

THE STATE OF SOUTH CAROLINA
In The 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

RECEIVED
APR 03 2015
SC Court of Appeals

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

v

Avni Grocers, Employer, and the South Carolina
Uninsured Employers' Fund of whom the South Carolina
Uninsured Employers' Fund is the Petitioner,

PETITION FOR WRIT OF CERTIORARI

Margaret M Urbanic, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
(843) 577-2026
Attorney for Petitioner

John S Nichols, Esquire
1614 Taylor Street
Columbia, SC 29201
Attorney for Respondent

Jarrel Wigger, Esquire
8086 Rivers Ave , Suite A
North Charleston, SC 29406
Attorney for Respondent

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CERTIFICATE OF COUNSEL

The undersigned certifies that a petition for rehearing was made and ruled upon by the South Carolina Court of Appeals on the matters raised by this petition

QUESTIONS PRESENTED

The Court of Appeals erred in finding that Judge Hill's order properly concluded that the employer was subject to the Act

The Court of Appeals erred in not addressing the issue of Judge Hill allowing the affidavit to be considered newly discovered evidence

The live testimony of Mr Herenda Pal should not have been allowed at the hearing in front of Commissioner Wilkerson

STATEMENT OF THE CASE

This claim arose out of the death of the Claimant's son Virendra Punyani while he was working at Fast Point/Amoco, a gas station/grocery store in Charleston, South Carolina, on November 14, 2002. The Claimant, Rajkumari Punyani, is the mother of the deceased Employee, Virendra Punyani (R pp 108, lines 4-6 and p 112, lines 5-9). 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). The gas station where the deceased Employee worked was known as Amoco Fastpoint (R p 242). 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).

A Form 52 was filed in 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. 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)

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)

Prior to the initial hearing, 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, Harendra Pal, identified as a witness

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 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 The Court of Appeals heard this matter on December 9, 2014 and issued a Per Curiam opinion on January 28, 2015 affirming the circuit court's order A Petition for Rehearing was filed on February 12, 2015 an Order denying the Petition was filed on March 5, 2015

ARGUMENTS

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

The Court of Appeal'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 other 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 there was four or more employees is an error of law, this Court should reverse the order.

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

The second basis for Judge Hill's ruling that there was jurisdiction was that the Claimant proved that there were 4 or more employees. 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 where 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

The Court of Appeals held in the case of Hernandez-Zuniga v Tickle, 374 S C 235, 64 S E 2d 691 (Ct App 2007), that where there is a jurisdictional question, the Court's review is governed by the preponderance of the evidence standard. While the Court of Appeals has the power and duty to review the entire record and find jurisdictional facts without regard to conclusions of the Commission, a construction should not be adopted that does violence to the specific provisions of the Act where workers' compensation statutes are to be literally construed. In Zuniga, it was held that there was not substantial evidence to find that an Employer regularly employed four (4) or more Employees even though there was evidence that four (4) may have worked on one or more occasions. Hernandez-Zuniga, also found that it must be proven that the Employer "regularly" employed four (4) or more Employees.

In this case, the evidence offered at the initial hearing was that three (3) Employees worked at the store where the deceased Employee came to his death (R p 115, lines 8-10). The witness worked at a different store from the deceased employee (R pp 116-117 lines 23-1). It was unclear what, if any, relationship there was between the two stores. Further, there was no competent evidence offered at the initial hearing that this number of Employees were "regularly" employed.

The requirement of §42-1-150 is, not only that there be regular employment, but Employees also be "employed in the same business or establishment". Emphasis added. The issue of whether Mr. Pal was the owner of a company which regularly

employed four (4) or more Employees was not proved at the initial hearing. At best, the evidence offered at the initial hearing before Commissioner Huffstetler was that three (3) Employees worked at one (1) business or establishment, and three (3) Employees worked at another second business or establishment. There was no evidence at the time of hearing that the location where the deceased Employee to his death was the "same business or establishment" where his spouse, the Claimant, worked.

2. THE COURT OF APPEALS ERRED IN NOT RULING ON THE ISSUE OF JUDGE HILL ALLOWING THE AFFIDAVIT TO BE CONSIDERED NEWLY DISCOVERED EVIDENCE.

