the club during the time and came outside to see what was happening when they heard the sirens. We then began expanding the search area for possible witnesses and Detective Sloane and myself drove to the next convenience store on Spruill Avenue heading south. Detective Moore and Reynolds teamed up and headed west on McMillan Avenue toward St. Charles Place where the gated community has a security guard. The interview with the other store operator yielded negative results for suspicious subjects coming in to his store around the time in question.

Detective Sloane and I then caught up with Detective Moore and Reynolds at St. Charles Place on McMillan Avenue, where we learned from the security guard on the gate, Richard Earl Carswell, Jr., that he got to work around 9:45 pm because he was running late for work and had been by the Fast Point to get gas, but the line was too long inside, so he went down the road to another gas station and came on in to work. Shortly after his arrival, three black males and a white female came walking from the direction of the Fast Point and he described them and knew them as tenants inside St. Charles Place and knew them as Sherrie McIntrye, Kevin Moses and Jay or Jamal. The gate guard gave Detective Sloane and myself a written statement and also the address of Sherrie McIntyre and Kevin Sloane inside St. Charles Place (Building 2093, Apartment 536) and showed us on a map of the community. He also stated that they came walking into the complex a few minutes before he heard the sirens going towards Fast Point Amoco and that Judy Ruffin was the employee he relieved and she also saw the subjects coming in. We learned that there was a video and a card pass stamp recording available the next day of entries into the complex. We also initially learned from Detective Cpl. Deckard and Detective Sergeant K. Hagge that a video recording of the incident did not exist and that the cameras and monitor in the store was not hooked to a recorder. He also advised, at that time, that a young white female also worked at the store as a stocker and cleaning.

Detective Cpl. Hardee and Detective Sgt. Hagge met with us at St. Charles Place and the information about the four subjects coming into the complex just after the homicide and coming from the direction of the store was passed on to them and that they needed to be interviewed as possible witnesses and/or suspects.

Myself, Detective Hardee and Sgt. Hagge went to the address provided by the security guard while Detective Reynolds and Moore located the other security personnel for statements. We knocked on the apartment door and a black male answered the door and we asked if we could speak with them inside and we were invited in. A young white female came from upstairs after she yelled down that she was getting dressed. She sat next to the black male on the floor because there was little or no furniture in the apartment on the first floor. The black male stated that his name was June, like in June bug (later identified as John Harvey), and the female identified herself as Krista and that her step-mother also lived with her in the apartment and stated that June was her boyfriend and they just recently moved up to North Charleston from Georgia. We asked her where her mother was and she stated that her step-mother and her boyfriend, Jay, went to get them something to eat. June asked Sgt. Hagge what time it was and stated that he worked at Taco Bell on Rivers Avenue, just down the road, and Krista stated she didn't work anywhere. I asked them if they had been anywhere tonight and Krista stated she had only went over to a friends house inside the complex because the friend had a sick baby. I again asked her if they had been outside the gated (and fenced) community and she again said no. Sgt. Hagge asked how long her step-mother would be gone and Krista stated that her step-mother and her boyfriend should be back soon with their food. About that time, the person identified as her step-mother (Amie McIntyre) and Amie's boyfriend, Jay, came in with bags of food, followed by two other black males later identified as Derrick and Quintin Bennett. The Bennett brothers stated that they got a call from Krista around 11:00 pm, wanting a ride for her step-mother and Jay (later identified as Jamaar Hutchinson) so that they could get them something to eat. The food was given to Krista and June and they sat on the floor and ate and drank their food. Krista talked freely and appeared to be in a good mood and asked questions about the law enforcement career and talked about Jacksonville, Florida.

We asked Ms. McIntyre for permission to search the apartment and she gave permission/consent. They also gave us permission to search their vehicle parked in the parking area outside the apartment. Jay asked Sgt. Hagge to step outside the back door to talk to him and appeared to be nervous and was sweating profusely. When they returned inside, Sgt. Hagge said that Jay told him he had a large sum of money upstairs that he received from selling drugs. I was advised by Sgt. Hagge, after he received a

phone call from Detective Deckard, that they found the recorder at the store and that the suspects were three black males and a white female and that Krista may be an employee at the store.

Detective Reynolds arrived at the apartment and brought in the consent to search forms and after completing them, he and I searched the car they pointed out as theirs and owned by Amie McIntyre. The vehicle was in poor condition and apparently had not been driven in some time. The inside was filthy and littered with old food and trash and nothing was found of evidentiary value. Derrick Bennett stated that the vehicle doesn't run and that he drove them in his car and gave permission to search his vehicle.

Everyone was asked to come with us to NCPD headquarters except Amie McIntyre, so that she could be present for the search. After the money was found, Sgt. Hagge advised that we would secure a search warrant for the apartment while we transported the subjects to headquarters. I transported Jay and June after they agreed to do so and Krista and the other subjects was also transported by other Detectives.

After arriving at headquarters, Jamaar Moshe Hutchinson, aka Jay, was given his Miranda rights and after he understood his rights, he signed the Miranda rights form and waived his rights and gave a statement freely and voluntarily. I questioned Jamaar alone in Captain Tetanich's Office and he gave an implicating statement and identified the shooter as Rob, later identified as Robert Mitchell. Jamaar Hutchinson signed a written statement, after he read it, and indicated it was correct and Captain Barfield came in and witnessed his signature.

The information was passed on to other Detectives and prior to questioning, the suspects were swabbed for gun shot residue. Cpl. Deckerd then questioned June, which identified himself as Kevin C. Moses and later identified as John William Harvey. Harvey also gave a written statement involving himself in the homicide and robbery and indicating Robby (Mitchell) as the shooter.

We were advised by Sgt. Hagge that a sum of money was found upstairs with what appears to be blood on one of the bills.
The Detectives still at the apartment conducting the search, after serving the search warrant, obtained a location of Robert Mitchell's apartment and we prepared another search warrant for Mitchell's apartment and an arrest warrant for Mitchell. Hutchinson and Harvey identified Robert Mitchell also from a faxed photo from Beaufort County Sheriff's Office.

NCPD SWAT Team was activated and the search warrant and arrest warrant was executed at Robert Mitchell's apartment located at 1922 Pine Ridge Circle, Apartment #426, North Charleston. After taking him into custody, I escorted Robert Mitchell and a uniform officer back to NCPD headquarters where I gave him his Miranda rights and after understanding and signing his Miranda waiver, he gave a confessing statement as to shooting both victims and robbing the store. He also added that he received the murder weapon from June, aka Kevin Moses (later identified as John Harvey) and gave it back to him after the homicide. I confronted John Harvey with this information and he admitted that it was his weapon that was used and he gave it to Robbie prior to the homicide and got it back from him afterwards. When asked about the location, he stated that he threw it in a dumpster behind his apartment and Cpl. Jellico transported Harvey to the location of the dumpster to recover the weapon while Detective Reynolds and I prepared the arrest warrants.

According to Sgt. Hagge, Amie McIntyre denied any knowledge of the incident and/or involvement by anyone she knew throughout the investigation and after advising her that several individuals had given statements involving her after the fact. According to confessions received, McIntyre knew about the

homicide and robbery after the incident, including details, and received part of the money after being shown the stolen money.

Krista Lynn McDaniel, aka Sherrie McIntyre, gave a confessing statement to Detective M.Moore and Sloane after learning of the co-defendant statements and apprehension of Robert Mitchell. Mitchell, McDaniel, Hutchinson and Harvey were charged with two counts of Murder and Armed Robbery. McIntyre was charged with Misprison of a Felony.

On November 27, 2002, I received the St. Charles Place DoorKing, Inc printout and additional statement from Judy Rufin. The City of North Charleston MIS Department also down loaded the video from the St. Charles Place gate, on the date in question.

ON NOVEMBER 29, 2002, JOSEPH KANNIAINEN, OF THE CITY OF NORTH CHARLESTON MIS DEPARTMENT, COMPLETED THE DOWNLOAD OF THE FRONT GATE IMAGES FROM THE ST. CHARLES PLACE COMPUTER AND ORIGINALLY STORED THEM ON ONE OF THE CITIES COMPUTER SYSTEM UNTIL THEY COULD BE COPIED AND STORED ON CD'S. ON DECEMBER 26, 2002 @ 9:30 AM., JOSEPH KANNIAINEN GAVE R/O THREE CD RECORDINGS COPIED FROM THE ST. CHARLES PLACE FRONT GATE SYSTEM. THE THREE CD'S WERE ENTERED INTO THE NCPD EVIDENCE ROOM.

ADDITIONAL OTHERS

PERSON TYPE: V3

NAME (LAST, FIRST, MIDDLE)	VICTIM #1	VICTIM #2	VICTIM #3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
CHAUDHARI, ANITA	ST	EE	ST	J	W	F	35	02/13/1967	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
		BLK	BRO	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO | DAY PHONE: 843-572-9695 XH B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☒ EXPLAIN— Internal — COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☒

USING: ALCOHOL ☐ YES NO ☐ UNK ☒ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE:

PERSON TYPE: V4

NAME (LAST, FIRST, MIDDLE)	VICTIM #1	VICTIM #2	VICTIM #3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
FASTPOINT									

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: 843-554-1386 XH B | EVENING PHONE: 843-554-1386 XH B

VISIBLE INJURY ☐ YES NO ☒ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☒

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE:

PERSON TYPE: S2

NAME (LAST, FIRST, MIDDLE)	VICTIM #1	VICTIM #2	VICTIM #3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
MCDANIEL, KRISTA LYNN				J	W	F	16	08/15/1986	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
506	126	BRO	HAZ	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: H B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☒ DRUGS ☐ YES NO ☐ UNK ☒ TYPE

PERSON TYPE: S3

NAME (LAST, FIRST, MIDDLE)	VICTIM #1	VICTIM #2	VICTIM #3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
MITCHELL, ROBERT LIVINGSTON				J	B	M	18	04/05/1978	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
511	166	BLK	BRO	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: H B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☒ DRUGS ☐ YES NO ☐ UNK ☒ TYPE:

PERSON TYPE: S4

NAME (LAST, FIRST, MIDDLE)	VICTIM #1	VICTIM #2	VICTIM #3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
HARVEY, JOHN WILLIAM				J	B	M	27	02/11/1975	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
509	140	BLK	BRO	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: H B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☒ DRUGS ☐ YES NO ☐ UNK ☒ TYPE:

PERSON TYPE: S5

NAME (LAST, FIRST, MIDDLE)	VICTIM #1	VICTIM #2	VICTIM #3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
MCINTYRE, AMIE RENEE				J	W	F	27	08/09/1975	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
502	140	BRO	GRN	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: H B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☒ DRUGS ☐ YES NO ☐ UNK ☒ TYPE

Report Date / Time : 11/14/2002 9:52:16 PM
Incident # : 2002038224

ADDITIONAL OTHERS

PERSON TYPE: W1

NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
BENNETT, QUINTIN L				S	B	M	23	10/29/1979	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
		BLK	BRO	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: 843-746-9529 XH B | EVENING PHONE: 843-216-5847 H

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☒ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE

PERSON TYPE: W2

NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
RUFIN, JUDY A				J	W	F	56	01/27/1946	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
503	250	BRO	HAZ	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: 843-566-9096 XH B | EVENING PHONE: 843-629-4800 H

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☒ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE

PERSON TYPE: W3

NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
CARSWELL JR, RICHARD EARL				J	W	M	29	02/08/1973	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
600	185			

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: 843-764-5218 XH B | EVENING PHONE: 843-744-2274 XH B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☒ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE

PERSON TYPE: W4

NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
HAWKINS, THOMASINA				J	B	F	36	11/29/1966	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
510	240	BLK	BRO	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: 843-747-0110 XH B | EVENING PHONE: 843-744-5478 XH B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☒ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE

PERSON TYPE: W5

NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
MITCHELL, NICOLA LOUISE				J	B	F	31	11/13/1971	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
		BLK	BRO	

ADDRESS: 1 | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: 843-746-8529 XH B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☒ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☒ TYPE

PERSON TYPE: W6

NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
TRACY, LARRY				J	W	M	40	09/08/1962	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
		UNK	UNK	

ADDRESS | CITY | STATE | ZIP CODE | LOCATION NO. | DAY PHONE: H B | EVENING PHONE: H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE

ADDITIONAL OTHERS

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
W7	BENNETT, DERRICK,				J	B	M	20	10/16/1982	N

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.
510	160	BLK	BRO	

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE
					843-569-1417 XH B	843-849-7384 XH E

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE:

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE
					H B	H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE:

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE
					H B	H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE:

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE
					H B	H B

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE:

PERSON TYPE	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE
					H B	H E

VISIBLE INJURY ☐ YES NO ☐ EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES NO ☐

USING: ALCOHOL ☐ YES NO ☐ UNK ☐ DRUGS: ☐ YES NO ☐ UNK ☐ TYPE:

ADDITIONAL PROPERTY ESTIMATE SHEET

PROPERTY EST.	TYPE (GROUP)						
	STOLEN						
	DAMAGED						
	BURNED						
	RECOVERED						
	SEIZED						
PROPERTY EST.	TYPE (GROUP)						
	STOLEN						
	DAMAGED						
	BURNED						
	RECOVERED						
	SEIZED						
PROPERTY EST.	TYPE (GROUP)						
	STOLEN	--					
	DAMAGED						
	BURNED						
	RECOVERED						
	SEIZED						
PROPERTY EST.	TYPE (GROUP)						
	STOLEN						
	DAMAGED						
	BURNED						
	RECOVERED						
	SEIZED						

PROPERTY

STATUS STOLEN	RELATED TO VICTIM 4 , FASTPOINT	CLASS MONEY/CASH
DESCRIPTION CASH		LOCATION

BRAND	MODEL	SERIAL NO
UCR CODE 120	QUANTITY 1	VALUE $800.00
DATE RECOVERED	JURISDICTION STOLEN SC0100800	JURISDICTION RECOVERED

TOTAL P.14

STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION

RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI , deceased, Appellant,	)	WCC FILE #0221897
v.	)	MOTION TO INTRODUCE ADDITIONAL EVIDENCE INTO THE RECORD ON A CASE ON REVIEW
AVNI GROCERS UNINSURED EMPLOYERS' FUND, Respondent,	)	

THE CLAIMANT ABOVE-NAMED moves before this Commission for an Order allowing the addition of evidence into the record in this case on review. The Appellant has obtained an Affidavit of Harendra Pal, the owner of Avni Grocers and employer of the deceased and hereby makes this Motion to the South Carolina Workers' Compensation Commission Judicial Department to have the Affidavit added to the evidence in this matter, pursuant to the Code of Laws of South Carolina, Section 42-17-50, 1976 as amended and S.C. Regulation 67-707.

That the Appellant makes this motion to introduce the additional evidence as the evidence to be introduced would likely have produced a different result had the evidence been procurable at the initial hearing in this matter.

This matter arises following the shooting and death of the deceased, Anita Chaudhari. The Appellant filed a workers' compensation case following the death and it was determined by the Commission that the Respondent was subject to the Workers' Compensation Act and was in violation of the Act by being uninsured. In July of 2003, it was determined by the Commission's Coverage and Compliance that the Respondent had 15 employees who were paid in cash and only one employee who was reported to the Employment Security Commission. At the time Appellant's counsel was notified of the findings of Coverage and Compliance, he was also advised that the case would then be turned over to the SC Uninsured Employers' Fund to pay or defend. The findings were not challenged by the

Appellant and thus the SC Uninsured Employers' Fund was place on notice of the claim pending on behalf of the deceased. The Defendants nor the Uninsured Employers' Fund filed a brief raising any issues or defenses. Based on the Commission's findings and the lack of any brief being submitted by the Defendants raising any defenses, the Appellant did not procure any further evidence of the employer's subjectivity to the Act, as the Claimant's Personal Representative was an employee and able to testify regarding employees and ownership.

A hearing was held on January 4, 2006. Based on the correspondence Appellant had already received from the Commission, the Appellant was aware that the Commission had already determined the Employer was subject to the Act. The Defendant Employer nor the UEF submitted any briefs or defenses. Even though the issue had already been addressed and a determination already made by the Commission, there was undisputed evidence from the Claimant, the Hearing Commissioner, Commissioner David Huffstetler made the determination following the hearing that the Employer was not subject to the Act.

Had the Appellant known that the issue was up for additional review during this hearing to determine benefits, Appellant would have procured additional evidence regarding the Employer being subject to the Act. Defendants did not raise that issue in their brief, and in fact submitted no brief. Since the hearing, counsel for the Appellant has located and contacted the deceased Appellant's previous Employer, Harendra Pal, owner of Anvi Grocers and has obtained an Affidavit from Mr. Pal. Mr. Pal's Affidavit states that: 1) He was the sole owner of Avni Grocers/Avni International of South Carolina; 2) He owned both locations, which regularly employed more than five employees; and 3) No other entity had any interest in the company or the two stores.

Clearly, based on the findings of Coverage and Compliance and the determination of coverage and the notification of same provided to counsel for the Appellant, Appellant was not on notice that the subjectivity of the Employer to the Act would be of issue at the Hearing. Had the

Appellant and thus the SC Uninsured Employers' Fund was place on notice of the claim pending on behalf of the deceased. The Defendants nor the Uninsured Employers' Fund filed a brief raising any issues or defenses. Based on the Commission's findings and the lack of any brief being submitted by the Defendants raising any defenses, the Appellant did not procure any further evidence of the employer's subjectivity to the Act, as the Claimant's Personal Representative was an employee and able to testify regarding employees and ownership.

A hearing was held on January 4, 2006. Based on the correspondence Appellant had already received from the Commission, the Appellant was aware that the Commission had already determined the Employer was subject to the Act. The Defendant Employer nor the UEF submitted any briefs or defenses. Even though the issue had already been addressed and a determination already made by the Commission, there was undisputed evidence from the Claimant, the Hearing Commissioner, Commissioner David Huffstetler made the determination following the hearing that the Employer was not subject to the Act.

Had the Appellant known that the issue was up for additional review during this hearing to determine benefits, Appellant would have procured additional evidence regarding the Employer being subject to the Act. Defendants did not raise that issue in their brief, and in fact submitted no brief. Since the hearing, counsel for the Appellant has located and contacted the deceased Appellant's previous Employer, Harendra Pal, owner of Anvi Grocers and has obtained an Affidavit from Mr. Pal. Mr. Pal's Affidavit states that: 1) He was the sole owner of Avni Grocers/Avni International of South Carolina; 2) He owned both locations, which regularly employed more than five employees; and 3) No other entity had any interest in the company or the two stores.

Clearly, based on the findings of Coverage and Compliance and the determination of coverage and the notification of same provided to counsel for the Appellant, Appellant was not on notice that the subjectivity of the Employer to the Act would be of issue at the Hearing. Had the

Appellant known that the Commission's own findings could or would be challenged at the hearing on January 4, 2006 or that the Defendant was raising such as a defense, Appellant would have procured this additional evidence supporting the Commission's Coverage and Compliance ruling.

Based on the above and pursuant to the Code of Laws of South Carolina, Section 42-17-50, 1976 as amended and Regulation S.C. 67-707, in addition to the history and file of this matter, which was referenced as part of the evidence of record at the hearing, the Appellant respectfully requests the Commission allow the additional evidence of the Affidavit of Harmendra Pal in the matter on Appeal review to the Commission.

Jarrel L. Wigger/JDM

Jarrel L. Wigger, Esquire
Attorney for the Appellant
8086 Rivers Avenue, Suite A
North Charleston, SC 29406
(843) 553-9800

North Charleston, South Carolina
This 19 day of April, 2006.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

CERTIFICATE OF SERVICE

The Undersigned assistant to the Attorney for the Claimant, 8086 Rivers Avenue, Suite A, North Charleston, South Carolina, 29406, does hereby certify that she has served the following named individuals and/or companies with a copy of the pleading indicated below by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked, on the date indicated below:

PARTIES SERVED:

Terri M. Lynch, Esquire
Uninsured Employer's Fund
1470 Ben Sawyer Blvd., Ste. 10
Mt. Pleasant, SC 29464

PLEADINGS:

[WCC FILE #0221897 Puniyani v. Avni Grocers/SCUEF]

MOTION TO INTRODUCE ADDITIONAL EVIDENCE INTO THE RECORD ON A CASE ON REVIEW

MOTION TO STAY

Shelly A. Hoffman, Paralegal
Wigger Law Firm, Inc.
8086 Rivers Avenue, Ste. A
North Charleston SC 29406
(843) 553-9800

This 19th day of April, 2006
North Charleston, South Carolina

BEFORE THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0221896

Anita Chaudhari, Deceased Employee, Dharmendra Chaudhari, Claimant, -vs- Avni Grocers, Uninsured Employer, -with- the South Carolina Uninsured Employers' Fund, Appearing, Respondents.	RESPONSE TO MOTION TO INTRODUCE ADDITIONAL EVIDENCE

TO: The South Carolina Workers' Compensation Commission and Jarrel L. Wigger, Esquire, Attorney for the Claimant/Appellant:

Comes now the South Carolina Uninsured Employers' Fund, by counsel and does, hereby, reply to the Motion of the Claimant, Dharmendra Chaudhari, to introduce additional evidence into the record in the case on review.

