

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

W.C.C File No. 1308837

Appellate Case No. 2015-000191

Gino's The King of Pizza, LLC, ... Respondent,

v.

Esvin Leonel Lopez Perez, Appellant.

INITIAL BRIEF OF RESPONDENT

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Statement of the Issue on Appeal

- I. **DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT GINO'S THE KING OF PIZZA, LLC DID NOT REGULARLY EMPLOY FOUR (4) OR MORE PERSONS AND IS THEREFORE NOT SUBJECT TO THE ACT.**

Statement of the Case

The claimant, Esvin Leonel Lopez Perez, initiated this Workers' Compensation claim by filing a Form 50 in which he alleged that he suffered a compensable injury which arose out of his employment on May 22, 2013. Defendant Gino's the King of Pizza, LLC filed a Form 51 contesting jurisdiction and argued that it did not maintain the requisite number of employees to be subject to the Workers' Compensation Act.

A hearing was held in Horry County, South Carolina on April 23, 2014. All parties were duly notified of the date, time and place of the hearing, and all parties and their representatives appeared at the scheduled hearing. Commissioner Aisha Taylor presided at the hearing and received testimony and other evidence from the parties' witnesses for the sole purpose of determining the jurisdictional issue. The claimant was the sole witness to testify on behalf of his position. No other people alleged by the claimant to have been regularly employed by Gino's the King of Pizza, LLC were present. Gino's the King of Pizza, LLC presented one of its bookkeepers, Katrina Sorce, to testify as to the number of employees maintained by the business entity.

Having heard the testimony and reviewed the evidence presented, Commissioner Taylor issued an Order on July 7, 2014 wherein she found that Gino's the King of Pizza, LLC did not regularly employ four (4) or more employees at all times relevant to this action. The Commissioner also found that it became clear upon cross-examination that the claimant had no actual knowledge as to the working relationship of any other persons he testified about, that his beliefs were based on speculation and hearsay, and that the only credible testimony was presented by Gino's the King of Pizza, LLC. The Commissioner further found that Gino's the King of

Pizza, LLC only owns and operates one pizza restaurant location and while there are several other business entities operating under the trade name Gino's Pizza, they are not related to the employer in this case. Finally, the Commissioner held that, because it did not regularly employ four (4) or more employees, Gino's the King of Pizza, LLC was not subject to the South Carolina Workers' Compensation Act and, therefore, denied all of the claimant's claims for benefits.

The claimant appealed the decision of the single Commissioner to the Appellate Panel of the Full Commission. A hearing was conducted before the Appellate Panel on October 27, 2014 which was comprised of Commissioner T. Scott Beck, Commissioner Melody L. James, and Commissioner R. Michael Campbell, II. Following the hearing and a review of all documents presented, the Appellate Panel affirmed the Order of the single Commissioner including all findings of fact and conclusions of law. This appeal now follows.

Facts

Gino's the King of Pizza, LLC is the business entity that owns and operates a pizza restaurant located at 532 Highway 17 N., North Myrtle Beach, South Carolina 29582. (Transcript of Hearing Before Single Commissioner p. 47, ll. 3-9). While there are other unrelated business entities conducting business under similar trade names, Gino's the King of Pizza, LLC only owns and operates that one location and is unrelated to any other business entities. (Transcript of Hearing Before Single Commissioner p. 47, ll. 10-21).

The Gino's entity is a limited liability company with two members; Francesco Sorce and Nancy Sorce. (Transcript of Hearing Before Single Commissioner p. 48, ll. 7-12). As a small business, the restaurant typically required only two or three people to operate the location. (Transcript of Hearing Before Single Commissioner p. 56, ll. 19-21). On a normal day, Francesco Sorce, Nancy Sorce, and the claimant would be the people working at the restaurant. (Transcript of Hearing Before Single Commissioner p. 66, ll. 18-25; p. 67, ll. 1-4). Infrequently, if additional help was needed, Edwin Molina would be allowed to work at the restaurant. (Transcript of Hearing Before Single Commissioner p. 68, ll. 12-18). However, Mr. Molina would only work on a very limited, sporadic basis on days that he would call or randomly stop in the restaurant and ask if he could help and only if needed by the restaurant. (Transcript of Hearing Before Single Commissioner p. 49, ll. 22-25; p. 50, ll. 1-7). In addition, if needed, friends and family members of the Sorce family would provide assistance to the restaurant on a very limited, irregular, and/or voluntary, unpaid basis. (Transcript of Hearing Before Single Commissioner p. 52, ll. 9-19 discussing the