The Court of Appeals did not address this issue and it was an error for the affidavit to be submitted as newly discovered evidence and the Appellants would request that this issue be heard. Judge Hill, in reversing the decision of the Full Commission denying the submission of additional evidence, relied upon §42-17-50, S C Code Ann 1976 and (Supp 2006). That section provides in part

If an application for review is made to the Commission within fourteen (14) days from the date when notice of the award shall have been given, the Commission shall review the award and, if good grounds be shown therefore, reconsider the evidence, receive further evidence, re-hear the parties or their representatives and, if proper, amend the award (Emphasis added)

Judge Hill also found that the Appellants were aware that the Coverage and Compliance Division had determined that the Employer was subject to the Act. That finding is erroneous, when, in fact, the evidence in the record is that the Claimant's attorney was advised that Coverage and Compliance did not have sufficient resources to serve the alleged owner of Avni Grocers by publication and that, therefore, the Claimant had the threshold burden of proving that the Employer was subject to the Act,

before the merits of the claim could be heard (R pp 353-354) No Order was issued based upon a Rule to Show Cause Hearing

Judge Hill also found that there was "uncertainty of whether the issue regarding the number of Employees could have been raised" This is also an incorrect statement of the facts in that there was no question that the Claimant bore the burden of proving the number of Employees at the time of the hearing In fact, the Claimant was also advised of this by Commissioner Huffstetler at the time of the hearing and chose, instead, to go forward at that time (R p, 108)

Regulation 67-607 was adopted by the Commission, and became effective on September 2, 1990 Judge Hill found that the regulation referring to newly discovered evidence altered or added to the terms of §42-17-50, which states only that if evidence may be allowed "good grounds" be shown Instead, it appears that Regulation 67-707 defines "good grounds", and sets forth the circumstances under which the Commission will consider additional evidence Regulation 67-707 provides that

A When additional evidence is necessary for the completion in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner

C The moving party must establish the new evidences of the same nature and character required for granting a new trial and show

(1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character, but would likely have produced a different result have the evidence been procurable at the first hearing, and

(2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidences being brought to the attention of the Commission immediately upon its discovery

The Court of Appeals 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 (Ct. 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 (Ct. 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

Although there are no cases directly on point, this 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), SCRPC 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 Court of Appeals 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 not have been considered newly discovered evidence and this issue should be reviewed by this Court

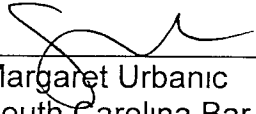
III. THE LIVE TESTIMONY OF MR. HERENDA PAL SHOULD NOT HAVE BEEN ALLOWED AT THE HEARING IN FRONT OF COMMISSIONER WILKERSON.

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

CONCLUSION

For the reasons stated above, Respondents respectfully petitions this Court to grant certiorari

Respectfully submitted,



Margaret Urbanic
South Carolina Bar #13574
Clawson and Staubes, LLC
126 Seven Farms Dr , Suite 200
Charleston, SC 29492

THE STATE OF SOUTH CAROLINA

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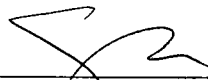
Employer/Defendant and the South Carolina Uninsured Employers' Fund of whom the
South Carolina Uninsured Employers' Fund is the Appellant

PROOF OF SERVICE

I certify that on the 2 day of April 2015, I have served a copy of the Appellant's
Petition for Certiorari by Fed Ex overnight delivery on the addresses listed below

Jarrel Wigger, Esquire
8086 Rivers Ave , Suite A
North Charleston, SC 29406
Attorney for Respondent

John S Nichols, Esquire
1614 Taylor Street
Columbia, SC 29201
Attorney for Respondent



Margaret Urbanic

Bar #. 13574

Clawson and Staubes, LLC

126 Seven Farms Drive, Suite 200

Charleston, SC 29492

**CLAWSON
AND
STAUBES**
LLC

Margaret M. Urbanic
Licensed in SC
purbanic@clawsonandstaubes.com
SC Certified Circuit Court Mediator

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April 02, 2015

APR 03 2015

File No.: 2006967.000

SC Court of Appeals

VIA FED EX
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Rajkumari Puniyani, Spouse of Virendra Puniyani v AVNI Grocers
Case No. 2013-000412

Dear Ms Kitchings

Enclosed please find a Petition for Certiorari to the Supreme Court and a Proof of Service Please file the Petition and Proof of Service Thank you

Very truly yours,

CLAWSON and STAUBES, LLC



Margaret M Urbanic

MMU/st
Enclosures

cc. John Nichols, Esq
Jarrel L Wigger, Esq