Regulation 67-707 provides the method by which additional and newly discovered evidence may be presented to the Full Commission on review. Under that regulation, the moving party must establish that the new evidence is the same as evidence required for granting a new trial by showing: 1) the evidence sought to be introduced is not cumulative 2) the evidence was not known to the moving party at the time of the first hearing or by reasonable diligence it could not have been secured, and 3) the evidence was brought to the attention of the Commission immediately upon its discovery.

In the case at hand, the Claimant seeks to submit an affidavit an alleged prior owner of Avni Grocers, the alleged employer in this claim. The Claimant has not shown how that evidence was not known to him at the time of the first hearing, and, in fact, it appears to be evidence readily available to him, as he was able to obtain it at this point. Additionally, it appears that, if the Claimant was able to obtain this evidence at this point, he could additionally also, by reasonable diligence, have presented it at the time of the hearing.

Additionally, an affidavit of a witness is not sufficient for purposes of the Administrative Procedures Act which allows only for the submission of written expert reports as evidence and not their testimony, by affidavit, or otherwise. Therefore, the South Carolina Uninsured Employers' Fund does not believe the evidence sought to be submitted by the Claimant is proper nor is it evidence of a nature so as to constitute additional or newly discovered evidence.

The Claimant also asserts that the reason he did not present this evidence at the hearing, which further infers that it would have been available at that time, was because he believed the issue had already been adjudicated, and was not aware that the number of employees was an issue for a hearing. In reviewing the records of the Department of Coverage and Compliance in this matter, it is noted that Garry Smith, of the Coverage and Compliance Department, specifically, advised the Claimant, through counsel, that no Form 52 had been served on the Employer, and that the file had not been sent to the Judicial Department for a hearing. Mr. Smith also advised that costs precluded Coverage and Compliance from serving by publication and that, therefore, they were unable to present their case at a "Show Cause Hearing". Therefore, in fact, there has never been either a "Show Cause Hearing" nor a capitulation agreement signed by the Employer, which would constitute an order to this matter reflecting that the Employer regularly employed four (4) or more employees in the state of South Carolina so as to be subject to the Act. Therefore, the issue

of whether the employer regularly employed four or more employees was a threshold issue in any case before the Commission. Mr. Smith's letter of July 17, 2003 (a copy of which is attached), noted that: "At 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". Further, in a memo to the file, Mr. Smith also noted that: "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 of the claim can be heard.".

Finally, counsel for the Claimant asserts that the Uninsured Employers' Fund should not be able to raise the issue of whether the Employer employed four (4) or more employees at the time of the hearing, because they did not submit a Pre-hearing Brief to raise that issue. In fact, the Uninsured Employers' Fund only received notice of this hearing the day prior to the hearing and advised the Commission that it would be unable to appear at the hearing at that time. Commissioner Huffstetler, however, required the Uninsured Employers' Fund to be present at which time they obtained local counsel, The Lynch Law Firm, L.L.C. Therefore, they were unable to and did not file a brief on their behalf. They did, however, raise that issue at the hearing.

Where there has been no capitulation agreement, nor a Rule to Show Cause Order issued by the Commission, the issue of whether the Employer regularly employed four (4) or more employees is always the threshold issue before the Commission.

Based upon the foregoing, the Uninsured Employers' Fund does, hereby, submit that the Motion to Introduce Additional Evidence into the Record on Review is not proper and should be denied.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

P. O. BOX 1715
COLUMBIA, S. C. 29202-1715

JARREL L. WIGGER
ATTORNEY AT LAW
8086 RIVERS AVENUE
NORTH CHARLESTON SC 29406

W.C. FILE NO. 0221897

Emp. Code No. 383654757

PUNIYANI VIRENDRA
JARREL L. WIGGER
VS
AVNI GROCERS/FAST POINT AMOCO
TERRI MORRILL LYNCH

Car. Code No. 00000-

Car. File No. NR

Date: 09/14/06

DATE OF ACCIDENT: 11/14/02

Dear JARREL L. WIGGER:

Your request for postponement of the Review in the above mentioned case is granted. The case will be rescheduled as soon as our schedule permits. Briefs are due in accordance with original Review Hearing Notice unless a properly filed extension is filed.

By copy of this letter to all parties, we are notifying them of this action.

If I may assist you further, please contact me.

Sincerely,

Eugenia Hollmon
Judicial Docketing Director
(803) 737-5737

/ech

CC: TERRI MORRILL LYNCH
ATTORNEY AT LAW
1470 BEN SAWYER BLVD STE 10
MOUNT PLEASANT SC 294644593

LATONYA D. EDWARDS (SI)
KOGER CNTR WINTHROP BLDG ST 119
220 EXECUTIVE CENTER DR
COLUMBIA SC 29210

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Please

D. Garrison Hill, Circuit Court Judge

Case No. 2007-CP-10-0013

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

v.

Avni Grocers, Employer, ... Defendants,

and

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

Case No. 2007-CP-10-0014

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased, Claimant

v.

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

MOTION TO LATE FILE APPELLANT'S MEMORANDUM RE: INTERLOCUTORY ORDER

Terri Morrill Lynch, Esq.
Matthew J. Story
Margaret M. Urbanic
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
(843) 577-2026 office
(843) 722-2867 fax
Attorneys for Appellant

and

Latonya Edwards, Esq.
South Carolina Uninsured Employer's Fund
100 Executive Center Drive, Suite 101
Santee Building
Columbia, South Carolina 29210
Attorneys for Appellant

COME NOW, the Appellants, The South Carolina Uninsured Employer's Fund, by counsel, and hereby, move to be allowed to late serve and file the Appellant's Memorandum Re: Interlocutory Order as follows:

The basis for this request is that, after receipt of the Court's scheduling request, counsel for the Appellants was out of the office (and country) for a week, and upon her return found that several orders, briefs, pre-hearing briefs and settlement documents were due. During the same time, counsel's assistant was hospitalized and also out of the office. It was believed that the Memorandum in this case, could be completed and mailed by the due date, however, it was not completed when the mail left the office.

Based upon the foregoing, the Appellants respectfully request that they be able to serve and file the Appellants Memorandum Re: Interlocutory Order on or after March 25, 2010. Additionally, the Appellants are, hereby, filing a certificate stating that this Memorandum complies with the South Carolina Court of Appeals order of March 5, 2010.

Dated: March 26, 2010

Terri Morrill Lynch
Terri Morrill Lynch
Matthew J. Story
Margaret M. Urbanic
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
(843) 577-2026 office
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and

Latonya Edwards
South Carolina Uninsureds Employer's Fund
100 Executive Center Drive, Suite 101
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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Please

D. Garrison Hill, Circuit Court Judge

Case No. 2007-CP-10-0013

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

v.

Avni Grocers, Employer, ... Defendants,

and

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

Case No. 2007-CP-10-0014

Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased, Claimant

v.

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

SOUTH CAROLINA UNINSURED EMPLOYER'S FUND MEMORANDUM RE: INTERLOCUTORY ORDER

Terri Morrill Lynch, Esq.
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Attorneys for Appellant

and

Latonya Edwards, Esq.
South Carolina Uninsured Employer's Fund
100 Executive Center Drive, Suite 101
Santee Building
Columbia, South Carolina 29210
Attorneys for Appellant

Pursuant to the scheduling request of the Court of Appeals, the South Carolina Uninsured Employer's Fund, one of the Defendants in the above-captioned matter, does, hereby, file a memorandum to address whether or not the order issued by Circuit Court Judge D. Garrison Hill, on September 13, 2007, constitutes an interlocutory order and, if so, whether this matter should be dismissed by the Court of Appeals, and remanded to the Full Commission of the Workers' Compensation Commission.

This matter, initially, went forward to a hearing before a hearing commissioner and on appeal to the Full Commission, following which the Claimants, in both of these cases, filed appeals to the Circuit Court of Horry County. The Circuit Court Judge, in his order, considered evidence not properly before him, which was not allowed by the Full Commission as newly discovered evidence, and remanded this matter to the Full Commission. The Court, specifically, found that the Commission's refusal to admit the additional evidence proffered by the Claimant was reversed, and there was evidence that Avni Grocers employed at least four (4) employees so as to be subject to the Act. It then remanded the case to the Full Commission for further proceedings consistent with the Court's order.

In South Carolina, generally, an order is deemed interlocutory and not immediately appealable if the case is remanded by the Circuit Court to the Full Commission. This Court addressed, however, in Foggie v. G.E., 376 S.C. 384, 656 S.E.2d 395 (Ct.App. 2008) that the Courts in South Carolina have recognized that, in some situations, remand orders from the Circuit Court to the Commission may be immediately appealable. Cf. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct.App.2005).

In Brown, it was held that the Circuit Court order finally determined an issue on the merits, and concluded that, where the Circuit Court order constituted a final decision on the merits and the

remand order had no effect on the finality of the decision, the order was immediately appealable.

In the case at hand, by determining that additional evidence should have been submitted upon the issue of jurisdiction, the Circuit Court's order constituted a final decision on the merits. This order allowed evidence, not previously submitted, finding four (4) or more employees, and the remand for the Commission to make that finding, has no effect on the finality of the decision, which is that the Commission had jurisdiction to hear this case.

The South Carolina Code provides for an appeal of interlocutory orders in cases where substantial rights are effected or involve the merits of the case. An order effecting a substantial right includes when an order grants or refuses to grant a new trial which, in effect, the Circuit Court has done in this case by remanding this matter to the Full Commission.

The South Carolina Supreme Court has defined "involving the merits" in an order as one that finally determines some substantial issue forming the whole or part of some cause of action or defense". Cf. Jefferson v. Gene's Used Cars, Inc., 368 S.E.2d, 456 (1988). The Circuit Court judge, in reversing the decision of the Commission not to allow additional evidence has determined a substantial issue forming the cause of action, which is whether or not the employer regularly employed four (4) or more employees so as to be subject to the Act. The Circuit Court judge, in basing his decision upon evidence not properly before him has determined a substantial issue, "jurisdiction" allowing a cause of action to both Claimants. The Workers' Compensation Commission cannot hear a case nor award benefits where it does not have jurisdiction. Therefore, if it is held that the Circuit Court judge's order was in error, both based upon it allowing improper evidence, which was previously denied by the Commission, and in finding that the Commission should issue a determination that it did have jurisdiction in this matter, a substantial issue forming the cause of action is before this court, and should be considered by it.

In Green v. Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct.App.1993) this Court also held that an appeal from an interlocutory order may be taken "if it deprives the appellant of a substantial right" and if it "finally determines some substantial matter forming the whole or part of some cause of action or defense in this case." In Green, involving an issue of election of claims, a single commissioner required an election, which became the law of the case, while the Appellant panel reversal held that the Claimant could not pursue benefits. This Court held that the remand had the effect of determining a substantial matter because the election became the law, and the Claimant could not pursue the case.

Similarly, in the case at bar, the Circuit Court judge, by allowing in evidence previously denied by the Commission, and in finding that it established four (4) or more employees so as to be subject to the act, has found that the Commission does have jurisdiction. Therefore, the Circuit Court judge's order affected the merits, and is immediately appellable.

Further, this Court has held that a Circuit Court order remanding a case to the Commission is appealable even where it directs the Commission to make findings, if it finally determined an issue on the merits. Cf. Brown v. Greenwood Mills, Inc., 622 S.E.2d 546 (Ct. App. 2005). In the case at hand, the Order directs the Commission to make a determination that the Commission has jurisdiction. Within the holding of Brown, supra, this directs the Commission to make a specific finding and, further, is based upon evidence outside of the record. Therefore, the Circuit Court judge has made a "finding", which directs the Full Commission to, likewise, make a finding.

In the case at hand, the order directs the Commission to consider evidence showing that "Avni Grocers employed at least four (4) people, so as to be subject to the Act and the Commission's decision to the contrary is reversed. Within the holding of Brown this directs the Commission to make a specific finding of fact that it has jurisdiction. In Brown, the Court order

mandated apportionment, which was determined to be on the merits. Similarly, in the case at hand the Circuit Court order mandates a finding of jurisdiction, which is a decision on the merits because it decides that the Commission has jurisdiction.

Additionally, the order in the above-captioned matter is immediately appealable because the Circuit Court considered evidence not properly before it. Doctrines of fairness and judicial economy are best served by an immediate review of the Court of Appeals. If this case is remanded back to the Commission, an appeal will have to be filed after its issuance of an order to allow the appellate court address the consideration of the allowance of the improper evidence.

A Circuit Court review is limited to a determination of whether the substantial evidence supported the Commission's finding. Rather than discussing whether there was substantial evidence, the Circuit Court judge discussed and reviewed only new evidence introduced by the Claimant upon the issues of jurisdiction. Therefore, the Order is also appealable because the Court has stepped outside of the bounds of review in an appeal from the Full Commission.

A finding of subject matter jurisdiction, specifically, allows an appellate court's decision to be immediately appellable. In Deskins v. Boltin, 317 S.C. 310, 454 S.E.2d 322 (Ct. App. 1994), this Court addressed whether a motion denying summary judgment is appealable. It was concluded that, in Deskins, the Court did not decide anything affecting the merits of the case, and did not have the effect of striking any defense that might be revised later in the proceeding. This ruling is at opposition to the facts in the present case, which are that the Circuit Court judge allowed evidence conferring jurisdiction to the Workers' Compensation Commission, and, in effect, deprived the Defendants of raising a jurisdiction defense. This Court, in Deskins, noted the holding of the Supreme Court in Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993), certiorari granted (1004), holding that an interlocutory order in a workers' compensation case

denying a motion for summary judgment based upon lack of subject matter jurisdiction was immediately appealable. The same should be true in the case at hand where the Circuit Court ruling is that the Commission does have jurisdiction to hear this matter. That ruling is immediately appealable and should be allowed in this case. The Circuit Court order was not interlocutory to the extent that it found jurisdiction conferred to the Workers' Compensation Commission.

The Defendants/Appellant will be prejudiced if they are forced to re-litigate the issue of jurisdiction where the circuit court judge considered evidence not properly before it and made a ruling and final decision on the merits of "jurisdiction", with the remand having no effect on the finality of the decision. Therefore, even though this order remands the case to the Commission, its decision affects the merits, and is immediately appealable.

Dated: March 26, 2010

Terri Morrill Lynch, Esq.
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Santee Building
Columbia, South Carolina 29210
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Please

D. Garrison Hill, Circuit Court Judge

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Dharmendra Chaudhari, Husband of Anita Chaudhari, Deceased, Claimant

v.

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

CERTIFICATE OF COUNSEL

The undersigned attorney certifies that the Appellants' Memorandum Re: Interlocutory Order complies with Court of Appeals Order of March 5, 2010.

Dated: March 26, 2010

CLAWSON & STAUBES, LLC.

Terri Morrill Lynch

Terri Morrill Lynch
Matthew J. Story
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ISSUE BEFORE THE COURT

In an Appeal from the Workers' Compensation Commission, Is an Order from the Circuit Court Reversing the Commission's Decision and Remanding the Matter for Further Proceedings Immediately Appealable to the Court of Appeals Regardless of the Issues Raised on Appeal?

I. Supreme Court Precedent Clearly Establishes That any Order from the Circuit Court Remanding a Case to an Administrative Agency for Additional Proceedings Is Not Directly Appealable.

II. The Cases *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) Are Not Controlling Law on this Question.

III. The Cases *Deskins v. Boltin*, 317 S.C. 310, 454 S.E.2d 322 (Ct. App. 1994) and *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993), Cited by Appellant in its Memorandum, Are No Longer Good Law

BACKGROUND

This is an appeal in a workers' compensation case. The Claimants/Respondents are the personal representatives of two employees who were murdered by a co-worker while on the job with Avni Grocers (the Employer). Each estate brought claims under the Act. The Fund became involved in the matter because the Employer was operating without Workers' Compensation coverage. The primary issue in the case was whether Employer regularly employed four (4) or more employees so as to be subject to the Act at the time of the murders.

The matters were consolidated and called for a hearing 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. The Hearing Commissioner concluded that the Fund was properly served with the Form 52 and received adequate notice of the hearing. Employer failed to appear at the hearing. Following the hearing, the Hearing Commissioner ruled that Claimants failed to produce substantial evidence that Avni Groceries regularly employed four (4) or more employees so as to be subject to the Act.

Following the merits hearing, Claimants located the owner of Avni Grocers, Harendra Pal, who had moved out of state. Claimants obtained an affidavit from Mr. Pal that established the statutory requirements were met and the Employer was subject to the Act. Claimants filed a Motion to add Additional Evidence to the record, but the Commission refused to accept the additional evidence. Claimants appealed from both the Appellate Panel's affirmance of the Hearing Commissioner's order as well as the Commission's denial of the motion to accept the additional evidence.

Following briefing and arguments, the circuit court held the Commission erred as a matter of law in refusing to accept Mr. Pal's affidavit as additional evidence. The court further ruled that the preponderance of the evidence supported Claimants' position that the employer regularly employed four (4) or more employees so as to be subject to the Act. The court declined to address any additional issues, and remanded the matter to the Commission for further proceedings consistent with the court's rulings.

The Fund timely appealed the circuit court's order to this Court. On May 28, 2008, this Court advised the parties that the two cases would no longer be consolidated. Hence, each case is being briefed separately. However, the cases were once again consolidated for oral argument and were heard jointly on March 2, 2010.

At oral argument, Respondents/Claimants advised the Court that the circuit court's order of remand may not be appealable, and suggested the Court would benefit from additional briefing on the issue. On March 5, 2010, the Court issued an order setting forth a schedule for the parties to file memoranda regarding this issue. This memorandum is in response to the Court's Order.

DISCUSSION

In an Appeal from the Workers' Compensation Commission, Any Order from the Circuit Court Reversing the Commission's Decision and Remanding the Matter for Further Proceedings Is Not Immediately Appealable to the Court of Appeals Regardless of the Issues Raised on Appeal

I. Supreme Court Precedent Clearly Establishes That any Order from the Circuit Court Remanding a Case to an Administrative Agency for Additional Proceedings Is Not Directly Appealable.

The Supreme Court of South Carolina 's decision in the case *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) controls this case. Like the instant appeal, the order at issue in *Montjoy* was an order of the circuit court which remanded a case to the workers' compensation commission. The Court began by citing to S.C. Code Ann. § 1-23-390 (Supp. 2009), the statute which allows the Supreme Court to review a circuit court's judicial resolution of a contested administrative case, and the Court stated "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618.

The Supreme Court has reiterated its adherence to this approach on more than one occasion. In the case *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), the Court granted a writ of certiorari to review a decision from this Court which remanded a workers' compensation case to the commission. The Court of Appeals had held that the circuit court had "exceeded its appellate jurisdiction" and should instead have simply remanded the case to the commission. *Id.* at 493-94, 530 S.E.2d at 127-28. In affirming the decision to remand the case, the Supreme Court held that the circuit

court's order, "was not directly appealable since it remanded the matter to the single commissioner for further proceedings." *Id.* at 493-94, 530 S.E.2d at 127-28.