voluntary nature of Gino Sorce's relationship with the restaurant); (Transcript of Hearing Before Single Commissioner p. 55, ll. 15-25; p. 56, l. 1 discussing the voluntary nature of Katrina Sorce's employment); (Transcript of Hearing Before Single Commissioner p. 48; ll. 13-25; p. 53, ll. 3-18 discussing the fact that Katrina Sorce's brother, Hipolito Rivera, help out at the restaurant only five (5) or six (6) days in 2013); (Transcript of Hearing Before Single Commissioner p. 53, ll. 21-25; p. 54, ll. 1-13 discussing the voluntary nature of Francesco Sorce's friend Alan's employment). (Transcript of Hearing Before Single Commissioner p. 50; ll. 17-25; p. 51, ll. 1-5 discussing the limited and sporadic nature of work performed by Ernesto Hernandez). While Appellant testified that several other people worked at Gino's the King of Pizza, LLC that testimony was based upon speculation and hearsay and proved to be erroneous. (Transcript of Hearing Before Single Commissioner p. 51; ll. 21-25; p. 52, ll. 1-4 discussing how Carlos Perez-Perez was unknown to and never worked for Gino's the King of Pizza, LLC contrary to Appellant's position); (Transcript of Hearing Before Single Commissioner p. 56, ll. 2-18 discussing the fact that Katrina Sorce's brother-in-law, Carlo Sorce, lived in New York and did not work at Gino's the King of Pizza, LLC contrary to Appellant's assertion).

Standard of Review

Where factual issues before the Commission involve a jurisdictional question, this court's review is governed by the preponderance of evidence standard. *Nelson v. Yellow Cab Co.*, 343 S.C. 102, 108, 538 S.E.2d 276, 279 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002); *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994). The appellant bears the burden of demonstrating by a preponderance of the evidence that jurisdiction is proper. *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 244, 647 S.E.2d 691, 695 (Ct. App. 2007)). The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. (*Bass v. Kenco Group*, 366 S.C. 450, 455, 622 S.E.2d 577 (Ct. App. 2005)); (*Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000)); (*Parsons v. Georgetown Steel*, 318 S.C. 63, 456 S.E.2d 366 (1995)); (*Frame v. Resort Servs., Inc.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2002)); (*Gibson v. Spartanburg Sch. Dist. #3*, 338 S.C. 510, 517, 526 S. E. 2d 725, 729 (Ct. App. 2000)). While the appellate court may take its own view of the preponderance of evidence on the existence of an employer-employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel. (*Hernandez-Zuniga*, 374 S.C. at 244, 647 S.E.2d at 695).

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. (*Nelson v. Yellow Cab Co.*, 343 S.C. 102, 109, 538 S.E.2d 276, 279 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E. 2d 110 (2002) (citing *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 416 S.E.2d 639

(1992)); (*O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 305 S.E.2d 241 (1983)). However, a construction should not be adopted that does violence to the specific provisions of the Act. (*Hernandez-Zuniga*, 374 S.C. at 243, 647 S.E.2d at 695); (*White v. J. T. Strahan Co.*, 244 S.C. 120, 125, 135 S.E.2d 720, 723 (1964)). The statutory language unequivocally exempts employers who do not regularly employ four or more employees. (*Hernandez-Zuniga*, 374 S.C. at 257, 647 S.E.2d at 702). The reviewing body is "constrained to interpret the Act as it is written and does not have the power to expand its scope." (*Id.*)

Argument

I. This Court should affirm because the Appellate Panel of the Full Commission correctly found that Gino's the King of Pizza, LLC is not subject to or bound by the provisions of the South Carolina Workers' Compensation Act because it did not regularly employ four (4) or more persons.

In his brief, Claimant/Appellant claims the Appellate Panel erroneously found that Gino's the King of Pizza, LLC, was not subject to the provisions of the South Carolina Workers' Compensation Act. This argument lacks merit, and the Appellate Panel properly found that Gino's the King of Pizza, LLC did not regularly employ four (4) or more people during the time periods relevant to this action. This Court should affirm for three reasons. First, Gino's the King of Pizza, LLC is a separate and distinct entity from any other entity operating pizza restaurants in the area and no employees from any other pizza restaurant should be considered when determining whether Gino's the King of Pizza, LLC regularly employs four (4) or more people. Second, Gino's the King of Pizza, LLC did not regularly employ four (4) or more employees at any time relevant to this action. Third, Gino's the King of Pizza, LLC

provided credible witnesses while the claimant's testimony was merely based on speculation and hearsay.

