THE STATE OF SOUTH CAROLINA
In the Supreme Court



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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

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Opinion No. 2015-UP-051 (S.C. Ct. App. filed Jan. 28, 2015)

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Anita Chaudhari, Deceased, Employee,
and Dharmendra Chaudhari, Claimant, . . . . . Respondents,

v.

Avni Grocers, Employer, Defendant, and The
South Carolina Uninsured Employer's Fund,

of whom

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

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**RETURN**

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## COUNTER-STATEMENT OF THE CASE

This is a tragic case that has a long history with the Workers' Compensation Commission and with the courts. The deaths occurred in 2002 and the matter has been proceeding since February 2003. The case has been before the Court of Appeals twice.[1] The issues are, however, fairly straightforward.

The Claimant/Respondent, Dharmendra Chaudhari, is the widower of the deceased Employee, Anita Chaudhari. Mrs. Chaudhari and her brother-in-law, Verendra Puniyani[2], were murdered on November 14, 2002, during an inside-job robbery by a co-

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[1] Respondent includes the entire procedural history for this Court's information. *See Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 116, 754 S.E.2d 486, 488 (2014) (noting a workers' compensation case came to the Court "after multiple workers' compensation hearings/appeals spanning more than 11 years.").

[2] The Fund has also sought review of Mr. Puniyani's companion case.

worker. Both Mr. Puniyani and Mrs. Chaudhari were on the job with Avni Grocers (the Employer). Each deceased worker's estate brought a claim under the Workers' Compensation Act.

The Employer was operating without Workers' Compensation insurance coverage at the time of the murders. The Fund, therefore, took over defense of the case. The primary issue eventually became whether the Employer regularly employed four or more employees so as to be subject to the Act at the time of the decedents' deaths.

The cases were consolidated and called for a hearing before Commissioner David Huffstetler on January 4, 2006. 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 issues the Fund had as to coverage or benefits.[3] The Fund did not submit any evidence at the hearing.

The Fund asserted it did not have timely notice of the claims. Commissioner Huffstetler asked the Claimants to agree to continue the matter. Claimants wanted to proceed, however, because Claimants had been waiting for a year for a hearing, one Claimant had traveled from Atlanta, Georgia, and Claimants produced proof that the Fund had, in fact, been properly served. Commissioner Huffstetler continued to insist that Claimants continue the hearing (confessing in his instructions for an order that he was rude to the Claimants' counsel in this effort, R. p. 204), but Claimants still wanted to proceed. Commissioner Huffstetler concluded that the Fund was properly served with the

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

Form 52 and received adequate notice of the hearing.

The Employer, Avni Grocers, failed to appear at the hearing. During the pre-hearing 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 or more employees. After the hearing Commissioner Huffstetler ruled that Claimants failed to produce substantial evidence that Avni Grocers regularly employed four or more employees so as to be subject to the Act and, at best, Claimants offered proof of only three employees at the store where the decedents worked and died.

Claimants timely sought review by an Appellate Panel of the Commission. While the appeal was pending, Claimants located Harendra Pal, the owner of Avni Grocers, who had moved from South Carolina immediately after the murders. Claimants obtained an affidavit from Mr. Pal that established Avni employed four or more employees and that the Employer was subject to the Act. Claimants filed a Motion to Add Additional Evidence to the record and proffered the Pal affidavit. The Appellate Panel refused to accept the affidavit, holding it did not meet the test of "after-discovered evidence" under 25A S.C. Code Ann. Regs. 67-707 (Supp. 2006). The Appellate Panel thereafter affirmed.

Claimants sought judicial review of both the affirmance of Commissioner Huffstetler's order as well as the denial of the motion to accept the additional evidence. The two cases continued to be consolidated for purposes of judicial review.

The circuit court (Judge Gary Hill) heard arguments and on September 13, 2007, Judge Hill entered an order finding the Commission erred as a matter of law in refusing to accept Mr. Pal's affidavit as additional evidence. Judge Hill further ruled separately that,

notwithstanding Mr. Pal's affidavit, the preponderance of the evidence Claimants submitted at the hearing supported Claimants' position that the Employer regularly employed four or more employees so as to be subject to the Act.[4] Judge Hill declined to address any additional issues, and remanded the matter to the Commission for further proceedings consistent with his rulings.

The Fund appealed Judge Hill'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 the cases jointly. At oral argument, Claimants' counsel advised the Court that Judge Hill's order was not immediately appealable because it contained a remand to the Commission. The Court ordered briefing of appealability and on June 29, 2010, the Court issued an order dismissing the appeals without prejudice because Judge Hill's order was not immediately appealable. *Puniyani, et al. v. Avni Grocers, Employer*, 2010-UP-338 (S.C. Ct. App. filed June 29, 2010). On July 7, 2010, the Court remitted the cases to the Commission.