More recently, the case *Magaha v. Greenwood Mills, Inc.*, Op. No. 2008-UP-244 (S.C. Ct. App. filed April 24, 2008)[1] **(Attachment C)** was an appeal to this Court from an order of the circuit court which reversed the workers' compensation commission's determination that the claimant had failed to comply with the notice requirement contained in the Workers' Compensation Act. *See* S.C. Code Ann. § 42-15-20 (Supp. 2009) (generally imposing a ninety-day reporting requirement for an accidental injury). The circuit court found that the claimant had satisfied the notice requirement and the court accordingly ordered that the case be remanded to the commission. The claimant's employer appealed to this Court, and this Court denied the claimant's motion to dismiss the employer's appeal. **(Attachments A and B).** This Court's unpublished opinion in the case distinguished *Montjoy* and cited two Court of Appeals cases for the proposition that "remand orders from the circuit court to an administrative agency may be immediately appealable where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision." *Magaha*, slip. op. at 6. The losing party on the merits petitioned for a writ of certiorari, the Supreme Court denied the petition, and in the order of denial, the Supreme Court vacated this

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[1] Respondent understands that ordinarily unpublished opinions or orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Rule 268(d)(2), SCACR. However, given the unique perspective the Magaha rulings provide on the issue before the Court, Respondents respectfully request that the Court acknowledge and consider both the unpublished opinion from this Court and the unpublished Order from the Supreme Court vacating this Court's opinion and dismissing that appeal.

Court's opinion. **(Attachment D)**. The Supreme Court wrote:

> The petition for a writ of certiorari is denied because the order on appeal is not immediately appealable. *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) (an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable). We therefore vacate the Court of Appeals' opinion.

Id.

There is no meaningful distinction between the procedural posture in the instant case and the postures of the cases presented in *Montjoy*, *Leviner*, and *Magaha*. On each occasion, the Supreme Court has unequivocally stated that an order from the circuit court remanding a case to an administrative agency for additional proceedings is not immediately appealable. This Court should accordingly dismiss this appeal.

II. The Cases *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) Are Not Controlling Law on this Question.

A series of cases from this Court purport to allow the immediate review of interlocutory decisions remanding cases from the circuit court to an administrative agency or from an appellate division of an administrative agency to an administrative hearing officer. See, e.g., *Canteen v. McLeod Reg. Med. Ctr.*, 384 S.C. 617, 682.S.E.2d 504 (2009). These decisions are contrary to controlling Supreme Court precedent as well as the current statutory law and they should not control.

An examination of the recent *Canteen* opinion is instructive. That case was an appeal to the circuit court from the appellate panel of the workers' compensation

commission which had reversed the hearing commissioner's finding with respect to the claimant's brain injury and remanded the case to the hearing commissioner for further proceedings. The circuit court dismissed the appeal on the grounds that it did not have jurisdiction and this Court reversed, finding that the order was indeed immediately appealable. *Id.* at __, 682 S.E.2d at 504-507. In doing so, this Court relied on *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993). A close analysis of this jurisprudence shows this reliance upon *Foggie*, *Green* and *Brown* to be misplaced, particularly in light of the Supreme Court's disposition in *McGaha*.

The Supreme Court's opinion in *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955) is the best starting point for an examination of this area of this Court's jurisprudence. *Chastain* contains a pronouncement from the Supreme Court of the common law policy of requiring that administrative orders be final before they are subject to judicial review. In *Chastain*, the ourt examined and adopted the policy of requiring final agency action before allowing judicial review of administrative determinations and instructed, at the close of its analysis:

> In the case at bar, the Commission's order . . . is not a final one. It neither allows nor denies compensation. Not does it affect the merits. It is, therefore, not appealable prior to the Commission's final determination of its review of the Hearing Commissioner's award.

Id. at 66, 88 S.E.2d at 838.

Claimants contend that the *Green – Brown – Foggie* line of cases has focused on

Chastain's use of the phrase "affect the merits" to justify analyzing the appealability of these types of interlocutory orders under the general appealability statute, S.C. Code Ann. § 14-3-330 (1985 & Supp. 2009). In addition to allowing appeals from final judgments, § 14-3-330 allows for immediate appellate review of an interlocutory decision which involves the merits or affects a substantial right. *Id.*

Chastain admittedly gives direct support to this interpretation. In addition to including the phrase "affect the merits" in the Court's opinion, the Court distinguished two of its previous cases where it had granted immediate appellate review of interlocutory orders remanding administrative cases to the workers' compensation commission, and commented with respect to one of the cases that it had allowed review because the lower tribunal's decision had "deprived [a party] of a substantial right." 228 S.C. at 66-67, 88 S.E.2d at 838. This Court's decision in *Green v. City of Columbia* relied exclusively on *Chastain*, see *Green*, 311 S.C. at 79-80, 427 S.E.2d 685, and *Green* has been the bedrock of the cases on this issue that have followed. See *Brown*, 366 S.C. at 386-88, 622 S.E.2d at 550-51 (distinguishing *Montjoy* and applying *Green*); *Foggie*, 376 S.C. at 388-89, 656 S.E.2d at 397-98 (distinguishing *Montjoy* and relying on *Brown*); *Magaha*, slip op. at 6 (distinguishing *Montjoy* and relying on *Foggie* and *Brown*); and *Canteen*, 384 S.C. at __, 682 S.E.2d at 505-07 (relying on *Brown*, *Foggie*, and *Green*).

Importantly, however, *Green* and *Chastain* both pre-date *Montjoy* and *Leviner*; and despite the language that appears in *Chastain* and upon which *Green* and its progeny have seized, the Supreme Court's decisions in *Montjoy* and *Leviner* do not contain any echos of the analysis courts use to determine whether interlocutory appeals are

nevertheless immediately reviewable under § 14-3-330. Put simply, neither *Montjoy* nor *Leviner* have anything to say about interlocutory decisions affecting substantial rights or involving the merits. Those cases unquestionably stand for the proposition that any order from the circuit court remanding a case to an administrative agency is not directly appealable. As this Court is bound by Supreme Court precedent, *Montjoy* and *Leviner* must control. See S.C. Const. art. V, § 9 (providing that "The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

The explanation for this disconnect between the Supreme Court's "affecting the merits/substantial right" language in *Chastain* and the more categorical approach expressed in *Montjoy*, *Leviner*, and *Magaha* lies in the passage of the Administrative Procedures Act (APA). Before the passage of the APA, appeals from the workers' compensation commission were governed by two statutes. The first statute allowed for appeals to circuit court from the commission's final decisions. See 1962 Code § 72-355. The second statute was the predecessor to current § 14-3-330, the general appealability statute. See 1962 Code § 15-123. In *Cord v. E. H. Hines Construction Company*, 220 S.C. 356, 67 S.E.2d 677 (1951), the Supreme Court reviewed the commission's denial of an employer's request to have a claimant undergo a medical evaluation. The circuit court had affirmed the decision, and on appeal, the claimant contended that the order was not immediately appealable because it was not the commission's "final order." *Id.* at 362, 67 S.E.2d at 679. Rejecting this assertion, the Supreme Court cited to the then-applicable version of the general appealability statute and stated that "[t]he applicability of the general statutes relating to appeals from the Court of Common Pleas to this court in

matters originating before the [commission]" had already been established. *Id.* The Supreme Court held the order reviewable because it affected the employer's "substantial right[s]." *Id.*

The subsequent passage of the APA – first in 1976 and then in revised form in 1977 – changed this landscape dramatically. Both iterations of the APA required a party seeking judicial review to have exhausted administrative remedies and that the party be aggrieved by an agency's final decision in a contested case. See Act No. 176 § 8, 1977 S.C. Acts 391, 403-04; see also Act No. 671 § 24, 1976 S.C. Acts 1758, 1768.

The final decision requirement remains the centerpiece of the current statutory construct for the judicial review of agency decisions. See S.C. Code Ann. §§ 1-23-380 and -390 (Supp. 2009). The only qualification found in the current law's prohibition of review of intermediate agency determinations is the portion of § 1-23-380 providing that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

To the extent that the general statutes relating to the judicial appeals process used to apply to reviews of decisions from the workers' compensation commission and to decisions of lower judicial courts reviewing an administrative agency's resolution of a contested cases, the passage of the APA was a sea change. The *Cord* case's citation to the general appealability statute can no longer bear the weight the *Chastain* opinion put on it, see *Chastain*, 228 S.C. at 66-67, 88 S.E.2d at 838 (citing *Cord*), and *Chastain*, as a pre-APA case, cannot bear the weight of *Green*, *Foggie*, and *Brown*; all post-APA cases. See *Green*, 311 S.C. at 79-80, 427 S.E.2d 685 (relying exclusively on *Chastain*); *Brown*,

366 S.C. at 386-88, 622 S.E.2d at 550-51 (distinguishing *Montjoy* and applying *Green*); *Foggie*, 376 S.C. at 388-89, 656 S.E.2d at 397-98 (distinguishing *Montjoy* and relying on *Brown*). See also Act No. 387 § 53, 2006 S.C. Acts 3131 ("This Act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling."). The rubric which applies to judicial review of agency decisions is supplied by §§ 1-23-380 and -390, and the cases of *Montjoy* and *Leviner* control the question whether a circuit court order remanding a case to an administrative agency is reviewable. This view is punctuated by the Supreme Court's handling of *Magaha*.

The Court may decide to seek clarification from the Supreme Court of this issue in light of the divergent authority that has developed, and in light of what occurred in *Magaha*. Because the root of the conflicting approaches to the appealability question is drawn from apparently irreconcilable language in *Chastain* and the later case of *Montjoy*, an option this Court may wish to pursue is to request that the Supreme Court certify the issue of appealability pursuant to Rule 204(b), SCACR.

III. The Cases *Deskins v. Boltin*, 317 S.C. 310, 454 S.E.2d 322 (Ct. App. 1994) and *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993), Cited by Appellant in Its Memorandum, Are No Longer Good Law

Apart from citing to *Foggie*, *Brown* and *Green*, Appellant cites to *Deskins v. Boltin*, 317 S.C. 310, 454 S.E.2d 322 (Ct. App. 1994) (*Deskins I*) and *Woodard v.*

Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993) (*Woodard I*) in support of its argument that the order before the Court is, in fact, an appealable order. (Memorandum, fourth and fifth pages of argument). The Supreme Court, however, has directly overruled each of those cases on the issue of appealability.

In *Woodard I*, this Court noted a conflict in Supreme Court precedent over the appealability of a denial of a Rule 12(b)(1), SCRCP, raising subject matter jurisdiction, and felt bound by the then most recent pronouncements of the Supreme Court to hold the order was appealable. The Supreme Court granted a writ of certiorari, vacated this Court's opinion, and dismissed the appeal. *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995) (*Woodard II*), *overruled on other grounds Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002) (holding exclusivity provision under the Workers' Compensation Act does not involve subject matter jurisdiction, and overruling *Woodard II* which had indicated otherwise in footnote 3 of *Woodard II*). The Supreme Court expressly found the order in that case was not immediately appealable.

This Court relied upon its decision in *Woodard I* in deciding *Deskins I*, a case that also held the denial of a Rule 12(b)(1) motion was immediately appealable. The Court "entertain[ed] some doubt" over the appealability of the order but again felt bound by the then latest pronouncement from the Supreme Court. The Supreme Court, however, granted a writ of certiorari, vacated the Court of Appeals decision and dismissed the appeal. *Deskins v. Boltin*, 319 S.C. 356, 461 S.E.2d 395 (1995) (*Deskins II*). The Supreme Court stated:

> On appeal, the Court of Appeals initially expressed some

> reservation about the appealability of the order, but proceeded to address the merits of the case since its decision in *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (Ct. App.1993) had not been overruled.
>
> However, this Court recently overruled the Court of Appeal's decision in *Woodard v. Westvaco Corp.* and held that the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. *Woodard v. Westvaco Corp.*, Op. No. 24290 319 S.C. ----, 460 S.E.2d 392 (S.C. Sup. Ct. filed July 24, 1995) (Davis Adv. Sh. No. 17 at 49). Accordingly, we dismiss this appeal and vacate the opinion of the Court of Appeals in this matter.

Deskins v. Boltin, 319 S.C. at 357-358, 461 S.E.2d at 395-396.

Hence, the cases Appellants cite to this Court to support their argument that the order on appeal is immediately appealable are no longer good law. This Court should reject this argument and follow the rules set forth in *Montjoy* and *Leviner* as set forth above.

CONCLUSION

The Supreme Court's pre-Administrative Procedures Act and pre-*Montjoy* and *Levine*r decisions relating to the appealability of interlocutory decisions from administrative agencies fully support the view of appealability expressed in the *Green*, *Foggie*, *Brown* cases. However, those recent Court of Appeals cases fail to take into account the fact that the Supreme Court jurisprudence forming their foundations is based on a statutory construct that is no longer applicable. Under current law, any order from the circuit court remanding a case to an administrative agency is not immediately appealable.

This Court should take the Supreme Court's decision in *Magaha* for the clear signal that the Court's order provides and should accordingly dismiss this appeal.

Respectfully submitted,

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April 2, 2010

Exhibit A

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

J. Cordell Maddox, Circuit Court Judge

Case No. 04-CP-24-1606

Bessie M. Magaha, ... Respondent,

v.

Greenwood Mills, Inc., ... Appellant.

MOTION TO DISMISS

Pursuant to Rule 224, SCACR, the Respondent, Bessie M. Magaha, hereby moves the Court to dismiss the appeal in this matter. This is an appeal from an order of the circuit court reversing a decision of the Workers' Compensation Commission and remanding the matter to the Commission for further proceedings. This matter therefore involves an unappealable interlocutory order. Accordingly, the Respondent hereby moves this Court to dismiss this appeal for the reasons discussed below.

I. The Circuit Court's Order is Not Directly Appealable

The order in this case remanded the matter to the full workers' compensation commission for further proceedings consistent with the circuit court's order. (Order of Judge Maddox, Exhibit A). Case law from the Supreme Court is clear that such an order is not immediately appealable to

the Court of Appeals. *See, e.g., Leviner v. Sonoco Products Co.*, 338 S.C.492, 530 S.E.2d 127 (2000) (circuit court's order, though final, was not appealable since it remanded the matter to the single commissioner for further proceedings; accordingly, appeal should have been dismissed); *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) (order remanding matter to workers' compensation commission not directly appealable); Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina (Second Ed.)*, pp. 101-102 (2002 S.C. Bar).

In *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955), the Supreme Court of South Carolina *sua sponte* raised the question of whether the full commission's order was appealable and, if not, the circuit court and the Supreme Court would have had no jurisdiction except to dismiss. The Court listed matters from other jurisdictions held unappealable because they lacked finality:

> (1) an order of the commission allowing a claimant to amend his claim;
> (2) an order vacating the order of the single commissioner denying compensation, and holding the case in abeyance for later determination of disability;
> (3) an order granting both parties the right to take further testimony;
> (4) an order setting aside the examiner's findings and award and ordering the matter scheduled for further hearing;
> (5) an order of the commission granting claimant's petition for introduction of further evidence;
> (6) an order of the compensation appeal board remanding a compensation case to the commissioner for further development of proof.

The Supreme Court added:

> That the appealability of the order...has not been questioned or discussed by either party is of no consequence. The order not being either a final one or an intermediate one affecting the merits or depriving appellants of a substantial right, the circuit court was without jurisdiction, in the state of the proceedings, to consider the appeal on its merits.

Id., 228 S.C. at 67.

In fact, subject matter jurisdiction may not be waived, and must be raised when found to be lacking, even by the Court on its own motion. *Brown v. Greenwood School District 50*, 344 S.C. 522, 544 S.E.2d 642 (Ct. App. 2001) (issues relating to subject matter jurisdiction may be raised at any time and should be taken notice of by the appellate court on its own motion; case dismissed because interlocutory order transferring equity case to non-jury roster not appealable).

In three (3) recent matters this Court has refused to entertain direct appeals from circuit court orders that remanded a case to the Workers' Compensation Commission for additional proceedings. *See Nesbitt v. Duke Energy Corp.*, Order (S.C. Ct. App. filed Oct. 30, 2002); *Rinehart v. Darlington County School District*, Order (S.C. Ct. App. filed June 20, 2002); *Ott v. Pony Express*, Order (S.C. Ct. App. filed Oct. 18, 2001). Copies of the orders dismissing these matters are attached to this motion. (Exhibits B, C, and D).

II. *Green v. City of Columbia* and *Brown v. Greenwood Mills*

In her letter to this Court, Respondent pointed out the case of *Brown v. Greenwood Mills Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), *certiorari pending*, in which this Court held an order of the circuit court was immediately appealable despite the fact that the order remanded the matter to the commission for apportionment between compensable and non-compensable causes of claimant's byssinosis. This Court held the order finally determined an issue on the merits – that claimant's smoking, a non-compensable cause, contributed to his disability – and the circuit court's order mandating apportionment finally determined with finality an issue affecting the merits. The Court distinguished *Montjoy* and made no reference to *Leviner*.

The Court in *Brown* relied upon an earlier Court of Appeals decision, *Green v. City of*

Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993), in which the Court found a Commission order that *sua sponte* reversed a single commissioner on the issue of election of remedies involved the merits of the case so as to be immediately appealable to the circuit court pursuant to *Henderson v. Wyatt*, 8 S.C. 112 (1877) ("An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled").

In its letter to this Court of February 14, 2006, the Employer cited to *Green* and *Brown*[1] in support of its position that the circuit court's order is, in fact, appealable. These cases, however, should not control. First, *Green* appears to conflict with the Supreme Court cases of *Montjoy* and *Leviner*. In *Montjoy*, the Supreme Court did not describe the appealed order in detail, but issued an order which reads as follows in its entirety:

> This appeal is from an order of the circuit court remanding this case to the Workers' Compensation Commission. Respondent moves to dismiss the appeal on the ground the order is interlocutory and not directly appealable. We agree and dismiss the appeal.
>
> S.C. Code Ann. § 1-23-390 (1986) provides:
>
> > An aggrieved party may obtain a review of any final judgment of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases.
>
> Accordingly, we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Whit*, 279 S.C. 343, 306 S.E.2d 621 (1983). To the extent our recent decision in *Blakely v. State Board of Medical Examiners*, 310 S.C. 29, 425 S.E.2d 37 (1993), may be read to allow such an appeal, it is hereby overruled.

Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. at 52-53, 446 S.E.2d at 618. *Green* is a "pre-

---

[1] *Brown* involved the same employer and employer's counsel as the case *sub judice*.

Montjoy case," as pointed out by this Court in the *Nesbitt* order. (Exhibit D). As the Court stated in the *Nesbitt* order:

> This court is bound by precedent of the South Carolina Supreme Court. *Daniels v. City of Goose Creek*, 314 S.C. 494, 431 S.E.2d 256 (Ct. App. 1993). While sometimes compelling arguments can be made that certain circuit court orders remanding to the commission should be immediately appealable, *Montjoy* is controlling authority unless clearly distinguishable.

Nesbitt, p. 8. Inasmuch as *Green* cannot be reconciled with *Montjoy* and *Leviner*, *Green* is no longer good law.

Second, insofar as *Green* has not been impliedly overruled by *Montjoy*, *Green* is distinguishable. In *Green*, the hearing commissioner required the claimant to elect between a claim under S.C. Code Ann. § 42-9-20 (general disability statute) and S.C. Code Ann. § 42-9-30 (scheduled member statute), and rather than objecting, the claimant elected to proceed under § 42-9-20. The commissioner denied benefits and claimant filed an application for appellate panel review, but that application did not assert error in forcing the election. The appellate panel, however, *sua sponte* held the forced election was an error of law, affirmed the denial of benefits under § 42-9-20, and remanded the matter to the hearing commission for a new hearing to determine benefits under § 42-9-30. The employer appealed to the circuit court, claiming the appellate panel's ruling exceeded the scope of the issues before it since claimant had not raised the election issue in the application for review. The circuit court dismissed the appeal, finding the appellate panel's remand order was interlocutory and not appealable. The employer then appealed to this Court.

The Court of Appeals began its analysis by noting that the hearing commissioner's findings of fact and law became the "law of the case" to the extent they were not challenged by

the claimant's exceptions to the appellate panel. Because the hearing commissioner required the election between § 42-9-20 and § 42-9-30, that ruling became the law of the case even though it may have been error. The Court held the employer could therefore rely on the fact that it did not have to address the election issue on review by the appellate panel. Hence, the panel's reversal and remand had the effect of finally determining a substantial matter forming part of a defense the employer had available, that is, that the election issue was the law of the case and claimant could not pursue benefits under § 42-9-30. The Court held that the panel's action affected the merits and was therefore immediately appealable.