- a. **Commissioner Taylor and the Appellate Panel of the Full Commission correctly found that Gino's the King of Pizza, LLC is a separate and distinct entity from other entities operating businesses bearing the name "Gino's Pizza" and correctly excluded from jurisdictional consideration the employees of those unrelated entities.**

Defendant respectfully submits that the single Commissioner and Appellate Panel did not err in finding that Gino's the King of Pizza, LLC is a separate and distinct entity from any other entity conducting business using "Gino's" in their trade name. While Appellant has asserted that Gino's the King of Pizza, LLC owns and operates multiple locations, the record reflects otherwise.

In his brief, Appellant has asserted that the Sorce family owns three restaurants bearing the name "Gino's Pizza." However, this is inaccurate and not relevant to this action. The public records show that all of the asserted "Gino's Pizza" locations are owned and operated by separate and distinct business entities. (Appellant's APA No. 8: SC Secretary of State Records). Appellant did not introduce anything into the record reflecting the identities of the officers or members of those other entities. In addition, it is clear from the filings in this action that Appellant does not believe any other entities should be joined because none of those other business entities have been included in this action by the claimant, there are no allegations that corporate formalities were not followed, and nothing in the record would support Appellant's attempt to amalgamate unrelated business entities. (Form 50).

The restaurant in question, located 532 Highway 17 N., North Myrtle Beach, South Carolina 29582, is owned and operated by Gino's the King of Pizza, LLC of which Nancy Sorce and Francesco Sorce are the LLC members. (Transcript of Hearing Before Single Commissioner p. 46, ll. 23-25; p. 47, ll. 1-21) (Employer's APA #2: K1's for Gino's the King of Pizza, LLC identifying Nancy Sorce and Francesco Sorce as members of the LLC). At the hearing, evidence and testimony was introduced showing that Gino's the King of Pizza, LLC does not own or operate any locations other than the restaurant located at 532 Highway 17 N., North Myrtle Beach, South Carolina 29582. (Hearing Before Single Commissioner p. 47, ll. 3-21). Appellant did not offer anyone to contradict Gino's the King of Pizza, LLC's testimony and, instead, relies on an unauthenticated listing from the Sun News directory identifying "Gino's Real New York Pizzeria" having three locations. However, the employer in this action is "Gino's the King of Pizza, LLC" and not "Gino's Real New York Pizzeria." (Form 50 and Form 51). Notwithstanding that fact, Appellant did not offer anyone from the Sun News to testify as to the authenticity of the newspaper clipping or to testify as to how that information was obtained, who provided that information, who verified that information, or how accurate that information is.

At the Hearing, Appellant's argument to include other unrelated business entities' locations was based on the fact that there are multiple pizza restaurant locations containing variations of the name "Gino's" and the word "pizza" in the Sun News directory. However, Commissioner Taylor and the Appellate Panel correctly found that the name of the restaurant has nothing to do with its ownership or corporate structure. For instance, if Appellant's assertion is correct, then Gino's the King of

Pizza, LLC also has ownership in the unrelated business entity named Gino's Pizza & Spaghetti which has forty (40) locations in various states including West Virginia, Kentucky, Ohio, and Virginia. In addition, other unrelated pizza restaurants bearing variations of the name "Gino's Pizza" appear nationwide.¹ In his argument, Appellant is disregarding the legal significance of corporate formation and the protections offered to each separate and distinct entity. Testimony and evidence was introduced showing that Gino's the King of Pizza, LLC does not maintain any business records for any other business entity and only performs business on behalf of the one location that it owns. (Hearing Before Single Commissioner pp. 47 ll. 13-21).