The cases were consolidated again for trial and were heard before Commissioner Avery Wilkerson on November 29, 2011. (R. p. 141, l. 20 - p. 142, l. 17). The parties

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[4] Because the issue involves a jurisdictional question, Judge Hill'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 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 requisite number of employees to be subject to the Act is jurisdictional; court takes own view of the preponderance of the evidence). Judge Hill 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.*

stipulated that Mr. Dharmendra Chaudhari would reaffirm his prior testimony. (R. p. 151, ll. 4-5). They also agreed to present the prior deposition of Mrs. Puniyani's mother. (R. p. 149, ll. 8-24). The Fund objected to consideration of Mr. Pal's affidavit and to his live testimony. (Tr. p. 147, ll. 16-20). Commissioner Wilkerson admitted both the Pal affidavit pursuant to Judge Hill's order and Mr. Pal's live testimony in his discretion. On February 6, 2012, Commissioner Wilkerson entered an order finding that Avni Grocers had four 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 involved (1) the finding that Employer employed four 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 entered an order affirming Commissioner Wilkerson based upon its own review of the record.

On September 25, 2012, the Fund filed a Petition for Judicial Review. The Fund stated seven (7) separate grounds, all of which asserted error arising out of Judge Hill's prior order that reversed the Commission's initial decision denying Claimant's proffer of the Pal affidavit. (R. p. 89). The circuit court (Judge J. C. Nicholson) heard arguments on January 9, 2013. Because the exceptions raised only challenged Judge Hill's order, Judge Nicholson entered a Form 4 order that same date denying the appeal. (R. p. 61). The Fund filed and served its notice of appeal to the Court of Appeals on February 5, 2013.

Respondents filed a motion in this Court on January 13, 2014, requesting that the Court certify the appeals pursuant to Rule 204, SCACR, consolidate them for review, and

expedite the appeals. On February 21, 2014, this Court (by 3-2 vote) denied the motions.

On April 17, 2014, Respondents moved the Court of Appeals to consolidate and expedite the appeals. On April 24, 2014, the Fund filed a return opposing both motions. On April 28, 2014, the Court denied these motions.

On August 26, 2014, the Court of Appeals advised counsel that it had requested certification from this Court in *Puniyani* (*Chaudhari* was not part of the request). The Court cancelled previously scheduled oral arguments in both cases. On August 27, 2014, this Court notified the Court of Appeals that it declined to certify the appeal in *Puniyani*.

The Court of Appeals heard arguments on December 9, 2014, and on January 28, 2015, the Court issued its unpublished opinion affirming the rulings below. *Chaudhari v. Avni Grocers*, 2015-UP-051 (S.C. Ct. App. filed Jan. 28, 2015). The Fund sought rehearing and on March 5, 2015, the Court denied that petition.

On April 2, 2015, the Fund filed and served its petition seeking a writ of certiorari to the Court of Appeals from this Court.

## ARGUMENTS

### I. This case does not present the character of reasons for which this Court will grant discretionary review pursuant to Rule 242, SCACR

In the Petition for Writ of Certiorari, the Fund does not set forth any specific reason under Rule 242, SCACR, why this Court should review the Court of Appeals' decision in this case. The Court should deny the petition.

Rule 242 governs certiorari to the Court of Appeals, and provides:

> **(b) Considerations Governing Review.** A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only where there are special and important reasons*. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered: (1) Where there are novel questions of law. (2) Where there is a dissent in the decision of the Court of Appeals. (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. (4) Where substantial constitutional issues are directly involved. (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242, SCACR (emphasis added). *See also Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (2000), *overruled on other grounds Douglas v. State*, 369 S.C. 213, 631 S.E.2d 542 (2006) (a petition for writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which petitioner is entitled as a matter of right).

The Court of Appeals correctly applied relevant and settled precedent of this Court in affirming this case. Petitioner has not demonstrated any "special and important reasons" to grant the Petition in this matter and no such "special and important reasons" exists. Furthermore, the case as decided: (1) does not involve a novel question of law; (2) did not contain a dissent in the decision of the Court of Appeals; (Appx. pp. 19-21); (3) did not involve a decision of the Court of Appeals that conflicts with a prior decision of this Court; (4) does not involve substantial constitutional issues that are directly involved; or (5) does not include a federal question or a decision of the Court of Appeals that conflicts with a decision of the United States Supreme Court.