In this case, the circuit court ruled that the only evidence in the record was that Claimant had met the statutory notice requirements of S.C. Code Ann. § 42-15-20 as a matter of law. The Circuit Court reversed the Commission's order and remanded the matter "for further findings of fact consistent with this order." (Exh. A, Order of Judge Maddox, p. 8). The order does not preclude the Employer from proceeding on the remaining issues in the case. (Exh. A, Form 4). The order is most like the order held to be not appealable in *Nesbitt*, in which the circuit court reversed the commission's due to an error of law, not of fact, ruling that Claimant did not establish an "injury by accident" and remanded for further proceedings. Hence, the employer in *Nesbitt* "lost" the defense of failure to prove the existence of an injury by accident as required by the Workers' Compensation Act.

Because *Brown v. Greenwood Mills* relies upon *Green v. City of Columbia* in finding the order in *Brown* appealable, *Brown* also does not control insofar as it conflicts with *Montjoy* and *Leviner*.

Under *Montjoy* and *Leviner*, this interlocutory order is not appealable under S.C. Code

Ann. § 14-3-330, as this Court has previously found in *Nesbitt*, *Rinehart*, and *Ott*. Although this Court recently held an order remanding a matter was indeed appealable in *Brown v. Greenwood Mills, Inc.*, that opinion is based upon analysis set forth in *Green v. City of Columbia*, a case that pre-dated the Supreme Court opinions in *Montjoy* and *Leviner*.

III. Conclusion

For the reasons stated, Respondent respectfully requests this Court look into this matter, find the order on appeal is an unappealable interlocutory order, and dismiss the appeal without prejudice.

Respectfully submitted,

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Attorneys for Respondent

February 17, 2006

Exhibit B

The South Carolina Court of Appeals

Fred Ott, Employee,

Respondent,

v.

Pony Express, Inc., Employer, and AIG/Insurance Company of the State of Pennsylvania, Carrier,

Appellants.

The Honorable Clifton Newman
Richland County
Trial Court Case No. 2001-CP-40-01422

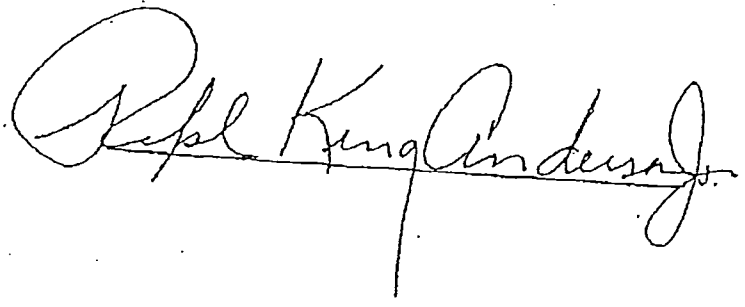
ORDER

Appellants appeal an order of the circuit court remanding the matter to the Workers' Compensation Commission for a *de novo* hearing. Respondent moves for an order dismissing the appeal and awarding costs on the ground the circuit court order remanding the case for further proceedings is not immediately appealable. In their return, appellants argue the order is immediately appealable because it involves the merits and affects a substantial right by granting a new trial on findings that were not appealed. Appellants also argue review following the remand will deprive them of an adequate remedy. Appellants request an award of costs.

Following a review of the motion, return and reply, this Court concludes the order is not immediately appealable. An order remanding a case to the Workers' Compensation Commission for additional proceedings is not immediately appealable. Levine v. Sonoco Products, Inc., 339 S.C. 492, 530 S.E.2d 127 (2000); Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 492, 446 S.E.2d 618 (1994). Accordingly, the appeal is dismissed without prejudice. Costs of $25.00 are awarded to Respondent and Appellants' motion for costs

is denied.

IT IS SO ORDERED.



Columbia, South Carolina

October 18, 2001

cc: George D. Gallagher, Esquire
Margaret Miles Bluestein, Esquire
John S. Nichols, Esquire
The Honorable Barbara A. Scott

FILED

10/19/01

Exhibit C

The South Carolina Court of Appeals

Elaine Rinehart, Appellant,

v.

Darlington County School District, Employer, Self-Insured through the S.C. School Boards Insurance Trust, Respondent.

The Honorable James E. Lockemy
Darlington County
Trial Court Case No. 2000-CP-16-00728

ORDER

Appellant appeals a circuit court order reversing and remanding the case to the South Carolina Workers' Compensation Commission for more detailed and specific findings of fact. At the request of this Court, the parties submitted memoranda addressing the issue of appealability of the circuit court order.

An order of the circuit court remanding a matter to the South Carolina Workers' Compensation Commission for more specific findings of fact is not immediately appealable. Leviner v. Sonoco Prods., Co., 339 S.C. 492, 530 S.E.2d 127 (2000); Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994); Davis v. Laz-Z-Boy Chair Co., 287 S.C. 121, 337 S.E.2d 238 (Ct. App. 1985); S.C. Code Ann. § 1-23-390 (Supp. 2001); Rule 201, SCACR. Accordingly, the appeal is dismissed without prejudice.

IT IS SO ORDERED.

Carol Connor, J.

Columbia, South Carolina

June 20, 2002

cc: John S. Nichols, Esq.
Kirsten L. Barr, Esq.
The Honorable Scott B. Suggs

FILED

Exhibit D

The South Carolina Court of Appeals

Rosetta Nesbitt, Employee, Respondent,

v.

Duke Energy Corporation,
Employer and Self-Insured, Appellant.

The Honorable Donald W. Beatty
Spartanburg County
Trial Court Case No. 2000-CP-42-00939

ORDER

The respondent has moved to dismiss this appeal on the ground the order is not immediately appealable under Montjoy v. Asten Hill Dryer Fabrics. The appellant opposes the motion.

This is a workers' compensation case. The single commissioner denied Rosetta Nesbitt's claim concluding she did not injure her back in 1997 by accident arising out of and in the course of her employment. Also, her application for review of a 1994 Commission order was barred because the

application was not made within 12 months of the last payment of compensation pursuant to the award.

Upon appeal, the Appellate Panel of the S.C. Workers' Compensation Commission affirmed the denial of benefits. The Panel specifically adopted the commissioner's findings of fact and conclusions of law. The Panel added (1) a finding of fact that Nesbitt did not timely file a claim for a 1997 accident since her treatment for the problem began prior to May 1, 1997, and she failed to prove an accident or unexpected result of work activity for the date she alleged, i.e. July 22, 1997; and (2) a conclusion of law that Nesbitt's right to benefits was barred under section 42-15-40 as she failed to file a claim within two years after an accident.

Nesbitt appealed to the circuit court. Initially, the circuit court affirmed the denial of Nesbitt's claim, but reversed the Panel's conclusion that her claim was barred by section 42-15-40. Both parties filed motions to reconsider.

Upon reconsideration, the circuit court withdrew its prior order. The court held:

> [T]he Commission erred as a matter of law in requiring the Claimant to establish the "injury by accident" in this case through

> proof of the occurrence of a specific untoward event in the course of her employment. This case involves the same type of "injury by accident" discussed in Pee v. AVM, that is, the onset of the injury as the result of continued and repetitive trauma related to the duties of her new job with [the employer].

The court made no change in its ruling concerning the reversal of the statute of limitations bar. The order stated the "Full Commission's determination that Claimant did not establish an 'injury by accident' within the meaning of the Workers' Compensation Act is reversed, and this matter is remanded for proceedings consistent with this order."

Respondent argues the appeal should be dismissed because the circuit court order is not immediately appealable under the authority of Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994). Appellant makes several arguments to distinguish this case from Montjoy. First, with respect to the reversal on the statute of limitations issue, appellant contends there was no remand to the Commission. Second, as to the "injury by accident" conclusion, the circuit court reversed the Commission based upon an alleged error of law as opposed to an error of fact. Third, the remand directive does not state the remand is for the purpose of making specific findings of fact or for taking additional testimony.

I.

Under the APA, a party aggrieved by a final agency decision in a contested case may file an appeal to the circuit court. S.C. Code Ann. §1-23-380 (Supp. 2001). When the circuit court issues an order, an aggrieved party may obtain review of a "final judgment of the circuit court under this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." S.C. Code Ann. §1-23-390 (Supp. 2001).

In this appeal, there was a final agency decision on the merits. Thus, the Panel order was appealable to the circuit court under section 1-23-380. The question is whether the circuit court order is a "final judgment" under section 1-23-390. The term "final judgment" has been generally described as a "term of art" denoting the disposition of all issues in an action. Link v. School District of Pickens Cty, 302 S.C. 1, 393 S.E.2d 176 (1990).

In Montjoy, the supreme court granted a motion to dismiss the appeal holding that "an order of the circuit court remanding the case for additional proceedings before an administrative agency is not directly appealable." 316 S.C. 52, 446 S.E.2d 618 (1994). The Montjoy opinion cited two cases as

supporting authority, Owens v. Canal Wood Corp. and Hunt v. Whitt, and overruled inconsistent authority in Blakely v. State Board of Medical Examiners.

In Owens, the supreme court held a circuit court order remanding a workers' compensation case for the taking of additional testimony on the existence of the employee-employer relationship did not involve the merits and was not reviewable by the appellate court due to lack of finality of the circuit court order. 281 S.C. 491, 316 S.E.2d 385 (1984).

In Hunt, the supreme court held a circuit court order reversing and remanding a case to the hearing commissioner for the purpose of taking additional medical testimony from the claimant was not appealable due to the lack of finality. 279 S.C. 343, 306 S.E.2d 621 (1983).

Blakely was overruled in part by Montjoy. The circuit court issued an order remanding a case to the State Board of Medical Examiners to determine Dr. Blakely's fields of practice and to devise an appropriate exam to test the doctor's knowledge of those fields. In the opinion, the supreme court stated the State Board should have immediately appealed this circuit court order

because it was not interlocutory. 310 S.C. 29, 31, 425 S.E.2d 37, 39 (1993). This was the part of Blakely which the supreme court overruled.

Two published cases have cited Montjoy since it was issued. In Hicks v. Piedmont Cold Storage Inc., 324 S.C. 628, 479 S.E.2d 831 (Ct.App. 1996), the single commissioner and full commission concluded Hicks' death was not the result of injury by accident arising out of and in the course of his employment with Piedmont. Id. at 631, 479 S.E.2d at 834. On appeal, the circuit court found the commission's decision was against the substantial weight of the evidence and remanded the case to the commission for calculation of the amount of death benefits payable to Hicks' minor children. Id. at 632, 479 S.E.2d at 834. This court concluded the order of the circuit court was immediately appealable because additional proceedings were not required as the parties agreed on Hicks' average weekly wage. Thus, the proceedings on remand were purely ministerial and did not require the exercise of independent judgment or discretion by the commission. Id. at 639, 479 S.E.2d at 838. The supreme court granted certiorari and reversed this court's decision in Hicks based upon application of the substantial evidence

rule. However, the supreme court did not address the appealability question. Hicks v. Piedmont Cold Storage Inc., 335 S.C. 46, 515 S.E.2d 532 (1999).

In Leviner v. Sonoco Products Co., 339 S.C. 492, 530 S.E.2d 127 (2000), a form order of the circuit court remanding the case to the single commissioner was held to be not directly appealable. Factually, the supreme court held the form order did not contain adequate findings of fact or conclusions of law to enable the commissioner to know exactly what acts he was to perform. However, neither party timely filed a Rule 59(e) motion asking for clarification. Id. at 493, 530 S.E.2d at 128.

II.

The appellant relies primarily upon three cases: (1) Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct.App. 1993); (2) Sharpe v. Case Produce Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); and (3) Osteen v. Greenville County School District, 333 S.C. 43, 508 S.E.2d 21 (1998).

Green is a pre-Montjoy case. This court held the circuit court erred in dismissing an appeal by concluding the full commission's remand order was not immediately appealable to it. This court concluded the commission order involved the merits and was appealable to the circuit court because the

commission *sua sponte* reversed the single commissioner's ruling concerning election of statutory claims. Green, 311 S.C. at 80, 427 S.E.2d at 686. Green is distinguishable because the question was whether the commission order was immediately appealable to the circuit court, not whether the circuit court order was immediately appealable to the appellate court.

Sharpe and Osteen are also distinguishable. In Sharpe, the circuit court affirmed the decision of the full commission. 336 S.C. 154, 519 S.E.2d 102. Likewise, the circuit court affirmed the decision of the full commission in Osteen. 333 S.C. 43, 508 S.E.2d 21. Those two cases do not address circuit court orders remanding to the commission.

This court is bound by precedent of the South Carolina Supreme Court. Daniels v. City of Goose Creek, 314 S.C. 494, 431 S.E.2d 256 (Ct.App. 1993). While sometimes compelling arguments can be made that certain circuit court orders remanding to the commission should be immediately appealable, Montjoy is controlling authority unless clearly distinguishable.

The motion to dismiss the appeal is GRANTED.[1]

IT IS SO ORDERED.

Jaqueline Austin, J.

Thomas E. Huff, J.

W. Luther, J.

10/30, 2002.

cc: Richard B. Kale, Jr. Esquire
Gary L. Compton, Esquire
John S. Nichols, Esquire

FILED
10/31/02 dlp

[1] The motion for costs is DENIED.

Exhibit B

The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29201
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June 8, 2006

Roy R. Hemphill, Esquire
McDonald Patrick Baggett Poston & Hemphill, LLP
P.O. Box 1547
Greenwood, SC 29648

John S. Nichols, Esquire
Bluestein & Nichols, LLC
P.O. Box 7965
Columbia, SC 29202

Re: Magaha, Bessie v. Greenwood Mills

Dear Mr. Hemphill:

The following Order has been endorsed on your Motion in the above entitled case on appeal.

"Granted.

s/ Jasper M. Cureton A.J.

June 08, 2006."

Dear Mr. Nichols:

The following Order has been endorsed on your Motion to Dismiss in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton A.J.

June 08, 2006."

Please be advised that the appellant must send written notification immediately upon the receipt of the transcript of record in this case on appeal.

Very truly yours,

CLERK

KAR/et

cc: Carole M. Dennison, Esquire

Exhibit C

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bessie M. Magaha, Respondent,

v.

Greenwood Mills, Inc., Appellant.

Appeal From Greenwood County
J. Cordell Maddox, Jr., Circuit Court Judge

Unpublished Opinion No. 2008-UP-244
Submitted April 1, 2008 – Filed April 24, 2008

AFFIRMED

Roy R. Hemphill, of Greenwood; for Appellant.

Carole Marie Dennison, of Greenville; John S. Nichols, of Columbia; for Respondent.

PER CURIAM: Greenwood Mills, Inc. (the Mill) appeals the circuit court's order in this workers' compensation action. We affirm.[1]

FACTS

Bessie M. Magaha was employed with the Mill for over thirty years as a weaver. In November of 1998, the Mill transferred Magaha to work on a larger loom. Magaha alleged she sustained an injury to her right shoulder, arm, and hand. She first sought treatment for the pain from her family doctor on January 11, 1999. Magaha had two surgeries on her shoulder and sought payment of medical expenses and temporary total and permanent total disability. The Mill denied Magaha sustained an injury by accident and alleges it did not receive notice of the injury until it received a Form 50 on December 29, 2000, almost two years after the alleged accident.

At the hearing before the single commissioner, Magaha argued she suffered repetitive trauma to her right shoulder after moving to the larger loom. Magaha is five-feet, one-inch tall, was in her sixties at the time of the alleged accident, and has a seventh grade education. Magaha testified she informed Ronnie Butler, her supervisor at the Mill, of problems with her shoulder on the first day she used the new loom. At a prior deposition, Magaha testified she told Butler the soreness in her shoulder and arm was getting worse but did not explicitly tell Butler the soreness was related to her work. She explained at the hearing that she "figured he probably would [think] . . . that it's something . . . from work." Butler testified before the single commissioner that he did not remember whether Magaha told him about her injury. Nor did he remember whether Magaha complained about the new loom. Butler claimed he would have noted any complaints on Magaha's attendance card, pursuant to the Mill's policy. Butler conceded Magaha was a good worker, retired without any warnings, and rarely, if ever, complained.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Magaha began receiving short-term disability benefits in March or April of 1999. On her application for short term disability, Magaha represented that her injuries were not work-related. On cross-examination on the issue, Magaha testified that the Mill did not explain the short-term disability form to her and she did not remember checking a box on the form denying her injury was work-related. Magaha has suffered a stroke, has had a guardian ad litem appointed for her, and could not remember whether the Mill helped her fill out the disability forms.

After shoulder surgery in March of 1999, Magaha returned to work. Within two weeks, the pain returned. Magaha retired in July of 2000, had carpal tunnel surgery in October of 2000, and had a second shoulder surgery in February of 2002.

Dr. Michael Bryant, Magaha's treating physician, wrote the Mill after Magaha's first consultation. By letter dated January 19, 1999, Dr. Bryant informed the Mill:

> Ms. Magaha had been seen in my office on 1/11/99 with impingement syndrome with continued pain and discomfort. She had some decreased strength secondary to the pain as well as pain on internal and external rotation of the right upper extremity . . . . She is no longer doing the job that caused the impingement syndrome but continues to be debilitated at work working in pain. . . . I would appreciate your consideration in helping her cover this expense, as I think it will be less costly overall in her treatment. (Emphasis added.)

The Mill stipulated it received this letter.

The single commissioner found Magaha failed to prove a compensable injury and failed to give sufficient notice of having sustained an injury by accident. With one dissent, the full commission adopted the findings of the single commissioner.

Magaha appealed the issues of notice and compensability to the circuit court. In closing arguments at the circuit court hearing, Magaha's counsel argued:

> I think notice is everything. If she gave notice that she started an investigation to see if it was work related. Clearly the hearing commissioner was also concerned because . . . he asked the supervisor whether the [new loom] was bigger than the one she used to work on and he said it was, he admitted it was by probably an inch or two. So, that crucial two inches is very important and it is going down to whether she had to stretch further. And I think it is not appropriate and it is not fair and . . . [it] is not supported by substantial evidence. They didn't even conduct any kind of investigation, it is not legal, it is not proper for them to take Dr. Bryant's notes and put [them] in a personnel file without going out on the floor. [Magaha's supervisor] couldn't remember anything and that was one of the biggest problems in the case. . . . And if a proper investigation had been done, looking at the whole record then they would of (sic) found the case was compensable.

The discussion portion of the circuit court's order states:

> In this case, Dr. Bryant provided all the information that the Employer needed to properly investigate [Magaha's] injury. He told [the Mill] that a job change had caused the impingement syndrome, that Claimant was experiencing pain and discomfort in her right upper extremity which was her predominant arm for work, and that he was requesting that the Employer cover the expense of medical treatment.

> This information should have launched an investigation by the Employer into the specifics of Claimant's medical problems and whether or not a work related injury had occurred. Unfortunately for Claimant, the record does not contain any evidence that the Employer made any reasonable effort to determine the cause of the injury or to question the Claimant or plant personnel when their memories were still fresh. Under these circumstances, the Employer would be unable to properly determine whether or not Claimant's medical problems were work-related.
>
> As a further result, the Claimant was not afforded the opportunity to be provided medical care and treatment by the Employer. If this injury is later conclusively deemed work related on remand, the Employer has lost the chance to supervise and to direct her medical care and treatment. (Emphasis added.)

The order concludes:

> The only evidence in the record is that Claimant has met the statutory notice requirements of Section 42-15-20 as a matter of law. The decision of the Commission is hereby reversed and the matter is remanded to the Commission for further findings of fact consistent with this order.

The Mill appeals.

STANDARD OF REVIEW

"The Full Commission is the ultimate fact finder in Workers' Compensation cases." Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). "The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial

evidence." Id. However, "[s]ubstantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). A court may reverse or modify a decision of the commission if substantial rights of a party have been prejudiced because the findings, inferences, conclusions, or decisions are affected by other error of law. Etheredge, 349 S.C. at 456, 562 S.E.2d at 682.

LAW/ANALYSIS

APPEALABILITY

Our initial consideration in this case centers on whether the circuit court's order is immediately appealable. The Mill argues the circuit court reversed the commission's finding on the issue of timely notice but failed to rule on the issue of compensability of the injury and therefore the order is final and immediately appealable. Magaha argues the circuit court's order remands the action for further proceedings and therefore the issue is not immediately appealable pursuant to Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994).