Appellant also argues that other locations bearing variations of the name "Gino's Pizza" should be included in this action for jurisdictional purposes because Nancy Sorce, or her son-in-law, are the registered agents for Gino's Classic New York Pizza Company, Inc., Ginos Real New York Pizza, LLC, and Gino's the King of Pizza, LLC. However, it appears that Appellant is confused as to the legal significance of a registered agent. To be a registered agent, one must only be an individual resident of this State, a domestic corporation, another limited liability company, or a foreign corporation or foreign company authorized to do business in this State. (S.C. Code Ann. 33-44-108). There is no requirement that the registered agent is a shareholder or

¹ Examples Gino's Pizzeria, 1701 S Mays St Ste B, round Rock, TX 78664, Gino's Pizza, 1402 Lancaster Ave , Wilmington, DE, Gino's Pizza, 2210 N Market St , Wilmington, DE, Gino's Pizza, 383 #E Avenue of the Flags, Buellton, CA 93427, Gino's Pizza, 539 5 Cities Dr , Pismo Beach, CA 93449, Gino's Pizza, 6260 Glenwood Ave Ste 126, Raleigh, NC, Gino's, 3803 Highway 74 E, Wingate, NC 28174, Gino's Pizza, 1200 Atlantic Ave, St 100, Atlantic City, NJ 08401, Gino's Pizza, 345 E 83rd St New York, NY 10028, Gino's Pizza, 490 S Herlong Ave, Rock Hill, SC 29732, Gino's Pizzeria, 50 Pondfield Road West, Bronxville, NY, Gino's Pizzeria & Restaurant, 158-46 Crossbay Boulevard Howard Beach, NY 11414, Gino's of Emlont Pizzeria & Restaurant, 1615 Dutch Broadway Elmont, NY 11003, Gino's of Kissena Pizzeria & Restaurant, 65-01 Kissena Blvd, Flushing, NY 11367, and Gino's East of Chicago Pizza has ten (10) locations throughout Chicago and surrounding areas

member of the corporate entity and many times they are not. (*Id.*). Also, the person acting as the registered agent for multiple businesses does not create joint liability between those business entities. The registered agent is merely the one whom is to be served if there is an action filed against the business in which he or she is acting as the registered agent. It is often that a person with no ownership interest is a registered agent for many unrelated businesses. For example, many corporate attorneys act as the registered agent for multiple unrelated businesses in which they do not maintain an ownership interest. This does not amalgamate those otherwise unrelated businesses.

Appellant also argues that because multiple business entities are in the same business of being a restaurant and have hired one similar employee, those business entities are jointly liable and all employees should be considered in determining whether Gino's the King of Pizza, LLC maintains the numerical-minimum number of employees to be subject to the Act. However, there is no law to support such a position. Myrtle Beach is well known for being driven by its service industry. While many of the residents work in that industry, most require employment by multiple restaurants to make a living ^owage. The fact that an employee at one pizza restaurant chose to seek employment from a second pizza restaurant only shows that he is comfortable working in that food and beverage area. Appellant did not present anyone to testify in support of his contention that employees were "exchanged" between locations. Even if he had, no South Carolina court has recognized Appellant's argument that working at two similar restaurants would amalgamate those business entities. Otherwise, someone working at Pizza Hut on the weekdays and delivering pizzas for Papa John's on the weekends would unknowingly open up both restaurants to joint liability. While

Appellant asserts in his brief that "Employer admits one employee was moved from one location to another", this is a mischaracterization of the testimony provided by Gino's the King of Pizza, LLC and unsubstantiated by the record. Appellant also asserts in his brief that "[w]hen Employer obtained Workers Compensation coverage after the accident two different Gino's Pizzas were covered on one policy." This again is a mischaracterization of the testimony provided by Gino's the King of Pizza, LLC and unsubstantiated by the record. (Deposition of Katrina Sorce p. 22, ll. 22-25; p. 23, ll. 1-25; p. 24, ll. 1-5).

Finally, Appellant argues that the unauthenticated "Ginos Real New York Pizza" Facebook Page provided, which includes comments by "Ginos Real New York Pizza", somehow links it to the separate Gino's the King of Pizza, LLC entity. Appellant's argument is, again, relying on the fact that the name "Gino's" is used by the separate entities. This argument fails for the same reasons explained above. While Appellant may want to include all pizza restaurants containing variations of the name "Gino's Pizza" into the action, the law does not support doing so.