Accordingly, this Court should deny the Petition and instruct the Court of Appeals to remit the matter for further proceedings consistent with the Court of Appeals' decision.

## II. This Court Should Deny Review Because the Appeal Should Have Been Dismissed

A threshold issue is whether the Fund's appeal should have been dismissed for lack of subject matter jurisdiction. The Fund's notice of appeal was *solely* from Judge Nicholson's order affirming the Commission's ruling the second time around. The Fund did not indicate it was appealing the first order that Judge Hill entered, nor did the Fund attach Judge Hill's order to its notice of appeal. (R. p. 110). The Court of Appeals found it could reach the issues because the Fund had appealed Judge Nicholson's final order, relying upon *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). This ruling was not correct.

The *only* order the Fund attached to the notice of appeal was the Form 4 order Judge Nicholson entered. (R. p. 61). The failure to mention Judge Hill's prior order in the notice of appeal or to attach that order is not a mere clerical error in the notice. *See* Rule 203(d)(1)(B)(ii) (providing the notice of appeal "shall be accompanied by...(a) copy of the order(s) and judgment(s) to be challenged on appeal"). *Compare Weatherford v. Price*, 340 S.C. 572, 577–78, 532 S.E.2d 310, 313 (Ct. App.2000) (finding the clerical error of not referring to the trial court's original order in the notice of appeal did not merit a dismissal of the appeal because the order was attached to the notice of appeal).

Furthermore, Rule 203(e)(1) governs what information a notice of appeal "shall contain," including: (A) the name of the judge from which the appeal is taken (this notice said it was from Judge Nicholson only and did not mention Judge Hill (R. p. 110)); (B) the docket number of the case in the lower court (the notice includes only the docket

number 2012-CP-10-6355, which is from Judge Nicholson's order; the docket number from Judge Hill's order is 2007-CP-10-0013 (R. p. 21) and was not in the notice); (C) the date of the order from which the appeal is taken (the notice says it is from the order dated January 9, 2013, which is Judge Nicholson's order; Judge Hill's order was entered September 18, 2007, and that date is not mentioned in the notice). *See* Rule 203, SCACR.

*Charleston Lumber* involved a clerical error in the notice of appeal – the inadvertent failure to list in the notice of appeal one of five cases disposed of by a single order. The order being appealed in that case was attached to the notice and necessarily covered the omitted case. *Charleston Lumber* is meaningfully distinct from this case.

Here, the Fund specifically appealed *only* Judge Nicholson's order of 2013 without mentioning Judge Hill's 2007 order, without listing the 2007 case number, and without even listing Judge Hill as a judge being appealed. (R. p. 110). Under Rule 203, then, neither the Court of Appeals nor this Court has subject matter jurisdiction to address any argument directed at Judge Hill's 2007 order.

The Court of Appeals disposed of this case in an unpublished opinion pursuant to Rule 220, SCACR. That opinion need not be vacated as it is based on settled law that a court reviewing an issue involving subject matter jurisdiction may find its own facts according to the preponderance of the evidence. Also, there really is no honest dispute whether the Employer had four or more employees here. Rather, the Fund seeks a win by technical default. This Court should, therefore, deny review on the Fund's own default that is, by Rule, more than merely technical, and should instruct the Court of Appeals to remit the matter to the circuit court for calculation of interest and the entry of judgment.

## III. This Court Should Deny Review Because the Fund Failed to Properly Plead Any Defenses Before the Commission, and the Commission Should Not Have Addressed Any of Those Special or Affirmative Defenses

Commissioner Huffstetler found Claimant's Form 52 was properly served upon the Fund and the Employer but neither the Fund nor the Employer filed a Form 51 or Form 53 Answer to Claimant's Form 52. Furthermore, the Fund failed to file a Form 58 Pre-Hearing Brief for the hearing on the merits. These failures waived any affirmative or special defenses the Fund could have raised. Claimant raised these points at every step, but neither the Commission nor Judge Hill addressed this point, instead reaching the merits of the Fund's defenses.

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 mandates that a defendant in a workers' compensation case file a Form 51 or Form 53 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) . . . 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). *See also Hargrove v. Carolina Orthopaedic Surgery Associates, PA*, 389 S.C. 119, 124, 697 S.E.2d 641, 643 (Ct. App. 2010) (under Regulation 67-603, an employer who has failed to respond to a claimant's workers' compensation action is precluded only from raising affirmative defenses but may still deny liability).