The South Carolina appellate courts "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." Montjoy, 316 S.C. at 52, 446 S.E.2d at 618. However, our appellate courts also recognize that remand orders from the circuit court to an administrative agency may be immediately appealable where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision. Foggie v. General Elec. Co., 376 S.C. 384, 389, 656 S.E.2d 395, 397 (Ct. App. 2008). In Brown v. Greenwood Mills, Inc., this court found the circuit court's order finally determined an issue on the merits and the remand merely directed the commission to make the necessary findings to effectuate the circuit court's order. 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005). Viewing the order based on the Mills' interpretation, solely for the issue of appealability, we find the order immediately appealable.

NOTICE

The Mill first argues the circuit court erred in reversing the commission's finding that Magaha gave timely notice of the accident. We disagree.

Section 42-15-20 of the Workers' Compensation Act requires that every injured employee give the employer notice of a job-related accident within ninety days after its occurrence. S.C. Code Ann. § 42-15-20 (Supp. 2007). "Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." Bass v. Isochem, 365 S.C. 454, 472-73, 617 S.E.2d 369, 379 (Ct. App. 2005). The notice requirement is to be construed liberally in favor of claimants. Etheredge, 349 S.C. at 458, 562 S.E.2d at 683.

The Mill conceded it received Dr. Bryant's letter, in which he informs the Mill of Magaha's injury and its relationship to her work. In Etheredge, this court found a letter from the employee's family physician provided notice to employer. Id. at 458, 562 S.E.2d at 683. In light of the law requiring the liberal construction of the notice provision of the Workers' Compensation Act, we conclude Dr. Bryant's letter provided notice to the Mill.

COMPENSABILITY OF INJURY

The Mill next argues the circuit court's remand does not affect the commission's ruling on the compensability of Magaha's injury, and thus the issue of compensability is "law of the case." We disagree.

"Law of the case" is a doctrine dissuading courts from revisiting settled issues. John R. Knight, The Law of the Case Doctrine: What Does it Really Mean?, 43-Oct. Fed.R.Law. 8 (1996). Where a litigant fails to appeal a ruling on a particular issue, that ruling becomes law of the case. See Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473,

475, 427 S.E.2d 646, 648 (1993) (finding an unappealed ruling is law of the case).

After a thorough review of Magaha's notice of appeal to the circuit court, the transcript of the hearing, and the circuit court's order, we find the doctrine of "law of the case" does not apply. First, Magaha raised the issue of compensability in her notice of appeal to the circuit court. Furthermore, reading the circuit court's order as a whole, we find the emphasized language in the order indicates the circuit court expects the commission to revisit the issue of whether Magaha suffered an injury by accident arising out of and in the course and scope of her employment. We recognize the circuit court did not specifically rule on the issue in the conclusion portion of the order. However, given the circuit court's clear reversal on the issue of notice, there was no need for the court to remand with instructions for "further findings of fact consistent with this order" unless the court expected further proceedings on the issue of injury by accident.

CONCLUSION

The circuit court's order reversing the commission's finding on notice and remanding the action to the commission for further proceedings on the issue of whether Magaha suffered an injury by accident arising out of and in the course and scope of her employment is

AFFIRMED.

ANDERSON, SHORT, and THOMAS, JJ., concur.

Exhibit D

The Supreme Court of South Carolina

Bessie M. Magaha, Respondent,

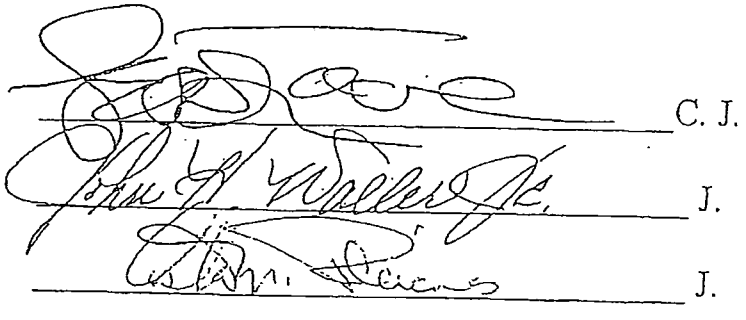
v.

Greenwood Mills, Inc. Petitioner.

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SC Court of Appeals

ORDER

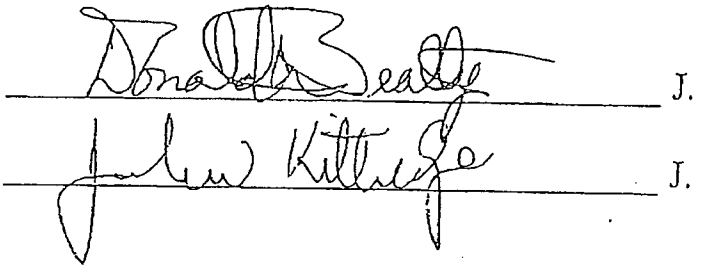
This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals' decision in Magaha v. Greenwood Mills, Inc., Op. No. 2008-UP-244 (S.C. Ct. App. filed April 24, 2008). The petition for a writ of certiorari is denied because the order on appeal is not immediately appealable. Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) (an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable). We therefore vacate the Court of Appeals' opinion.



C. J.

J.

J.



J.

J.

Columbia, South Carolina

February 19, 2009

CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

TERRI MORRILL LYNCH
tlynch@clawsonandstaubes.com

April 29, 2010

Reply to Charleston Office
File No.: 2006-0942 tml

Justice John C. Few
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Dharmendra Chaudhari, spouse of Anita Chaudhari, Deceased Claimant/Appellant, v. Avni Grocers, Employer/Defendant and The South Carolina Uninsured Employers' Fund, Carrier/Defendant/Respondent
Case No.: 2007-CP-10-0014

Re: Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee v. Avni Grocers and S.C. Uninsured Employers' Fund
Case No.: 2007-CP-10-0013

Dear Justice Few:

I have reviewed the reply brief of the Respondent concerning interlocutory orders in the above-captioned matters. Please note that the failure to cite the Supreme Court rulings in the cases of Deskins v. Boltin and Woodward v. Westvaco Corp. was inadvertent, and not an attempt to confuse or mislead the court.

We still believe that there are valid grounds for the Court of Appeals to hear the appeal in the above-captioned matter, particularly as a remand, on the basis of an interlocutory order, would require considerable expense and remand, first to the circuit court and then, most probably to the Full Commission, and then back up the ladder through all of the levels to the courts again. We also believe that, as the decision involves jurisdiction, it effects the merits of the case and a substantial right.

I appreciate the court's consideration in this matter. By copy of this letter to Mr. Nichols, I am providing him with this response.

With kindest regards, I remain

Very truly yours,

CLAWSON & STAUBES, LLC

Terri Morrill Lynch

TML/pav
cc: Jarrel L. Wigger, Esquire
John S. Nichols, Esquire
Latonya Edwards, Esquire
Virginia L. Crocker

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0221896

COUNTY OF RICHLAND STATE OF SOUTH CAROLINA Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee, Claimant, v. Fast Point Gas Station, Employer, SC Uninsured Employer's Fund, Carrier.	**NOTICE OF APA SUBMISSIONS AND WITNESSES ON BEHALF OF AVNI GROCERS/SC UNINSURED EMPLOYER'S FUND**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND JARREL L. WIGGER, ATTORNEY FOR CLAIMANT:

YOU ARE HEREBY NOTIFIED, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330, (1985), Employer, Avni Grocers, and Carrier, SC Uninsured Employer's Fund, hereby submit the following medical records or other evidence on behalf of the Employer, Fast Point Gas Station, and Carrier, SC Uninsured Employer's Fund:

PROVIDER	REPORT DATE	PAGE NOS.
1. Transcript of Record - Hearing held January 4, 2006		1-15
2. Transcript of Deposition of Dharmendra Chaudhari, p.8	4/14/03	16 - 17
3. Memo from Coverage & Compliance	7/15/03	18
4. Letter from Coverage & Compliance	7/17/03	Claimant's APA #9

YOU ARE FURTHER HEREBY NOTIFIED you have the right to cross-examination.

Should you desire to exercise that right, you are to schedule the deposition(s) of any of the physicians or other person(s) whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the documents referred to herein will be submitted at the Hearing before the South Carolina Workers' Compensation Commission.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called on behalf of the Employer/Carrier:

1. N/A.

CLAWSON & STAUBES, LLC

Terri Morrill Lynch

Terri Morrill Lynch
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026
Attorneys for Employer, Fast Point Gas Station, and Carrier, SC Uninsured Employer's Fund.

Charleston, South Carolina

December 6, 2010.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Form 58, Pre-Hearing Brief, and Notice of APA submissions has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this December 6, 2010

Jarrel L. Wigger, Esquire
Wigger Law Firm, Inc.
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Memo

July 15, 2003

To: Data
Fm: Gary Smith, Coverage & Compliance

RE: Dharmendra Chaudhari v. Avni Grocers
WCC File No. X030334
Date of accident: 11/14/02

Data, please process and forward to the File Room.

Investigator's note: The opinion of Coverage and Compliance is that the employer, Avni International of S.C. Inc., was subject to the SC Workers' Compensation Act by *regularly* having four or more employees. We set the case for a show-cause hearing but were unable to get the employer served by process server. The cost of service by publication precludes our being able to get the employer served by this means. We are creating an IC file that we are forwarding to the File Room. 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 of the claim can be heard. That should not be difficult because there is sufficient evidence in the file to prove that.

COVERAGE FOR D/A Yes ☒ No ☐
CARRIER CODE # 00001
FEIN 383654757

cc: Uninsured Employers' Fund

State of South Carolina

1612 Marion Street
P.O. Box 1715
Columbia, S.C. 29202-1715

TEL: (803) 737-5700
FAX: (803) 737-5768

Workers' Compensation Commission

July 17, 2003

Jarrel L. Wigger, Esquire
Davidson Bennett & Wigger
8086 Rivers Avenue
North Charleston, SC 29406

Re: Dharmendra Chaudhari v. Avni Grocers
WCC File # To be assigned (claim file)

Rajkumari Puniyani v. Avni Grocers
WCC File # To be assigned (claim file)

Dharmendra Chaudhari v. Avni Grocers
WCC File # X-030334 (investigation file)

Rajkumari Puniyani v. Avni Grocers
WCC File # X-030335 (investigation file)

Date of Accidents: November 14, 2002

4428
MSW

Dear Mr. Wigger:

As we discussed, investigation by the Division of Coverage and Compliance has led to the opinion that Avni International of SC, Inc. is subject to the South Carolina Workers' Compensation Act and is uninsured. We have attempted to serve the employer by both certified mail and process server, but we have been unsuccessful. The apparent new owner of the business, Aki Nabulsi, has alleged that Avni International of SC, Inc. is no longer in existence and the whereabouts of the previous owner are unknown.

However, the corporation is still listed in good standing at the Secretary of State's Office. According to that Office, the address for legal service for the registered agent is as follows: Avni International of SC, Inc., Registered agent: Harendra Pall, 1900 McMillian Drive, Charleston, SC 29405.

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We have created two (2) claim files to replace the two (2) investigation files. Once WCC file numbers have been assigned, please use them on all correspondence regarding these claims. Since the Forms 52 have not been served on the employer, we have **not** sent the files to the Judicial Department to set for a hearing. Instead, they will be sent to the File Room to await legal service. This may well have to be accomplished by publication.

Cost precludes the Coverage and Compliance Division from serving by publication; therefore, we are unable to present our case at a Show Cause Hearing. At 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. We are of the opinion there is sufficient information to prove this; however, you must first get service on the registered agent of the corporation.

Furthermore, you will need to serve the Uninsured Employers' Fund. Although they take the position they are not a party until ruled so by the Commission, since the issues of coverage and compensability will be addressed at the same hearing, they are a necessary party.

If you have any questions, please do not hesitate to contact me.

With kindest regards,

Gary L. Smith, Director
Division of Coverage and Compliance
(803) 737-5704

GLS/mb
Enclosure

c: SC Uninsured Employers' Fund
Enclosure

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Rajkumari Puniyani in re Virendra Puniyani, Deceased Employee, Claimant, v. Avni Grocers, Employer, SC Uninsured Employer's Fund, Carrier.	W.C.C. FILE NO. 0221897 **NOTICE OF APA EXHIBITS AND WITNESSES ON BEHALF OF AVNI GROCERS/SC UNINSURED EMPLOYER'S FUND**

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND JARREL L. WIGGER, ATTORNEY FOR CLAIMANT:

YOU ARE HEREBY NOTIFIED, pursuant to the provisions of the South Carolina Workers' Compensation Act and South Carolina Code Section 1-23-330, (1985), Employer, Avni Grocers, and Carrier, SC Uninsured Employer's Fund, hereby submit the following medical records and other evidence:

Exh.#	PROVIDER	DATE	PAGE NOS.
9.	Letter from Coverage & Compliance	7/17/03	42-43
12.	Transcript of Record	1/4/06	60-74
13.	Transcript of Deposition of Dharmendra Chaudhari, p.8	4/14/03	75-76
14.	Memo from Coverage & Compliance	7/15/03	77

YOU ARE FURTHER HEREBY NOTIFIED you have the right to cross-examination. Should you desire to exercise that right, you are to schedule the deposition(s) of any of the physicians or other person(s) whose reports are submitted, for the purposes of cross-examination.

YOU ARE FURTHER NOTIFIED that the documents referred to herein will be submitted at the Hearing before the South Carolina Workers' Compensation Commission.

YOU ARE FURTHER NOTIFIED that the following witnesses may be called:

1. South Carolina Uninsured Employer's Fund objects to affidavit of Harendra Pal and/or his testimony as not properly before the Commission;

2. Dharmendra Chaudhari and/or his deposition and transcript of prior hearing; and

3. Rajkumari Puniyani.

CLAWSON AND STAUBES, LLC

Terri J. Morrill

Terri J. Morrill, Esquire
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026
Attorneys for Employer, Avni Grocers/Fast Point Amoco, and Carrier, SC Uninsured Employer's Fund.

Charleston, South Carolina
October 31, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Form 58, Pre-Hearing Brief, and Notice of APA submissions, has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 31st day of October, 2011.

Jarrel L. Wigger, Esquire
Wigger Law Firm
8086 Rivers Avenue, Suite A
North Charleston, SC 29406

Avni Grocers/Fast Point Amoco
1900 McMillian Avenue
North Charleston, SC 29405

AND ALSO CERTIFIED MAIL TO:

Avni Grocers/Fast Point Amoco
1900 McMillan Avenue
N. Charleston, SC 29405

BNT

BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

Margaret Miles Bluestein
John Shannon Nichols
Stacy Elizabeth Thompson
John Dennis Delgado
Allison Paige Sullivan
Ashley Trout Thompson
Blake Alexander Hewitt

OF COUNSEL
O. Eugene Powell, Jr.
Rebecca Cagle Patrick

June 15, 2012

VIA HAND DELIVERY
Virginia L. Crocker, Judicial Director
SC Workers' Compensation Commission
1333 Main Street Suite 500
Columbia, South Carolina 29202

RE: Dharmendra Chaudhari, Spouse of Anita Chaudhari vs. AVNI Grocers, and The South Carolina Uninsured Employers' Fund
W.C.C. File No.: 00221896

Virendra Puniyani, Deceased Employee, and Rajkumari Puniyani vs. AVNI Grocers, and The South Carolina Uninsured Employers' Fund
W.C.C. File No.: 00221897

Dear Virginia:

Please find enclosed for filing the original and seven (7) copies of the *Brief of Respondent to Appellate Panel* for the referenced cases, as well as a certificate of service upon counsel for the Appellants. Please return the additional filed copies to me via our courier.

Thank you in advance for you assistance in this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

John S. Nichols

JSN:emb
Enclosures
cc: Jarrel L. Wigger, Esquire
Terri Morrill Lynch, Esquire
Latonya Edwards, Esquire

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0221897

Virendra Puniyani, Deceased Employee and Rajkumari Puniyani, Employee/Claimant/Respondent, v. Avni Grocers/Fast Point Amoco, Employer and WC Uninsured Employers Fund, Defendant/Appellant.	**BRIEF OF RESPONDENT TO APPELLATE PANEL**

STATEMENT OF THE CASE

This is a tragic case that has a very long history with the Commission. It has been proceeding for nearly a decade. The issues, however, are fairly straightforward.

The Claimant/Respondent, Rajkumari Puniyani, is the widow of the deceased Employee, Virendra Puniyani. Mr. Puniyani and his sister-in-law, Anita Chaudhari, were murdered on November 14, 2002, by a co-worker while 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 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 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 Huffstetler instructed the Claimants to agree to continue the matter. Because Claimants had been waiting for a year for a hearing, one Claimant had traveled from Atlanta, Georgia, and the Claimants had produced proof that the Fund had been properly served, Claimants indicated a desire to proceed. 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), 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 Employer, Avni Grocers, failed to appear at the hearing. During the prehearing 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 Groceries 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 where the decedents worked.

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

Claimants timely filed an appeal to the Appellate Panel. While the appeal was pending Claimants located Harendra Pal, the owner of Avni Grocers, who had moved to North Carolina immediately after the murders. Claimants obtained an affidavit from Mr. Pal that established the statutory requirements were met and the Employer was subject to the Act. Claimants filed a Motion to Add Additional Evidence to the record and proffered the affidavit. The Appellate Panel, however, refused to accept the additional evidence.

Claimants appealed from both the Appellate Panel's affirmance of Commissioner Huffstetler's order as well as the Commission's denial of the motion to accept the additional evidence to the Circuit Court. The two cases for the deceased Avni Grocers employees continued to be consolidated for purposes of judicial review.

Following briefing and oral arguments, the Circuit Court held the Commission erred as a matter of law in refusing to accept Mr. Pal's affidavit as additional evidence. The Circuit Court 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] The Circuit Court declined to address any additional issues, and remanded the matter to the Commission for further

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[2] Because the issue involves a jurisdictional question the Circuit Court'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, the Court 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.*

proceedings consistent with the Circuit Court's rulings.

The Fund timely appealed the Circuit Court'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. 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 asserted that the Circuit Court's order was not immediately appealable because it contained a remand to the Commission. On June 29, 2010, the Court of Appeals issued its consolidated opinion dismissing the 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 issued the remittiturs in these cases on July 7, 2010, and the cases were returned to the Commission.

The cases were consolidated 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). Defendants objected to consideration of Mr. Pal's affidavit or his live testimony. (Tr. p. 12, ll. 16-20). Commissioner Wilkerson denied the Defendants' objections and admitted both Mr. Pal's affidavit pursuant to the Circuit Court's order as well as Mr. Pal's live testimony.

On February 6, 2012, the Hearing Commissioner 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. The Commissioner ordered compensation accordingly.

On February 29, 2012, the Fund filed a Form 30 seeking Appellate Panel review. The

issues involve (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.

STATEMENT OF THE FACTS

As noted above, this case involves a terrible crime – one worker murdering two of her co-workers on the job. The Employer did not have coverage, and the factual issue is whether he employed four (4) or more employees so as to be subject to the Act such that the Fund has to assume responsibility.

Mr. Dharmendra Chaudhari's testimony at the prior hearing was admitted into evidence without objection. Mr. Chaudhari (the Claimant Anita Chaudhari's widower) testified that there were two (2) locations of the Defendant's store, one in Vance, South Carolina, and one in Charleston. Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. 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. Mr. Chaudhari also indicated that one of the stores sold a different type of gas - Citgo.

Mr. Pal testified before Commissioner Wilkerson that he owned Avni Grocers. (Tr. p. 17, ll. 8-10). Avni was a corporation that owned two gas stations/convenience stores at two (2) different locations. (Tr. p. 17, ll. 12-16). Both locations were under "the same corporate umbrella." (Tr. p. 17, ll. 17-19). One store was in Vance, South Carolina and the other store was in North Charleston. (Tr. p. 25, l. 20 - p. 26, l. 17). One store sold Amoco gasoline while the

other store sold Citgo. (Tr. p. 26, l. 18 - p. 27, l. 4).

At various times Avni employed five (5) to seven (7) employees. (Tr. p. 17, ll. 20-23). Mr. Pal identified them as Anita Chaudhari, Virendra Puniyani, "the girl who was involved (Krista McDaniel, who murdered the others)...and there were the other two (2) employees and plus Mr. Dharmendra [Chaudhari]." (Tr. p. 18, ll. 3-6, 12-14; p. 27, ll. 6-8). He stated there were six (6) Avni Grocers employees at the time of the murders. (Tr. p. 18, ll. 8-9). Both claimants were killed on the job. (Tr. p. 18, ll. 21-23).