- b. Commissioner Taylor and the Appellate Panel of the Full Commission correctly found that Gino's the King of Pizza, LLC did not regularly employ four (4) or more employees and, therefore, was not subject to the Act.**

Per S.C. Code § 42-1-360, employers who do not "regularly employ" four or more workers are not covered under the Act. Because South Carolina workers' compensation law is fashioned after North Carolina's statute, South Carolina courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act. *Nelson v. Yellow Cab Co.*, 343 S.C 102, 117-118, 538

S.E.2d 276, 284 (Ct. App. 2000) aff'd 349 S.C. 589, 564 S.E.2d 110 (2002) (citing *Spoone v. Newsome Chevrolet-Buick*, 309 S.C. 432, 424 S.E.2d 489 (1992); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) (decisions of North Carolina courts interpreting that state's Workers' Compensation statute are entitled to weight when South Carolina courts interpret South Carolina Workers' Compensation law). North Carolina courts have interpreted "regularly employed" as "employment of the same number of persons throughout the period with some constancy." *Grouse v. DRB Baseball Management, Inc.*, 121 N.C. App. 376, 465 S.E.2d 568, 570 (N.C. Ct. App. 1996) (citing *Patterson v. L.M. Parker Co.*, 2 N.C. App. 43, 162 S.E.2d 571, 575 (1968)). The court in *Patterson* explained that the purpose of the Act would not be accomplished "by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act." *Patterson*, 162 S.E.2d at 575

Under South Carolina law, the statute itself does not define "regularly employed." In *Hernandez-Zuniga*, this Court opined that dictionaries can be helpful tools during the initial stages of legal research for the purpose of defining statutory terms. (*Hernandez-Zuniga*, 374 S.C. 235 at 248, 647 S.E.2d 697). This Court continued by explaining that Black's Law Dictionary, 1285 (6th ed. 1990) defines "[r]egular" as meaning "usual, customary, normal or general." (*Id.*). In addition, there are a variety of South Carolina cases that discuss this issue. South Carolina courts have found 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." *Hernandez-Zuniga*, 374 S.C. at 248, 647 S.E.2d at 697-98 (citing *Smith v. Coastal Tire and Auto Service* 263 S.C. 77, 81, 207 S.E.2d 810, 812 (1974); see also *Johnson v. Jackson*, 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012) (same proposition). Perhaps to add clarity to the analysis, some courts and commentators have juxtaposed the "casual employee" and "regularly employed" analyses. This Court in *Hernandez-Zuniga* provided guidance when it opined:

The question whether a particular employee should be disregarded for numerical-minimum purposes is very similar to the question whether he or she is a casual employee. It has been said that the two concepts are the same, and observation which, if true, would somewhat simplify the classification problem. As in the casual employment definition, both duration and regularity of recurrence are important factors. Thus, if the minimum number is exceeded on only eight of the one hundred and four days preceding the accident, the employer is not regularly employing the minimum. But if the number exceeds the minimum on seventeen out of twenty-seven days in the course of a construction job, the employer is covered.

Hernandez-Zuniga, 374 S.C. at 246, 647 S.E.2d at 696 (citing 4 Larson, *Workers' Compensation* §§ 74.01-02).

In analyzing the jurisdictional question at issue here, this Court looked to the number of days worked by a person in determining whether he or she was to be considered as "regularly employed" by an employer. In doing so, this Court differentiated between the elements used to determine whether an employer "regularly employs" the numerical-minimum (4 or more) to be subject to the Act and the elements evaluated to decide whether an otherwise casual employee may qualify for benefits under the Act where he or she is employed by an employer that regularly employs four

(4) or more employees. This distinction is important to the jurisdictional analysis currently before this Court.

In determining whether an employee should be disregarded from the calculation of an employer's numerical-minimum, which is the issue in front of the Court, South Carolina courts look to see if a person's work is too sporadic and casual to be considered regularly employed by the employer. If it is, that person is not included in the count for the numerical-minimum determination. Appellant incorrectly asserts that to be excluded from being counted as a "regularly employed" employee, an employee must be both "casual" and "not in the course of the trade, business, or occupation of his employer." However, Appellant is erroneously applying the wrong test. That is the test used to determine whether a casual employee will receive benefits when employed by an employer that is subject to the Act (i.e. one that regularly employ's four or more people). It is not used when determining whether that employee counts in an employer's numerical-minimum for jurisdictional purposes. This distinction is seen in the analysis provided by this Court in *Harding v. Plumley*. In that action, this Court held that construction workers whose work was sporadic and casual would not be counted as "regularly employed" employees when determining the same jurisdictional question present here. See *Harding v. Plumley*, 329 S.C. 580, 496 S.E.2d 29 (Ct. App. 1998) (holding that two construction employees whose work was sporadic and casual would not be considered when determining whether the construction contractor employer "regularly employed" four (4) or more employees). This Court was not concerned with the fact the employer owned a construction business and the workers in question were doing construction work. Thus, the "same trade, business, profession, or

occupation of employer" element of the analysis does not apply when determining if workers should be excluded from the numerical-minimum count for jurisdictional purposes.