On cross-examination, Mr. Pal stated he was "the main person" and the owner of Avni Grocers. (Tr. p. 19, ll. 11-24). There were no other corporate officers. (Tr. p. 19, l. 25 - p. 20, l. 1). Mr. Pal controlled everything for Avni – he wrote checks, received payments, and Mr. Chaudhari managed one of the stations. (Tr. p. 20, l. 10 - p. 21, l. 8). Mr. Pal would pay the bills for Avni and "everything that was left over" was his personal income. (Tr. p. 23, ll. 10-15). The company began in August 2002 and the murders occurred in November 2002. (Tr. p. 23, ll. 17-19). Mr. Pal closed the business immediately thereafter. (Tr. p. 23, l. 20).

Mr. Pal testified that Mr. Dharmendra Chaudhari mainly took care of the Vance store and that Mr. Pal "would normally used to go to Vance." (Tr. p. 27, ll. 13-15). Mr. Chaudhari stated that he, Mrs. Chaudhari, Mr. Puniyani, and Krista McDaniel, worked at the North Charleston location with "two (2) other more - - two (2) girls, working on a part-time basis; I think they used to come and fill the cooler and sometimes come - - used to come and sweep in the job...." (Tr. p. 27, ll. 16-23; p. 29, ll. 16-21). Mr. Pal did not recall the names of the other two employees because "most of the thing was run by [the deceased Claimant] Virendra [Puniyani]; he was - - he was hiring and he was doing everything. He was like a manager." (Tr. p. 27, l. 25 - p. 28, l. 4).

Mr. Chaudhari worked nearly every evening at North Charleston after he left the Vance location. (Tr. p. 28, ll. 6-11). Anita Chaudhari and Virendra Puniyani worked six (6) days a week. (Tr. p. 28, ll. 12-15; p. 30, ll. 10-14). McDaniel was part-time and worked between 20-22 hours. (Tr. p. 28, ll. 17-19).

The Hearing Commissioner informed Mr. Pal that he had the right to have counsel present, but Mr. Pal declined. (Tr. p. 21, l. 24 - p. 22, l. 17).

Mr. Pal stated he moved to Pineville, North Carolina in 2003. (Tr. p. 32, ll. 23-24; p. 34, ll. 16-18). At the time of the 2006 hearing Mr. Pal was out of the country. (Tr. p. 35, ll. 2-7, 18-21). The testimony was as follows:

Q: You did not appear at the hearing back in January of 2006, did you?

A: January of 2006, maybe I was not in the country that year.

Q: Okay.

A: I think I was out of the country.

Q: But shortly thereafter you returned?

A: Yeah.

Q: And you've been in the United States since then?

A: Yeah.

* * *

Q: So, you were available before January, 2006?

A: Yeah. I -- I -- I was out of the country from December 2005 to January 2006 --

Q: Okay.

A: -- and there was one and a half (1 1/2) month I was out.

Q: But other than that you've been around. You've been around from 2002 when this happened until 2006?

A: Yeah.

(Tr. p. 35). He returned to South Carolina in 2006 to provide the affidavit following the first hearing. (Tr. p. 33, ll. 9-19).

Commissioner Wilkerson concluded the evidence established Avni Grocers employed four (4) or more employees and was therefore subject to the Act. (Order p. 5, ¶ 2). The Commissioner added that "the Employer was out of the country and unavailable to testify at the time of the first hearing on the merits." (Order, p. 6, mandate ¶ 5).

This appeal follows.

ARGUMENTS

I. THE APPELLATE PANEL IS BOUND BY THE CIRCUIT COURT'S RULING THAT THE COMMISSION ERRED IN REFUSING TO ADMIT MR. PAL'S AFFIDAVIT

The Fund argues the Hearing Commissioner should not have considered Mr. Pal's affidavit under Regulation 67-707 of the South Carolina Code of Regulations. The Fund's argument is based upon the Fund's contention that the Circuit Court's reversal of the prior order was allegedly controlled by an error of law. The Fund is raising this issue ostensibly to preserve it for appellate review because the prior appeal was dismissed since the Circuit Court's order of remand was not immediately appealable.

The Commission is bound, however, to follow the mandate in the Circuit Court's order that the Commission consider the affidavit. *See Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission.") (citations omitted). Accordingly, the Appellate Panel must affirm Commissioner Wilkerson's acceptance of the Pal affidavit into evidence.

II. THE HEARING COMMISSIONER'S DECISION TO PERMIT MR. PAL TO TESTIFY LIVE AND SUBJECT TO CROSS-EXAMINATION RENDERS THE FUND'S ARGUMENT ABOUT MR. PAL'S AFFIDAVIT MOOT

The Fund notes that Mr. Pal testified and asserts his "testimony was allowed by the Circuit Court Order." (Brief p. 8). In fact, the Circuit Court order said nothing about Mr. Pal testifying but found that, under the unique posture of the case, Claimant established "good

grounds" for the Commission to accept Mr. Pal's affidavit under S.C. Code Ann. § 42-17-50. (Order of 9/13/07, pp. 6-7).

Again, this Commission is bound by the Circuit Court's mandate. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990). The circumstances that persuaded the Circuit Court 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, and that decision was made part of the record. The Fund did *not* file a Form 51 or a Form 53, and thereby failed to raise any challenge to Claimant's assertion that jurisdiction was proper (that is, that Avni had four (4) or more employees based on the Coverage and Compliance Division's determination). 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 is crucial to the Circuit Court's decision and should not be overlooked: The first hearing was the first time the Fund notified Claimant that it was challenging the number of employees at Avni Grocers. Although Claimant believed the testimony presented from Mr. Chaudhari established the business had four (4) or more employees, Commissioner Huffstetler found against coverage, prompting Claimant to locate Mr. Pal and obtain the affidavit. The Circuit Court recognized the sandbagging that occurred and the ambush at the hearing, and ruled this sufficiently established "good grounds" requiring the Commission to "receive further evidence" under Section 14-17-50.

Following the remand from the Court of Appeals, Mr. Pal, who was living in North Carolina, 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 adequately raises any issue in Commissioner Wilkerson permitting Mr. Pal to testify live. *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 assert error in the Hearing Commissioner receiving this evidence. Mr. Pal's testimony plainly establishes that Avni Grocers employed four (4) or more employees. *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 is therefore not properly before the Appellate Panel.

On the merits, the upshot of the Fund's complaint in its Brief is this: Although the Fund does not say this is what it is doing, in order to preserve its challenge to the Circuit Court's construction of Section 42-17-50 against Regulation 67-707, the Fund must raise and argue the issue again before the Commission. The Commission is, of course, bound by the Circuit Court's decision and must affirm the Hearing Commissioner's ruling in light of Mr. Pal's affidavit as well as his live testimony. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990). 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 (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.

Furthermore, any complaint about allowing Mr. Pal's affidavit is now moot. As noted above, 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). Here, Mr. Pal's unchallenged live testimony renders moot any challenge to his affidavit. Mr. Pal's testimony contains the same facts as are in the affidavit and augments that information with further explanation of whom he employed at Avni Grocers. Even so, as the Circuit Court held, 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.

At bottom, the Fund is essentially attempting to take advantage of technical rules to prevail even though the *only* evidence in the record is that this employer, Avni Grocers, employed more than four (4) people. The public policy of this State favors disposition of issues on their merits rather than on technicalities. *Mictronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). Here, the Fund seeks to prevail where its own behavior (failing to file 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. This is offensive at every level, and this Commission should not reverse the Hearing Commissioner's order which is grounded in the actual facts in evidence.

This case is an "old law" case, meaning that because the injury occurred prior to July 1, 2007, the appeal was to the Circuit Court. In reviewing the Commission's decision, the Circuit Court sat as an appellant court, and its mandate on remand is binding upon the Commission. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990). The Circuit Court ruled that the Commission improperly refused to permit Mr. Pal's affidavit under Section 42-17-50 and that ruling was binding upon Commissioner Wilkerson. It is also binding upon this Appellate Panel.

Accordingly, the Appellate Panel should affirm the Hearing Commissioner's ruling that the evidence establishes the Employer employed four (4) or more employees and was therefore subject to the Act.

III. SECTION 42-17-50 IS NOT PERMISSIVE BUT MANDATES THAT THE COMMISSION PERMIT ADDITIONAL EVIDENCE UPON A SHOWING OF "GOOD GROUNDS"

The Fund describes 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." (Fund Brief, p. 12). This argument mischaracterizes (a) the language of Section 42-17-50 and (b) the Circuit Court's holding.

Once again, as discussed above, the Circuit Court's ruling that the Commission should have permitted the Pal affidavit was binding upon Commissioner Wilkerson and is binding upon this panel. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990). Further, Mr. Pal's unchallenged testimony renders any argument about permitting the Pal affidavit moot.

Ex parte Doe, 393 S.C. 147, 711 S.E.2d 892 (2011) (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).

This Appellate Panel should affirm the Commissioner Wilkerson's decision that the Employer in this case employed four (4) or more employees and was subject to the Act.

IV. THE HEARING COMMISSIONER'S FINDING THAT EMPLOYER HAD FOUR (4) OR MORE EMPLOYEES IS SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE

As the Circuit Court found, even if the Pal affidavit is not considered, the preponderance of the evidence demonstrated that Avni Grocer's had four (4) or more employees at the time of the murders and was therefore subject to the Act. The Panel 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 (4) employees in this State. *Hill v. Eagle Motor Lines*, 373 S.C. 422, 645 S.E.2d 424 (2002).

As the Circuit Court 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. At the outset of the hearing, the Hearing Commissioner ruled, without objection, that the Commission's file became part of the record with the exception of self-serving declarations and unstipulated medical reports. 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. 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....*") (emphasis added).

The evidence before the Commission demonstrated the Employer failed to respond to any inquiries, was out of the country during the time of the hearing, and upon his return to the U.S. had moved 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 both he and his

deceased wife worked for Avni Grocers seven (7) days a week. (Chaudhari Dep. p. 6, ll. 12-16). Mr. Chaudhari also testified at the first hearing that there were two locations of the Defendant's store, one in Vance, South Carolina, and one in Charleston – Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. 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, 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.

As the Circuit Court held, Mr. Chaudhari plainly testified that Avni Grocers regularly employed "altogether six" people. Mr. Pal's testimony corroborates these facts. Neither the hearing commissioner nor the Appellate Panel found Mr. Chaudhari's testimony not credible. *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 one of the stores sold Amoco gas that it was 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." 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. 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. pp. 15-16). Of course, Mr. Pal's affidavit, which the Appellate Panel improperly excluded, settled the issue since he stated he owned both locations and employed more than four (4) people to work those locations. His testimony corroborates his affidavit. 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. 17). 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: 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. 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. He worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. 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. 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, and that Mr. Chaudhari himself 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 readily distinguishable from the facts of this case.

The Hearing Commissioner correctly ruled that the evidence establishes Avni Grocers had four (4) or more employees at the time Claimants were murdered. The Appellate Panel is bound to follow the mandate of the Circuit Court and must consider the Pal affidavit along with the testimony presented in both the 2006 hearing and the 2012 hearing in reviewing this decision. The Panel should affirm.

CONCLUSION

For the reasons stated this Panel should affirm the Hearing Commissioner's order.

Respectfully submitted,

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June 15, 2012

STATE OF SOUTH CAROLINA

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0221897

Dharmendra Chaudhari, spouse of Anita Chaudhari, Deceased, Employee/Claimant/Respondent, v. Avni Grocers/Fast Point Amoco, Employer and WC Uninsured Employers Fund, Defendant/Appellant.	)	**CERTIFICATE OF SERVICE**

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

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Clawson & Staubes, LLC
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Charleston, South Carolina 29492

Latonya Edwards, Esquire
South Carolina Uninsured Employer's Fund
100 Executive Center Drive, Suite 101
Santee Building
Columbia, South Carolina 29210

June 15, 2012

Kathleen Suggs
Paralegal

SWORN and subscribed to before me
this 15 day of June, 2012

(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires 1/04/2022

STATE OF SOUTH CAROLINA
BEFORE THE WORKERS' COMPENSATION COMMISSION

RAJKUMARI PUNLYANI, mother of VIRENDRA PUNIYANI , deceased, Appellant,	WCC FILE #0221897
v.	AFFIDAVIT OF HARENDRA PAL
AVNI GROCERS UNINSURED EMPLOYERS' FUND, Respondent,	

I, HARENDRA 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 coworkers while working in my store located at 1900 McMillan Avenue, N. Charleston, SC 29405.

SWORN TO THIS 14th DAY OF APRIL, 2006.

HARENDRA PAL, PRESIDENT/OWNER
AVNI GROCERS/AVNI INTERNATIONAL
OF SOUTH CAROLINA

SWORN TO BEFORE ME THIS
THIS 14 DAY OF April, 2006

Lynn D. Clark
NOTARY PUBLIC FOR NORTH CAROLINA
MY COMMISSION EXPIRES: 4-15-2006

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

DHARMENDRA CHAUNDHARI, Employee/Claimant, -vs- AVNI GROCERS/FAST POINT AMOCO, Employer, and THE SOUTH CAROLINA UNINSURED EMPLOYER'S FUND, Carrier.	W.C.C. File No. X03C335 DEPOSITION OF: DHARMENDRA CHAUNDHARI

Given before G. Michael Alexander, Notary Public and Registered Professional Reporter, in the law offices of Davidson, Bennett & Wigger, 8086 Rivers Avenue, Charleston, South Carolina, on Monday, April 14, 2003, commencing at 2:20 o'clock, p.m.

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It was stipulated that the deponent was explained his right to read and sign the deposition and did waive that right.

(DHARMENDRA CHAUNDHARI, having been duly sworn, testified as follows:)

DIRECT EXAMINATION BY MR. DUNBAR:

Q Dharmendra, I'm going to go through and ask you some questions today about the death of your wife and your brother. If I ask you something you don't understand, let me know that so I can repeat it or rephrase it for you. Okay?

A Okay.

Q The court reporter is trying to type down everything that we say, so you need to give verbal responses instead of just shaking your head. Okay?

A Okay.

MR. WIGGER: First I want to do some things to set up identification in this situation. I want to attach this letter, first, which is our notice to the uninsured commission, dated January 15th from me to them. Mark these now.

(GROUP OF DOCUMENTS MARKED PLAINTIFF'S EXHIBITS 1 THROUGH 7 FOR I.D.)

MR. WIGGER: Exhibit No. 1 just reflects

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that in January we asked the Uninsured Employer's Fund to respond with an attorney to contact regarding this case.

Exhibit No. 2 is a document with the workers' compensation commission, indicating that the claim had been filed, and that they were on notice that there was a claim.

Exhibit No. 3 is the cover letter and the deposition notice for today's deposition, which is dated March 31st.

Exhibit No. 4 is the certified mail return receipt that shows that they received notice of the deposition.

Q Dharmendra, can you state your name for the record, please.

A Dharmendra, D-h-a-r-m-e-n-d-r-a.

Q Your last name?

A Chaudhari, C-h-a-u-d-h-a-r-i.

Q Tell me how old you are.

A I'm 38 years.

Q When did you first come to the United States?

A The first time we came here in 2001, we stayed here for 26 days, then we went back. The second time we came in January 2002.

Q When you came here in January of 2002, was it

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your intention to live here in the United States?

A Not at that time. After three months we decided.

Q After three months you decided to live here?

A Yes. Because my brother applied for permanent visa.

Q When did he apply for a permanent visa?

A In April 2002.

Q Did he also help you apply for your wife?

A No. We apply for my wife visa for different company.

Q When did you apply for a visa for Anita?

A August 2002.

Q When you applied for your visas was it your intention to live here in the United States permanently?

A Yeah.

Q How long had you and Anita been married?

A We married in May 1992.

Q Did you have any children?

A Two. Both are daughters; one is nine years old, the other one is four years old.

Q When you came to this country to live, can you tell me whether you had a job here to work at or not?

A Actually, we wanted to start our own business, so we get the L-1 visa, and we look for a job.

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Q Did you find a job with Auni Grocers?

A Yes, sir.

Q Is that also known as Fast Point Amoco?

A Yes. Name of the company is Omni International South Carolina Limited. I explain the name because the previous owners ....

Q How many people actually worked for Auni Grocers?

A Five.

Q And tell me what kind of business that was.

A Grocery store and gas station.

Q How many days a week were you working there?

A All seven days.

Q How many days a week was your wife working there?

A Same, all seven days.

Q What was the weekly pay amount that you, I don't need to know yours, what was the weekly pay amount that your wife received for her week there?

A She was getting it monthly, $2,600.

Q $2,600 monthly?

A Yes, sir.

Q When did she first start there?

A She started on August 9th.

Q Of what year?

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A 2002.

Q What was her job?

A She was mainly as a cashier on counter.

Q How many hours a day would she normally work?

A She was starting in the morning 9 o'clock up to 9:30 in the evening.

Q Did you also have another relative that worked at the store with you?

A Yeah.

Q What was his name?

A Virendra, my brother.

Q How do you spell his name?

A V-i-r-e-n-d-r-a.

Q How old was Virendra?

A Thirty-five years.

Q Was it also the same situation with Virendra, that he was going to live here permanently?

A Yes.

Q Do you know if he had applied for his permanent visa?

A Yes, he had applied for L-1 visa.

Q Did Virendra help provide support for your mother?

A Yeah. It was a joint family.

Q Was he sending her part of his pay on a regular

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basis?

A Yeah.

Q How much was he making working there for the grocery store?

A $2,800 a month.

Q How often did he work?

A He started on July 25th, the first day of the week.

Q During a typical week what were his work days?

A Starting at 7:00 in the morning up until 9:30.

Q How many days a week would he work?

A Seven days.

Q Can you tell us what happened on November 14th of 2002.

A Yeah. The gas station, almost 12 o'clock in the night, because they're supposed to come at 10:00. We waited, and the phone line was disconnected, we waited until 11:15. At last I told my mother "Let me go and check." They wanted to go buy some groceries for home. So after a quarter after -- until 12:00, "Now it is too late, I have to go." So I reach approximately 12 o'clock at the gas station when I saw many policemen there. And I ask one of the police officer, he told me about the details.

Q You found out that your wife and your

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brother --

A I found my wife and my brother both are killed.

Q Were they actually, and I'm sorry to ask you these type questions, but I have to, were they working that day?

A Yes, they were working.

Q Were they killed there on the job?

A Yes, sir.

Q The police prepared a report.

A Yes.

Q Is Exhibit 7 a copy of that report?

A Yeah.

Q Have you had a chance to read that report in the past?

A Yeah.

Q Is that report a fair and accurate rendition of your understanding of what happened?

A Yeah.

Q Following your wife and your brother's death, did they eventually catch the people that had killed them?

A Yeah.

Q And was it a co-worker that was involved in the scheme to rob the store that had killed them?

A Yeah.

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Q There was a funeral after they had been killed?
A Yeah.
Q And did you pay the bills from those funerals?
A Yes, sir.
Q Exhibits 5 and 6, are they copies of the bills from those funerals?
A Yes, sir.
Q Following the incident did you inquire through the business owners as to whether there was workers' compensation insurance available or not?
A I called them, but they were supposed to take, but they didn't take the workers' compensation.
Q For whatever reason it was not in place when this happened?
A Yeah.
Q Was it your understanding they were trying to get it in the place, but it just hadn't been placed yet?
A Yes, sir.
Q So as far as your know they were not insured for workers' compensation when this incident happened.
A Yes, sir.
Q Was there any question about the fact that your wife and your brother were on the job when they were killed?
A Sir?

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Q Was there any question with anybody about whether your wife and your brother were working when they were killed?

A No.

Q Is it your intention to return back to India now that your wife has been killed?

A Yes.

Q You're going to be leaving this country very shortly, I understand?

A Yes. I book for May 7th.

Q Dharmendra, I don't know if there will be another deposition while you're here or not. If there is I'll let you know. Otherwise we'll just need a way to reach you when you do get back to India. Okay?

A Okay.

MR. WIGGER: Thank you very much.

(The deposition concluded at 2:35 p.m.)

* * *

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STATE OF SOUTH CAROLINA)
: C-E-R-T-I-F-I-C-A-T-E
COUNTY OF CHARLESTON)

I, G. Michael Alexander, Registered Professional Reporter and Notary Public, certify that I did have **DHARMENDRA CHAUNDHARI** to appear before me at 2:20 p.m. on the 14th day of April, 2003, in the law offices of Davidson, Bennett & Wigger, 8086 Rivers Avenue, Charleston, South Carolina; that the witness was duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth; that the foregoing pages constitute a true and accurate transcript of his testimony, given at that time and place.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 29th day of April, 2003.

G. Michael Alexander, RPR/CSR
Notary Public for South Carolina
My Commission Expires June 25, 2006

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

DHARMENDRA CHAUDHARI and RAJKUMARI PUNLYANI, Employee/Claimant, -vs- FAST POINT AMOCO, Employer, and SECOND INJURY FUND and WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND Carrier, Defendants.	WCC File No. XO30334 DEPOSITION OF: MRS. RAJKUMARI PUNLYANI

COPY

Given before Raymond E. Swartz, Notary Public and Certified Court Reporter, in the Law Offices of Messrs. Davidson, Bennett & Wigger, 8086 Rivers Avenue, North Charleston, South Carolina on Thursday, May the 1st, 2003, commencing at 11:15 o'clock, a. m.

A P P E A R A N C E S

For the Claimant : Davidson, Bennett & Wigger,
By: Jarrell L. Wigger, Esquire
8086 Rivers Avenue
No. Charleston, SC 29406

For the SC Second Injury Fund & the Workers' Compensation Uninsured Employers' Fund : Brooks Shealy, Esquire
Deputy General Counsel
220 Executive Center Drive
Suite 119
Columbia, South Carolina 29210

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Cross Examination by Mr. Shealy	5

It was stipulated by and between counsel for the parties that this deposition is taken pursuant to notice and that all questions as to notice are waived; that all objections, save as to the form of the question, are reserved until the time of trial; that the deposition is taken pursuant to the South Carolina Rules of Civil Procedure for purposes of discovery; and that the deponent was explained her right to read and sign the deposition and waived that right.

(Mr. Divyesh Patel, the interpreter, was at this time duly sworn.)

(Mrs. Rajkumari Punlyani was duly sworn and testified through the interpreter as follows:)

DIRECT EXAMINATION BY MR. WIGGER:

Q If you would ask her to state her name for the record, please?

A Rajkumari.

Q And her last name?

A Punlyani.

Q And how old is she?

A Sixty-four years.

Q And how long has she been in the United States?

A January 20th, 2002.

Q Who did she live with?

A With Virendra, her younger son.

Q And that is Virendra Punlyani that we are here about today?

A Yes.

Q Would you ask her where Virendra worked?

A At the gas station he was working.

Q Ask her if he lost his life on November 14th, 2002?

A He got shot on November 14th.

Q Ask her if she knows if he was working that day?

A Yes, she knows that that day he was working.

Q Ask her if he helped provide support for her?

A Yes, her younger son was helping her.

Q Did she have any other source of income, other than Virendra?

A No.

Q Did Virendra work anywhere other than the store he was working at when he got shot?

A No.

Q Does she know when Virendra start working there, approximately?

A The 25th of July, 2002.

Q And did he work there the whole time from that date up until when he was killed?

A Yes.

Q Does she know anything about how he was paid?

A She says that he was working and when she needs money she got it from him.

Q And would he buy her food and the things that she needed to live with?

A Virendra was giving her money for whatever she needs.

Q Does she know who paid the funeral bill for Virendra?

A She doesn't know about that.

Q Did Virendra have any children alive when he passed away?

A No.

Q And was he married when he passed away?

A He was single.

Q And had he always provided his mother with support?

A Yes.

MR. WIGGER: Would you tell her those are all of the questions that I have. Mr. Shealy represents the Uninsured Fund. He may ask her some questions also and please answer those.

CROSS EXAMINATION BY MR. SHEALY:

Q Had Virendra ever been married?

A No.

Q How old was Virendra?

A Thirty-five years.

Q Is Virendra's father still alive?

A No.

Q What was his name and when did he die?

A His name Ranthrafas (ph) and he was ninety-seven, 15 August.

Q Does she know who shot her son?

A No.

Q Does she know anyone else who depended on Virendra for support?

A She was the only one.

Q Was anyone else living in the home with them, where they lived?

A Her son and her younger son.

Q Now, let's be sure. Younger sons of her, not sons of Virendra?

A No, no, not son of Virendra. Hers.

Q Her son?

A Her son.

Q Alright. Did any of those sons depend on Virendra for support?

A No. She was the only one.

Q The only one?

A Yes.

Q The younger sons had jobs also?

A Yes.

MR. SHEALY: That's all I have.

MR. WIGGER: I don't have any further questions. And let the record reflect that Mr. Shealy was given the opportunity to depose further Mr. Chaudhari and he declined to do so.

(The deposition concluded at 11:25 o'clock, a.m.)

STATE OF SOUTH CAROLINA)
: C-E-R-T-I-F-I-C-A-T-E
COUNTY OF CHARLESTON)

I, Raymond E. Swartz, Notary Public, certify that I did have Mrs. Rajkumari Punlyani to appear before me at 11:15 o'clock, a.m. on Thursday, May the 1st, 2003 in the Law Offices of Messrs. Davidson, Bennett & Wigger, 8086 Rivers Avenue, North Charleston, South Carolina; that the witness was duly sworn through the interpreter and cautioned to tell the truth, the whole truth and nothing but the truth; that the foregoing pages constitute a true and accurate transcript of her testimony given at that time and place through the interpreter.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand and seal this the 2nd day of May, 2003.



Notary Public for South Carolina.
My Commission Expires Nov 8, '10.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No.: 2012-CP-10-6357

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

v.

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

and

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal complies with Rule 210(c), SCACR.

September 9, 2013

Natalie Byars Fisher, Esquire
Clawson & Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, SC 29492-8144
(843) 577-2026
Attorney for SCUEF/Appellant

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr.

Trial Court Case No.: 2012-CP-1006357

Virendra Puniyani, Deceased Employee, and
Rajkumari Puniyani. . . . . .Respondent

v.

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

and

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

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

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

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

STATEMENT OF CASE

This case is an appeal by the South Carolina Uninsured Employer's Fund (herein after referred to as "SCUEF") from the Circuit Court Order filed January 9, 2013 by Judge J.C. Nicholson. (R. pp. 59-60) Judge Nicholson's decision summarily denied SCUEF's appeal of two (2) decisions of the South Carolina Workers' Compensation Commission (hereinafter "the Commission"), based upon a prior Circuit Court Order filed September 18, 2007, by Judge D. Garrison Hill. (R. pp. 20-32) Judge Hill's Order reversed two (2) previous decisions of the Commission, including by a Hearing Commissioner and three member Appellate panel finding that the Commission did not have jurisdiction over this workers' compensation claim for the reason that the Claimant failed to prove that Avni Grocers regularly employed four (4) or more Employees so as to be subject to the Act. Further, Judge Hill reversed the Full Commission's decision holding that evidence sought to be submitted after the hearing was not newly discovered evidence as set forth in the regulations of the South Carolina Worker's Compensation Act. (hereinafter "Act").

This case arose upon the filing of a Form 52, Employee's Notice of Claim and/or

Request for Hearing, Death Case, by Rajkumari Puniyani, the mother of the deceased Employee, Virendra Puniyani, in or about February of 2003. (R. pp. 61-62) The Claimant, in her Form 52, alleged that the Employer was Avni Grocers, who was uninsured. Following the Claimant's filing of the Form 52, an investigation was conducted by the SCWCC Division of Coverage and Compliance. A Rule to Show Cause hearing upon the issue of an Employer required to have an insurance and whether it was subject to jurisdiction from the Commission was scheduled, however, the Department of Coverage and Compliance stated that costs precluded it from publishing to locate the Employer and, therefore, no Rule to Show Cause hearing was held. (R. p. 352) Counsel for the Claimant was advised by the Department of Coverage and Compliance that he bore the burden of proof in showing that the Employer was subject to the Act, and, at a minimum, he would be required to present the Commission with evidence establishing jurisdiction over the Employer. (R. pp. 353-354)

This matter went forward to a hearing before Commissioner David W. Huffstetler on January 4, 2006. Following that hearing, Commissioner Huffstetler issued an order on February 15, 2006. (R. pp. 1-6). In his Findings of Fact, Commissioner Huffstetler found that the Claimant failed to produce substantial evidence showing that Avni Grocers regularly employed four (4) or more employees so as to be subject to the Workers' Compensation Act. He also found that the Claimant was given an opportunity to agree to a postponement of the hearing, but did not do so. He found that there was not substantial evidence that the Employer regularly employed four (4) or more Employees. Therefore, the Commission did not have jurisdiction to make a determination; and that the Claimant failed to meet his burden of providing entitlement to benefits under the Act. The Commissioner ordered that

the claim of the Claimant was denied.

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

A Full Commission review was held on October 16, 2006, following which the three member panel of the Workers' Compensation Commission issued its order on November 20, 2006. The Full Commission, by unanimous vote, determined that the Hearing Commissioner's Findings of Fact and Rulings of Law were correct and the law of the case, and sustained the order of the Hearing Commissioner in its entirety. (R. pp. 16-19).

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

introduction of additional evidence into the record. (R. pp. 21-32). On October 25, 2007, the SCUEF filed its Notice of Appeal to Judge Hill's decision, which was subsequently dismissed as interlocutory.

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

FACTS

This claim arose out of the death of the Claimant's 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.)

At the hearing on remand before Commissioner Wilkerson, Harendra Pal testified that Avni Grocers owned both locations, and employed six (6) employees during the time of the incident. (R. pp.137 line 12 - p. 138 line 9.)

STANDARD OF REVIEW

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

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

> The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedures;
>
> (d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or uncharacterized by abusive discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(A)(6)(2003 Supp.). Instead, judicial review of a Workers' Compensation decision beyond the Full Commission is governed by the substantial evidence rule. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 344 (Ct. App. 2003). It is the well-settled rule of law that the court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, and may only reverse a decision that is affected by an error of law. *Id.* In reviewing the Workers' Compensation Commission decision, the court may only review the decision to assess whether the Commission's decision is supported by substantial evidence or whether the decision is controlled by error of law. *Id.* Substantial evidence is evidence, which, considering the record as a whole, would allow reasonable, minds to reach the conclusion the administrative agency reached in order to justify its action. *Id* at 345. The court may reverse the Commission when its decision is affected by an error of law. Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

ARGUMENT

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

Judge Hill, in reversing the decision of the Full Commission denying the submission

of additional evidence, relied upon §42-17-50, S.C. Code. Ann.1976 and (Supp. 2006). That section provides in part:

> If an application for review is made to the Commission within fourteen (14) days from the date when notice of the award shall have been given, the Commission shall review the award and, if good grounds be shown therefore, reconsider the evidence, receive further evidence, re-hear the parties or their representatives and, if proper, amend the award. (Emphasis added)

Judge Hill also found that the Appellants were aware that the Coverage and Compliance Division had determined that the Employer was subject to the Act. That Finding is erroneous, when, in fact, the evidence in the record is that the Claimant's attorney was advised that Coverage and Compliance did not have sufficient resources to serve the alleged owner of Avni Grocers by publication and that, therefore, the Claimant had the threshold burden of proving that the Employer was subject to the Act, before the merits of the claim could be heard. (R. p 352). 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. 109, lines 5-13.) After this discussion, not only did the Claimant decline our offer to postpone the hearing, but the Claimant also failed to request the record remain open to allow a deposition of Harenda Pal.

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 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 o 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 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.

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 then by regulation does not have the force or effect of law as does a regulation.

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

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

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

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

In the case at bar, Regulation 67-707 is not at conflict, nor inconsistent, with §42-17-50, but instead is an additional regulation to the law, to assist in its implementation. "Good cause is defined as "[a] legally sufficient reason. Good cause is often the burden placed on the litigant...to show why a request should be granted or refused. Blacks 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)." The Claimant was aware of Harenda Pal's existence at the time of the initial hearing and he was not listed as a witness on the Form 58 along with the fact that no unusual problems were noted on Claimant's Form 58. (R. p. 64).

This Court has upheld the application of 25A S.C. Code Ann. Reg. 67-707 (1997) as providing the requirements to introduce newly discovered evidence, and in disallowing

additional evidence where it could by, reasonable diligence have been discovered, Martin v. Rapid Plumbing, *supra*. Clearly, Regulation 67-707 sets forth the recognized grounds to introduce evidence in a workers' compensation case, merely defining "good cause" as set forth in the statute.

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

The introduction of an affidavit of Mr. Pal following the hearing should not be allowed either on the basis of "good cause" or of being additional and newly discovered evidence. The evidence was known to the moving party at the time of the hearing or by reasonable diligence could have been secured, as is evidenced by the ease with which it obtained an affidavit from Mr. Pal following the hearing, and the Claimant's testimony at the hearing that Mr. Pal was residing in Charlotte. (R. pp. 152-153, lines 8-9). To allow Mr. Pal's affidavit after the hearing was also detrimental to the integrity of the process. The transcript of record of the January 4, 2006 hearing makes it clear that the SCUEF objected

to Commission's jurisdiction under the Act, and, rather than agreeing to continue the hearing, Claimant's counsel insisted on proceeding. By the time of the hearing, the underlying factual events had already occurred more than three (3) years prior. Certainly reasonable diligence would have revealed such evidence within those three (3) years. Claimant did not identify Mr. Pal as a witness nor did claimant identify Mr. Pal's unavailability as an issue in the Form 58 submission. It was not until after the adverse order of February 15, 2006, entered by Commissioner Huffstetler, did Claimant seek to attain competent evidence of the Commission's jurisdiction. To allow the Claimant to seek to introduce such evidence through affidavit after the fact creates waste and inefficiency in the proceedings, and, in the case at bar, subverted the very purpose for which Regulation 67-707 exists.

Additionally, an affidavit does not constitute evidence allowed under the Administrative Procedures Act. The testimony of a non-medical factual witness must be presented by testimony or deposition. S.C. Code Ann. §1-23-320(4)(c). Further, opportunity must be afforded to all parties to respond. S.C. Code Ann. §1-23-320(4)(e).

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

Further, it is not a function of the reviewing Court to weigh the submission of additional evidence, but only to consider whether the Commission's determination disallowing the submission of that evidence constituted error as a matter of law. Therefore, it was an abuse of discretion for Judge Hill to reverse the Commission's decision that the

evidence sought to be submitted did not constitute newly discovered evidence. As such, Judge Nicholson's dismissal of SCUEF's appeal was also in error.

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

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

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

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

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

The Claimant was also aware prior to the hearing that the SCEUF contested jurisdiction, the Notice of Hearing dated December 2, 2005, stated that the Subject of Hearing was to determine issues as set forth on Forms 52 and 53. (R. p. 233). In the Form 52, No.2 states that: "both the Employee and the Employer were subject to the Workers' Compensation Act at the time of the injury."

Further, both the Department of Coverage and Compliance (R. p. 352, R. P. 109, lines, 10-13)) and the Hearing Commissioner advised the Claimant that this was a necessary element. The Hearing Commission even gave the Claimant an option to a postponement, which he refused. The opportunity for postponement become important under both issues on appeal before this Court. As to the first issue, the Motion for Additional Evidence, it has been held by this Court that where a party in a Workers' Compensation case had evidence it could have shown to a witness before a hearing, and it "did not make a motion to adjourn or leave the record open to develop the evidence" that it did not satisfy the newly discovered evidence rule set forth in 25A S.C. Ann. Reg. 67-707 (1997). Martin, *supra.*

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

The only undisputed facts were that the deceased Employee, Virendra Puniyani, was

working at a grocery store/gas station, in Charleston that sold Amoco gas, on the date of his death. At that location, there were three people. (R. p.115, lines 8-10). The witness, Dharmendra Chaudhari testified that he worked at another location. (R. p.115, lines 4-7). The witness who testified was not aware of ownership papers stating that they were the same company and he did not appear to have sufficient knowledge of the 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 where Mr. Chaudhari worked, they sold CITGO. (R. p.116, lines 21-27).

What was disputed was the name and identity of the actual Employer in this case. The Claimant, in the Form 52, listed the Employer as Avni Grocers (R. p. 61), and in her 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 whatsoever, including any records from the Secretary of State; State Treasurer; paychecks; testimony of any witnesses; or by any other information reflecting ownership of the Fast Point/Amoco station where the deceased Employee came to her death.

As discussed in the Standard of Review, substantial evidence is not "mere scintilla" of the evidence, nor evidence viewed blindly from one side of the case. Etheredge v. Monsanto Co. 349 S.C. 451, 562 S.E.2d 679, re-hearing denied (S.C. App. 2002), *supra.* Here, it is clear that the evidence purportedly relied upon by Judge Hill in reversing the decision of the Full Commission constitutes a "mere scintilla of evidence", that evidence

being from an individual who had never seen any paychecks; never seen any ownership papers; and is unclear about the relationship of Avni Grocers to Fast Point Amoco or the relationship of Amoco to Fast Point Amoco. For the Circuit Court to have reversed the agency's decision and findings of fact was to have viewed this case blindly from one side–disregarding the Commission's findings of fact after weighing the evidence. A review of the entire record in this matter supports a finding only there was not substantial evidence to establish by whom the location where the deceased Employee came to his death was owned until after the evidence had been closed and ruled upon by the Hearing Commissioner.

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

> "This is a tragic, heart-rendering case. However, I am bound to the facts and the law without emotion. As I said at the hearing, I think it was ill advised for the Claimant to proceed with these hearings with so many procedural issues, I was close to, if not in fact, rude in questioning the Claimant's decision to go forward. But they did proceed and I am limited to the evidence that was presented...the more critical question deals with whether the employer is subject to the Act. Mr. Chaudhari testified that there were three (3) employees at each of the two locations of Avni Grocers. However, there is no evidence that these two stores were owned by the same person or company. They both bear the name Avni, but certainly could be operated by different family members with different business interests. Perhaps not, but there is no evidence of who owned or operated these stores. In his deposition, Mr. Chaudhari mentions Omni International South Carolina limited. He also says the store was also called Fast Point Amoco. There is no evidence concerning Omni International South Carolina Limited other than the one comment in the deposition. Perhaps Amoco actually owns these stores. Once could assume that since the store is called Fast Point Amoco, but there is no proof. I cannot speculate on these issues."

This Court has held in the case of Hernandez-Zuniga v. Tickle, 374 S.C. 235, 64 S.E.2d 691 (Ct. App. 2007), that where there is a jurisdictional question, the Court's review is governed by the preponderance of the evidence standard. While the Court of Appeals has

the power and duty to review the entire record and find jurisdictional facts without regard to conclusions of the Commission, a construction should not be adopted that does violence to the specific provisions of the Act where workers' compensation statutes are to be literally construed. In Hernandez-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 Claimant came to his death. (R. p. 115, lines 8-10). The witness worked at a different store from the deceased employee (R., p.115, lines 4-7). It was unclear what, if any, relationship there was between the two stores. Further, there was no 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, 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 brother, the witness worked.

It is the well-settled rule of law that any findings of the Commission must be founded upon the substantial evidence and cannot rest on surmise, conjecture, or speculation. Wynn

v. Peoples Natural Gas, 238 S.C. 1, 118 S.E.2d 812 (1961). In the case at hand the only way in which a determination could be made that Avni Grocers was the Employer of the location where the deceased Employee came to her death, and that it regularly employed four (4) or more employees in the same business or establishment is purely speculation. Therefore, it was error for the Circuit Court to reverse the initial Decision and Order of the Full Commission of November 20, 2006, finding that the Claimant failed to meet his burden of proving entitlement to benefits in this case. It was further error for the Circuit Court to affirm Claimant's entitlement to benefits on appeal of the matter on remand.

CONCLUSION

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

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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-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.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Should this Court dismiss this Appeal where the only order referenced in and attached to the Notice of Appeal was the 2013 Order from Judge J.C. Nicholson denying the appeal, and the Notice did not reference an appeal from Judge Garrison Hill's 2007 order or include a copy of Judge Hill's order?

II. Should this Court Affirm the Decision of Judge Hill 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?

III. Did Judge Hill 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?

IV. Does the Preponderance of the Evidence Support Judge Hill's Decision to Reverse the Commission's Affirmance of Commissioner Huffstetler's Ruling That Avni Grocers Did Not Employ Four (4) or More Employees and the Decision to Remand the Matter for Further Proceedings?

V. Does the Commission's Affirmance of Commissioner Wilkerson's Decision to Permit Mr. Pal to Testify Live and Subject to Cross-examination Render Moot the Fund's Arguments about Mr. Pal's affidavit?