At the Hearing, Appellant attempted to support his position that Gino's the King of Pizza, LLC regularly employed four (4) or more people through his testimony alone. No other person identified by Appellant as being employed by Gino's the King of Pizza, LLC testified on his behalf and Appellant's testimony was filled with speculation, hearsay, and inaccuracies. Appellant has asserted that multiple people were regularly employed by Gino's the King of Pizza, LLC. Regarding himself, Appellant first testified that he worked five (5) days a week, every week in 2013. (Hearing Before Single Commissioner p. 10, ll. 6-18; p. 25, ll. 1-10). However, he later testified that he worked as few as two days a week. (Hearing Before Single Commissioner p. 27, ll. 19-23; p. 29, ll. 9-13). Appellant then attempted to speculate as to how many days each other person he identified as an employee worked and about the working relationship each of those people had at Gino's the King of Pizza, LLC. However, it was clear that his testimony was based on speculation and hearsay. (Hearing Before Single Commissioner p. 33, ll. 3-25; p. 32, ll. 7-16) (Commissioner Taylor's Order p. 6, ¶ 9). For example, Appellant testified that he did not know who the owners of the business entity were and was just guessing based on what he was allegedly told by others. (Hearing Before Single Commissioner p.33, ll. 17-21; p. 34, ll. 1-5). In another instance, Appellant testified that Carlo Sorce worked with him at Gino's the King of Pizza, LLC. (Hearing Before Single Commissioner p. 35, ll. 7-9). However, only moments later, Appellant testified that Carlo Sorce actually lived in

New York. (Hearing Before Single Commissioner p. 35, ll. 12-14). Nonetheless, even after testifying that Carlo Sorce lived in New York, Appellant maintained his position that Carlo Sorce worked at Gino's the King of Pizza, LLC in North Myrtle Beach, SC. (Hearing Before Single Commissioner p. 35, ll. 15-17). And again, moments later, Appellant changed his sworn testimony and admitted that Carlo Sorce had never worked with him at Gino's the King of Pizza, LLC. (Hearing Before Single Commissioner p. 37, ll. 21-23). Appellant then made a final change to his testimony when he swore to the Commission that Carlo Sorce worked for a restaurant bearing the name "Gino's Pizza" in New York but then sometimes travelled to Myrtle Beach to work at Gino's the King of Pizza, LLC. (Hearing Before Single Commissioner p. 38, ll. 14-17). Appellant presented no credible evidence as to the employment arrangements or work schedules of any employee other than himself. (Commissioner Taylor's Order p. 6, ¶¶ 9, 10, and 12). He attempted to guess about how many days other people worked and about whom the owners of the LLC were based on what he was told. He provided no witnesses other than himself to substantiate his assertions and, in the end, his testimony proved to be inconsistent, speculative, and unreliable. (Commissioner Taylor's Order p. 6, ¶¶ 9, 10, and 12).

At the Hearing, Katrina Sorce, a bookkeeper for Gino's the King of Pizza, LLC who handles the payroll and has assisted in the restaurant, provided testimony regarding the actual employment relationships Gino's the King of Pizza, LLC had with all of the people alleged by Appellant to have been regularly employed. Testimony and evidence was introduced showing that Nancy Sorce and Francesco Sorce are the members of Gino's the King of Pizza, LLC. (Hearing Before Single Commissioner p. 46, ll. 23-

25; p. 47, ll. 1-2) (Employer's APA #2: K1's for Gino's the King of Pizza, LLC identifying Nancy Sorce and Francesco Sorce as members of the LLC). Testimony and evidence was introduced showing that only Nancy Sorce, Francesco Sorce, and Appellant regularly performed work at the restaurant. (Hearing Before Single Commissioner pp. 66, ll. 18-25; p. 67, ll 1-25, p. 68, ll. 11-8) (Commissioner Taylor's Order p. 7, ¶ 18). As neither Nancy Sorce nor Francesco Sorce elected to be included as employees for workers' compensation purposes, they are not counted as an employee of Gino's the King of Pizza, LLC under the Act. (See S.C. Code Ann. § 42-1-130 and Commissioner Taylor's Order p.6, ¶ 13). Therefore, Gino's the King of Pizza, LLC only had one (1) regularly employed employee. (Commissioner Taylor's Order p.7, ¶ 19).