COUNTER-STATEMENT OF THE CASE

This is a workers' compensation case. 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 by a co-worker 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. The primary issue in this case was whether Employer 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 Huffstetler instructed the Claimants to agree to continue the matter. Because the Claimants had been waiting for a year for a hearing, one Claimant had traveled from Atlanta, Georgia, and the Claimants had produced proof that the Fund *had* been properly served, 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) (R. p. 209) , but the 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.

Apparently, the Fund did very little work on the file following the retirement of the lawyer 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, 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 the Claimants regarding any objectionable issues the Fund had as to coverage or benefits.[1]

The Employer, Anvi 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 and, at best, the Claimants offered proof that there were only three (3) employees where the Claimants worked.

Following the hearing before Commissioner Huffstetler, the Claimants located Harendra Pal, the owner of Avni Grocers who had moved out of state, and obtained an affidavit from Mr. Pal that established the statutory requirements were met and the Employer 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 from both the Appellate Panel's affirmance of Commissioner Huffstetler's order as well as the Commission's denial of the motion to accept the additional evidence. The matters continued to be consolidated for purposes of judicial review.

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

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 timely appealed Judge Hill's order to this Court. On May 28, 2008, this Court 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. The Court requested additional briefing (R. p. 33), and on June 29, 2010, the Court of Appeals issued its consolidated opinion dismissing the 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 issued the remittiturs in these cases on July 7, 2010, and the cases were returned to the Commission.

The cases were consolidated 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. 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...." (R. p. 183, ll. 1-2). 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 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.

ARGUMENTS

SCOPE OF APPELLATE REVIEW

The Fund primarily asserts 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).

Furthermore, the Court may 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.*

The Claimant points out the correct scope of review here, even though the more restrictive "substantial evidence" rule favors affirmance from the latest Commission order (and thus favors the Claimant). If this Court intends to pierce through the last expression from the Commission and review the prior rulings, then this Court should do so by applying the correct scope of review in this appeal involving a jurisdictional question.

I. THE COURT SHOULD DISMISS THIS APPEAL

The notice of appeal the Fund filed and served states the following:

> The South Carolina Uninsured Employer's Fund appeals the [judgment] of the Honorable J.C. Nicholson, Jr., dated January 9, 2013. Appellant received written notice of entry of this judgment on January 16, 2013.

(R. p. 102). The *only* order attached to the Notice of Appeal was the Form 4 order Judge Nicholson filed on January 9, 2013 which provided "Appeal is Denied." (Emphasis in original). The Notice did *not* say the Fund was appealing from the 2007 order entered by Judge Hill, nor was *that* order attached to the Notice. However, all of the arguments in the Brief of Appellant are directed to Judge Hill's order from 2007, and there is *no* argument challenging anything Judge Nicholson did in his 2013 order.

Rule 203, SCACR, governs the requirements for a notice of appeal in South Carolina. The Rule provides:

> **(d) Filing**
>
> *(1) Appeals from the Circuit Court, Family Court and Probate Court.*
>
> * * *

(B) When and What to File. The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served. The notice filed with the appellate court *shall be accompanied by* the following:

* * *

(ii) A copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing;

* * *

(e) Form and Content. The notice of appeal shall be substantially in the form designated in the Appendix to these Rules.

(1) *Appeals from the Circuit Court, Family Court and Probate Court*. In appeals from lower courts, the notice of appeal shall contain the following information:

(A) The name of the court, judge, and county from which the appeal is taken.

(B) The docket number of the case in the lower court.

(C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken, or, if a cross-appeal, when the respondent received appellant's notice of appeal.

(D) The name of the party taking the appeal.

(E) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

(Emphasis supplied).

The Notice of Appeal in this case does not give this Court jurisdiction over Judge Hill's 2007 order because:

(1) The 2007 order was not attached to the Notice of Appeal, Rule 203(d)(1)(b)(ii);

(2) The Notice did not identify the 2007 order as being subject to the appeal because it did not:

(a) identify Judge Hill as the author of the ruling to be appealed, Rule 203(e)(1)(A);

(b) give the docket number of the case from which Judge Hill's order emanated, Rule 203(e)(1)(B); or

(c) give the date of Judge Hill's order, Rule 203(e)(1)(C).

See Ackerman v. 3-V Chemical, Inc., 349 S.C. 212, 562 S.E.2d 613 (2002) (noting Rule 203 requires the appealing party to file a copy of the order challenged on appeal with the notice of appeal if the order has been reduced to writing) sole issue timeline

This is much more than a mere clerical error. *Cf. Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) (finding appeal proper from final order even though appellant did not "technically" refer to the final order in the notice of appeal but referenced only order denying rehearing where appellant had attached both orders to the notice of appeal). The Notice of Appeal does not reference Judge Hill's 2007 order, nor is that order attached. The prior appeal was dismissed because the order was not an appealable interlocutory ruling – it was not held in abeyance pending a final order.

This Court lacks jurisdiction to address any of the issues emanating from Judge

Hill's order of 2007. Because that is the only order that is the subject of the Fund's arguments in its Brief to this Court, the Court should dismiss this appeal.

In the event this Court refuses to dismiss, then the Court should affirm the case based upon the arguments that follow.

II. THIS COURT SHOULD AFFIRM JUDGE HILL'S DECISION 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

As was pointed out to the Commission and Judge Hill, at the first hearing before Commissioner Huffstetler the Fund and the Employer failed to file a Form 51 or Form 53 Answer to the Claimant's Form 52, which Commissioner Huffstetler found was properly served upon them. 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. Both the Commission and Judge Hill, however, did not address this issue, but reached the merits of the Fund's defenses. The Claimant has raised this point throughout this process, and urges this Court to use this issue as an additional reason to affirm pursuant to Rule 220(c), SCACR.

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 file a Form 51 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) (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....*

25A S.C. Code Ann. Regs. 67-603(C) (Supp. 2006) (emphasis added).

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" defense allowed under the Act. The assertion that the Employer employed less than four (4) employees within the State was beyond a mere general denial, and as such was a special or affirmative defense that the Fund waived by not filing a Form 51.

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 Pre-Hearing Brief mandated by Regulation 67-611, so that it did not disclose any facts or legal issues in controversy. Once again Commissioner Huffstetler 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. 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 made by the Commission's Division of Coverage and Compliance.

This Court should take notice of the critical procedural bar to the issues the Fund raised before the Commission, and should affirm the trial court's order on this additional ground.

III. JUDGE HILL CORRECTLY RULED AS A MATTER OF LAW THAT THE COMMISSION SHOULD HAVE PERMITTED THE 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 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. This Court should affirm Judge Hill's ruling.

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 the Commission without objection. (R. p. 109, ll. 5-7).

As noted, prior to the hearing before Commissioner Huffstetler for which the Fund received notice, the Fund did not file a Form 51 or Form 53, nor did the Fund file a Pre-Hearing Brief setting forth any defenses or objections. The 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. The Claimant was aware that the Commission's Compliance Division had already determined that Employer was subject to the Act.

At the hearing before Commissioner Huffstetler the Claimant learned for the first time that the Fund intended to challenge the number of Employer's employees. Despite the Division's determination and the Fund's complete lack of response in advance, and the fact that the Fund did not plead any special defenses, Commissioner Huffstetler held that the Claimant failed to establish the Employer had four (4) or more employees so as to be subject to the Act.

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

The Claimant then moved the Commission to permit the introduction of this additional evidence. (R. p. 269). The Claimant reminded the Commission 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, and that finding was made a part of the record before the Commission without objection. The Commission refused to permit the evidence and summarily affirmed Commissioner Huffstetler. (R. p. 18).

South Carolina Code Ann. § 42-17-50 (1976 & Supp. 2006) 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.

(Emphasis added). In this case, the Commission excluded the evidence pursuant to 25A S.C. Code Ann. Regs. 67-707, finding the evidence was not "new evidence" as it was known to the Claimant at the time of the hearing, or by reasonable diligence could have been secured. Judge Hill held this was an error of law, however, because the 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 actions of 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 Coverage and Compliance, which was part of the record, 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 "good ground" to require the Appellate Panel to receive the additional

evidence under § 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 the Claimant's ability to bring forth the additional evidence in this matter, the Regulation is at odds with § 42-17-50, which requires the Commission to "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).

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

The Fund challenges several of Judge Hill's factual findings in the order. (Appellant's Brief, p. 7). 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 § 42-17-50 because the Regulation simply defines "good grounds" for purposes of the statute. Again, this point was not argued to or ruled upon by Judge Hill, nor was it raised 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). The Fund's 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 application of the regulation in *Wilkinson* conflicted with § 42-17-50. (R. p. 27 n. 1). *Holcombe* dealt with the predecessor to Regulation 67-707, and again there was no argument that application of that regulation to the evidence being proffered conflicted with the plain terms of § 42-17-50.

Martin involved the proffer of evidence as "after discovered" under the regulation without any claim that application of that regulation conflicted with § 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. Neither appellant in *Holcombe* or *Martin* argued that they had presented "good grounds" so as to require the Commission to admit the evidence under § 42-17-50.

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

Further, Section 42-17-50 provides 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 § 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. pp. 10-11). To begin with, the statute states that "if good *grounds* be shown therefor" the Commission "shall...receive further evidence...." (Emphasis added). 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, the 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 – that is, the Claimant proceeded following the investigation by the

Coverage and Compliance Division, coupled with the Fund's failure to file a responsive pleading or Pre-hearing brief and Mr. Pal's leaving the jurisdiction prior to the hearing – there was no need for the Claimant to believe Mr. Pal's affidavit was needed prior to the hearing.

The Fund summarily points to S.C. Code Ann. § 1-23-320 (1977 & Cum. Supp.) as providing that Mr. Pal's affidavit did not constitute "evidence" under the APA. (App. Br. P. 12). The Court should reject this argument.

First, the Fund never made this argument below, and the circuit court 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.*

Second, § 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.

There is nothing in § 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.

Fourth, this argument is so conclusory as to be deemed abandoned. *E.g.*, *Wilson v. Dallas*, ___ S.C. ___, 743 S.E.2d 746 (2013) (an argument is effectively abandoned if the appellant's brief treats it in a conclusory manner); *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) (where only passage in brief relating to issue appealed was single conclusory statement which left unargued the error assigned by exception, issue was abandoned).

The Fund further summarily argues that under § 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, the circuit court, and the Fund did not seek a ruling by post-judgment motion. Rule 52, SCRCP; Rule 59, SCRCP. Second, the argument is so conclusory that it should be deemed abandoned. *Wilson v. Dallas*; *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. Even so, the Commission 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, this 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 this matter to the Commission with instructions to reconsider its ruling in light of Mr. Pal's affidavit.

IV. THE PREPONDERANCE OF THE EVIDENCE SUPPORTS JUDGE HILL'S DECISION TO REVERSE THE COMMISSION'S AFFIRMANCE OF COMMISSIONER HUFFSTETLER'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. 12-17). This Court should affirm.

South Carolina Code Ann. § 42-1-150 (1985 & Supp. 2006) 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) (Supp. 2006), 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 the 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. (R. p. 352; R. p. 353). 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. (R. p. 109, ll. 5-7). 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. (R. p. 211).

The Claimant therefore 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....") (emphasis added).

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, the 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 brother was employed by Avni Grocers and worked for Avni Grocers seven (7) days a week. (R. p. 391, lines 7-16; p. 392, lines 7-11; p. 394, lines 23-25). 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. (R. p. 29). Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. (R. p. 29). 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 (R. p. 235; R. p. 257), 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. (R. p. 29). Neither Commissioner Huffstetler nor the first Appellate Panel found Mr. Chaudhari's testimony not credible. *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." (R. p. 29). 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. (R. p. 30). 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. pp. 15-16). Of course, Mr. Pal's affidavit, which the Commission improperly excluded, settled 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 demonstrated 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. 17). 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 Judge Hill'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, the 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. (R. p. 29; R. p. 391, ll. 14-16). 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. (R. p. 29). He worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. (R. p. 29). 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. (R. p. 30). 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 (R. p. 235; R. p. 256), 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.	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.
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 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.

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, Judge Hill correctly reversed the Commission's decision.

V. THE COMMISSION'S AFFIRMANCE OF THE COMMISSIONER WILKERSON'S DECISION TO PERMIT MR. PAL TO TESTIFY LIVE AND SUBJECT TO CROSS-EXAMINATION RENDERS THE FUND'S ARGUMENT ABOUT MR. PAL'S AFFIDAVIT MOOT

Mr. Pal testified live at the hearing on remand before Commissioner Avery Wilkerson. The Fund implies that this testimony was "in accordance with Judge Hill's Order and instructions...." (App. Brief, p. 3). In fact, Judge Hill's 2007 order said *nothing* about Mr. Pal testifying but found that, under the unique posture of the case, Claimant established "good grounds" for the Commission to accept Mr. Pal's affidavit under S.C. Code Ann. § 42-17-50. (R. pp. 26-27). Commissioner Wilkerson permitted the live testimony in his discretion, and that decision was not challenged before the Appellate Panel, the circuit court, or this Court on Appeal. The Court should find any complaint about the Pal affidavit is therefore moot.

At the outset, the Court should consider the circumstances that persuaded Judge Hill that fundamental fairness compelled the Commission to consider the Pal affidavit. 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, and that decision was made part of the Commission's record. The Fund did *not* file a Form 51 or a Form 53, and thereby failed to raise any challenge to Claimant's assertion that jurisdiction was proper (that is, that Avni had four (4) or more employees based on the Coverage and Compliance Division's determination). The Fund also did *not* file a Form 58 Pre-hearing Brief, thereby concealing the attack it subsequently raised for the *first* time when everyone arrived at the first hearing before Commissioner Huffstetler.

This point was crucial to Judge Hill's decision and bears repeating: The first hearing before Commissioner Huffstetler was the *first* time the Fund notified the Claimant that it was challenging the number of employees at Avni Grocers. Although the Claimant believed the testimony presented from Mr. Chaudhari established the business had four (4) or more employees anyway, Commissioner Huffstetler found against coverage, prompting the Claimant to locate Mr. Pal and obtain the affidavit. Judge Hill recognized the sandbagging that occurred and the Fund's ambush of the 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, the Court of Appeals dismissed and remanded because the ruling was not an appealable interlocutory order under settled Supreme Court precedent.

The Commission was thereafter bound to follow the mandate in Judge Hill's order that the Commission consider Mr. Pal's affidavit. *See Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) ("Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. In such a case the order limits the authority of the commission.") (citations omitted). Accordingly, Commissioner Wilkerson had to accept the Pal affidavit into evidence. But nothing about Judge Hill's order compelled Commissioner Wilkerson to permit any evidence other than the Pal affidavit.

Following the remand from the Court of Appeals, however, Mr. Pal returned to South Carolina, and Claimants called him to testify separately from his affidavit.

Although the Fund objected at the hearing, Commissioner Wilkerson overruled the objection.

Importantly, none of the Fund's exceptions to the Appellate Panel adequately raised any issue in Commissioner Wilkerson separate ruling that permitted Mr. Pal to testify live. *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 the Hearing Commissioner receiving this evidence. The Appellate Panel expressly found "[t]he Fund did not raise any challenge before this Appellate Panel to the hearing commissioner's ruling permitting Mr. Pal to testify." (R. p. 56, ¶ 10).

The Commission concluded "[t]he hearing commissioner's consideration of Mr. Pal's live testimony is unchallenged before this Appellate Panel and is therefore affirmed." (R. p. 57, ¶ 11). There was no challenge to this finding before the circuit court, nor is there any challenge to it in the brief to this Court. This is an alternative basis to affirm the decision in this case. *See* Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 707 S.E.2d 397 (2011) (the appellate court may affirm for any reason appearing in the record). *See also Sloan v. Department of Transp.*, 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005) ("The failure to appeal an alternative ground of the judgment below will result in affirmance."); *State v. Branham*, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) (unappealed alternative ground for judgment becomes the law of the case and provides an independent basis to uphold decision).

The Appellate Panel also affirmed Commissioner Wilkerson's finding that Mr. Pal's testimony plainly established that Avni Grocers employed four (4) or more employees. (R. p. 56, ¶ 11). Once again there was no challenge to this finding before the Commission so that this issue was not properly before the Appellate Panel. *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). There was also no challenge to this finding at the circuit court or in the brief to this Court, rendering it the law of this case. *Shirley's Iron Works, Inc. v. City of Union*, ___ S.C. ___, 743 S.E.2d 778 (2013) (an unappealed ruling is the law of the case and requires affirmance).

The Appellate Panel further found that "[e]ven without Mr. Pal's live testimony or his affidavit, Mr. Chaudhari's uncontradicted testimony establishes that Avni Grocers employed four (4) or more employees." (R. p. 56, ¶ 13). Again, the Fund did not challenge this separate finding before the circuit court or this Court on Appeal. This is another alternative basis to affirm the decision in this case. Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*; *Sloan v. Department of Transp.*

Additionally, the Appellate Panel held that:

> [E]ven without Mr. Pal's live testimony or his affidavit, or this Panel's own review of the other evidence in the record, the circuit court found that other evidence in the record established that Avni Grocers employed four (4) or more employees, and that finding is binding upon the Commission.

(R. p. 56, ¶ 14). The Fund has never challenged that alternative ruling in Judge Hill's order and it is the law of this case. It is also an alternative reason to affirm. Rule 220(c), SCACR; *Stinney v. Sumter School Dist. 17*; *Sloan v. Department of Transp.*

Apart from these procedural reasons to affirm, the Court should affirm on the record. The evidence in this case establishes by at least the preponderance of the evidence that Avni Grocers included both locations (Vance and North Charleston), that there were five (5) to (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. Thus, even though the *only* evidence in this case establishes there were, in fact, four (4) or more employees, the Fund contends it should have won this case on a technicality it created by sandbagging the Claimant. That is, the Fund does *not* contend there were *not* four (4) or more employees working for Avni Grocers at the time these employees were murdered by a co-worker. That argument would be impossible in light of (1) Judge Hill's unchallenged finding based on his own view of the evidence, (2) Mr. Pal's affidavit and (3) Mr. Pal's unchallenged live testimony. Instead, the Fund contends that it should have won these cases on the technicality created by its own behavior. According to the Fund, the Claimant should not have enjoyed an opportunity to contest the Fund's late in the day defense to these claims, even though the Fund never filed an answer or pre-hearing brief raising any defenses, and even though the Claimant had the Coverage and Compliance Report which found that more than four (4) employees worked for Avni Grocers. This appeal is simply the Fund saying "we should have won the first time, and even though we were wrong on the facts Judge Hill should not have reversed."

Under the circumstances of this case (which is now firmly into its 11th year), this Court should apply settled rules governing appellate procedure and affirm this case on

these unchallenged alternative grounds. This is not to say that Judge Hill was wrong - he was not. This is also not to say that the latest expression from the Commission is flawed - it is not. However, the arguments in this appeal reflect the Fund's intent to further delay the already long-delayed justice in this case.

Also, any complaint about allowing Mr. Pal's affidavit is now moot. As noted above, 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 Pal 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.

(R. p. 8, Stipulation 4). Here, Mr. Pal's unchallenged live testimony rendered moot any challenge to his affidavit. Mr. Pal's testimony contains the same facts as those that are in the affidavit.

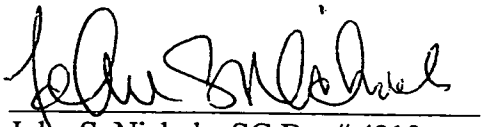
Even so, as Judge Hill previously held from his own view of the evidence in the first hearing before Commissioner Huffstetler, apart from the Pal affidavit or testimony, the record contained a preponderance of the evidence that Avni Grocers employed four (4) or more employees so as to be subject to the Act. That holding is correct and, in any event, is unchallenged in this appeal.

Accordingly, the Court should affirm the Appellate Panel, which affirmed Commissioner Wilkerson's ruling that the evidence establishes the Employer employed four (4) or more employees and was therefore subject to the Act.

CONCLUSION

For the reasons stated, this Court should dismiss this appeal because the Fund did not appeal Judge Hill's order, and all of its appellate arguments are aimed at that order. Alternatively, the Court should affirm Judge Hill's order in its entirety, and should order the matter remanded to the Commission for further proceedings consistent with the latest expression from the Commission.

Respectfully submitted,



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