While Appellant speculated as to other people he believed to be regularly employed people at the restaurant, Gino's the King of Pizza, LLC, through testimony from Katrina Sorce, explained that all other people that performed work in the restaurant did so in a nature that was, at most, sporadic, casual, on a very limited basis and with the understanding that the work would not continue. (Hearing Before Single Commissioner p. 53, ll. 3-18 detailing the Hipolito Rivera is a family member of the LLC members and only worked for 5 or 6 days total in 2013) (Hearing Before Single Commissioner pp. 48, ll. 13-25; p. 49, ll. 1-25; p. 50, ll. 1-25; p. 51 ll. 1-20 discussing the sporadic nature of others identified by Appellant as alleged employees). In addition, testimony and evidence introduced at the hearing showed that some of the people alleged by Appellant to have been employed at the restaurant did not even perform any work at Gino's the King of Pizza, LLC. For instance, testimony from

Katrina Sorce showed that Carlo Sorce, Mrs. Sorce's brother-in-law, lives in New York and never performed work for the restaurant in 2013. (Hearing Before Single Commissioner p. 56, ll. 2-8). As another example, testimony was introduced by the bookkeeper and spokesperson for Gino's the King of Pizza, LLC that Carlos Perez-Perez was unknown to Gino's the King of Pizza, LLC and that he had never performed work in the restaurant. (Hearing Before Single Commissioner p. 51, ll. 21-25, p. 52, ll. 1-4). Finally, testimony and evidence showed that multiple people asserted by Appellant to have been employees of Gino's the King of Pizza, LLC performed tasks on a voluntary basis, did not collect a paycheck, and never expected to be paid for any activities they performed. (Hearing Before Single Commissioner p. 55, ll. 15-25; p. 56, l. 1 discussing the voluntary nature of Katrina Sorce) (Hearing Before Single Commissioner p. 52, ll. 9-19 discussing the voluntary nature of Gino Sorce) (Hearing Before Single Commissioner p. 53, ll. 19-25; p. 54, ll. 1-13 explaining that Alan was a friend of the LLC members and helped when needed on a voluntary and free basis with no expectation of being paid). For the above reasons, the Appellate Panel correctly found that Gino's the King of Pizza, LLC only regularly employed one (1) employee and was not subject to the Act.

Interestingly, Appellant has attempted to use wage records, or the lack thereof, to support his position that Gino's the King of Pizza, LLC employed four or more regularly employed employees. In addition, Appellant has argued that the fact that Appellant was an illegal should be considered in this jurisdictional analysis. However, there is no South Carolina case law that would support Appellant's positions on this issue and, as explained by the single Commissioner and the Appellate Panel, that

information has no bearing on this jurisdictional analysis. As Commissioner Taylor correctly pointed out, the focus of the Hearing was to determine whether people were regularly employed not to evaluate whether business records were kept. (Hearing Before Single Commissioner p. 63, ll. 6-10; p. 64, ll. 13-23). Whether business records were kept or wage payment statutes were followed is "not one of the standards the commission basis regular employment on." (Hearing Before Single Commissioner p.64, ll. 13-23). For those reasons, objections were lodged at the Hearing and sustained by Commissioner Taylor. Because the objections were sustained, no testimony was provided by witnesses for Gino's the King of Pizza, LLC clarifying how it kept its business records or how it was in compliance with wage payment statutes. Even if wages were discussed, South Carolina case law does not look to the amount of wages paid to a person or whether an employer keeps proper wage records in determining whether an employer regularly employs four (4) or more people to be subject under the Act. For the above reasons, none of Appellants arguments based on those grounds are proper for consideration in the jurisdictional analysis and they were correctly disregarded by the single Commissioner and the Appellate Panel.

- c. **Commissioner Taylor and the Appellate Panel correctly found that Katrina Sorce, a bookkeeper responsible for Gino's the King of Pizza, LLC's payroll activities, provided the only credible testimony of the facts pertinent to the jurisdictional question at issue.**

Gino's the King of Pizza, LLC presented Katrina Sorce at the Hearing to testify regarding the number of people regularly employed by Gino's the King of Pizza, LLC. While Appellant suggests that Katrina Sorce has never worked in Gino's the King of Pizza, LLC, the record reflects otherwise. Additionally, while Appellant has asserted

that the best person to testify about the jurisdictional issues would have been the president of the employer, an officer, an employee, a CPA, or an accountant, this is not so. Katrina Sorce is the wife of one of the members of the LLC, Francesco Sorce, and helps out in the restaurant on a voluntary and unpaid basis. (Hearing Before Single Commissioner p. 55, ll. 14-24). She also works on a voluntary and unpaid basis as a bookkeeper performing payroll and other activities for Gino's the King of Pizza, LLC. (Katrina Sorce Deposition p. 5, ll. 22-25; p. 29, ll. 6-16; p. 34, l. 22). By performing activities related to the payroll, bookkeeping, shopping and activities in the restaurant itself, Mrs. Sorce has personal knowledge related to the employment relationship Gino's the King of Pizza, LLC has with each of its workers and testified accordingly. She is fully knowledgeable of all information related to the work relationships between Gino's the King of Pizza, LLC and all people alleged by the claimant to have been employees. (Hearing Before Single Commissioner p. 46, ll. 12-22). No objections were asserted at the Hearing about the ability of Mrs. Sorce to testify on the necessary topic areas and Appellant cannot now object to her testimony. While Katrina Sorce testified as to her personal knowledge, Appellant's testimony was inconsistent and ultimately speculation and hearsay. (Commissioner Taylor's Order p. 6, ¶ 9).

Additionally, Appellant has asserted that Ms. Sorce's testimony is not credible due to alleged issues with payment of, among other things, employment taxes. However, as explained above, these issues were addressed and discarded by Commissioner Taylor. In addition, at the inception of the hearing, Commissioner Taylor held that the sole issue and purpose of the hearing was to determine the issue of jurisdiction, i.e. whether Gino's the King of Pizza, LLC was subject to the act by way

of having four or more regularly employed employees as required under the Act. (Hearing Before Single Commissioner p. 4, ll. 15-23). Due to the limited nature of the hearing, Mrs. Sorce did not provide testimony clarifying Gino's the King of Pizza, LLC's position on those issues. For the same reasons discussed by Commissioner Taylor and the Appellate Panel of the Full Commission, this Court should disregard Appellant's arguments on those topic areas. (Hearing Before Single Commissioner pp. 63, ll. 1-15; p. 64, ll. 1-25; p. 66, ll. 1-9).

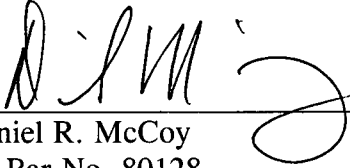
At the conclusion, Commissioner Taylor found that the only credible testimony on issues relevant to the jurisdictional question was provided by Katrina Sorce on behalf of Gino's the King of Pizza, LLC, (Commissioner Taylor's Order p. 6, ¶ 12). Because Commissioner Taylor personally witnessed all parties providing testimony and had a chance to consider each party's mannerisms, inflection, and tone, this Court should give deference to Commissioner Taylor's findings regarding witness credibility.

Conclusion

For the reasons presented above, Gino's the King of Pizza, LLC asserts that Commissioner Taylor and the Appellate Panel of the Workers' Compensation Commission were correct in holding that Gino's the King of Pizza, LLC was not subject to the Act and in denying the claimant's request for benefits. Gino's the King of Pizza, LLC submitted sufficient evidence at the hearing to meet its burden and find that it did not regularly employ four (4) or more people at all times relevant to this action. It was Appellant who failed to meet his burden. Gino's the King of Pizza, LLC, therefore, respectfully requests that this Honorable Court affirm the Order of the Appellate Panel.

Respectfully Submitted,

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April 21, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APR 22 2015

SC Court of Appeals

APPEAL FROM WORKERS COMPENSATION COMMISSION
WCC# 1308837

Case No. 2015-000191

Esvin Leonel Lopez Perez, Employee, Appellant,

v.

Gino's The King of Pizza, Employer, .. . Respondent.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Gino's The King of Pizza, Employer, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Respondent's Designation of Matter for the Record on Appeal

Initial Brief of Respondent

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April 22, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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April 22, 2015