The Fund was on notice by proper service of the Form 52 and was required to file

a Form 51 or Form 53 but failed to do so. Thus, under the unambiguous language of Regulation 67-603 the Fund waived any "special" or "affirmative" defenses allowed under the Act but could still generally deny liability. *Hargrove*. The assertion that the Employer employed less than four employees was not a general denial but a special or affirmative defense that the Fund waived by not filing a Form 51. *Cf. Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992) (affirmative defense conditionally admits the allegations of the complaint but asserts new matter to bar the action); *FMI, Inc. v. RMAX, Inc.*, 286 S.C. 343, 333 S.E.2d 360 (Ct. App. 1985) (affirmative defense assumes all elements of the plaintiff's case have been established).

Also, 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. (App. Br. pp. 2-3). Regulation 67-611 requires that each attorney representing a party file a Pre-Hearing Brief with the commissioner and serve a copy on the opposing party at least ten days prior to the 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. The Fund failed to file a Pre-Hearing Brief mandated by Regulation 67-611 and did not disclose any facts or legal issues the Fund contended were in controversy. Therefore the Commission should not have allowed the Fund to argue that the Employer was exempt from coverage under the Act.

The Court of Appeals held that because the issue of four employees involves subject matter jurisdiction, the issue could be raised at any time. This ruling ignores the

nature of the "less than four employees" issue. If the Court of Appeals is correct, then the Commission is required *in every case* to inquire into the number of employees *sua sponte*. And the Court must do so as well on review. That cannot be the law.

This Court should take notice of the critical procedural bar to the issues the Fund raised before the Commission, before Judge Hill, and before the Court of Appeals, and should deny review of Judge Hill's order for this additional reason.

## IV. The Circuit Court Correctly Ruled That the Commission Should Have Permitted Claimant to Supplement the Record with Mr. Pal's Affidavit

The Fund argues that the Court of Appeals should have ruled upon its argument that Judge Hill erred in reversing the Commission's original 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. (Petition, pp. 10-15). The Court should not be persuaded to address this issue through a writ of certiorari.

### A. Judge Hill's Rulings Were Correct

Section 42-17-50 of the South Carolina Code 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.

S.C. Code Ann. § 42-17-50 (1976)(emphasis added). In this case, the Appellate Panel excluded the Pal affidavit pursuant to Regulation 67-707, finding the evidence was not "new evidence" as it was known to Claimant at the time of the hearing, or by reasonable diligence could have been secured. 25A S.C. Code Ann. Regs. 67-707 (Supp. 2006).

Judge Hill held this was an error of law because Claimant established "good grounds" for the Commission to receive further evidence on the issue of whether Employer had four or more employees in this State. This ruling was correct.

In this case, 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 (R. p. 115, ll. 5-7), 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 before him. Despite receiving the Claimant's Form 52 and adequate notice of the pending hearing, the Fund failed to file any response. Under these circumstances Claimant established a "good ground" to require the Appellate Panel to receive the additional evidence under Section 42-17-50. As Judge Hill found, the Panel's refusal to do so was an error of law.[5]

Claimant demonstrated good grounds for requiring the Commission to accept Mr. Pal's affidavit as further evidence in the case. Mr. Pal unquestionably knows the nature of

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[5] Judge Hill found that insofar as Regulation 67-707 appeared to restrict Claimant's ability to bring forth the additional evidence in this matter, the Regulation was at odds with Section 42-17-50, which provides the Commission "shall ... receive further evidence" upon a showing of good grounds. This ruling was correct. 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 Avni's ownership and the number of employees he had at each location. Mr. Pal did not appear at the first hearing because he left the country, and Claimant relied upon the Compliance and Coverage Division's determination and the lack of any defensive response by the Fund in proceeding without locating Mr. Pal and obtaining his testimony.

The Fund challenges several Judge Hill's factual findings. (Petition, p. 11). The Fund did not make a motion to reconsider or alter and amend the judgment pursuant to Rules 52(a) and 59(e), SCRCP. *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 Section 42-17-50 because the Regulation in fact simply defines "good grounds" for purposes of the statute. (Petition, pp. 13-14). Again, this point was not argued to or ruled upon by Judge Hill, nor did the Fund raise the point by post-judgment motion. In any event, as Judge Hill held, the Regulation cannot define a statutory term in a way that limits the manner in which evidence may otherwise be admissible under that statute. *US Outdoor Advertising, Inc. v. SC Dep't of Transp.*; *Gadson v. Mikasa Corp.* Furthermore, nothing in Regulation 67-707 defines "good grounds" as used in § 42-17-50.

The Fund argues that the Court of Appeals 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). (Petition, p. 12). This argument misses the point raised in this case and ruled upon by Judge Hill. As Judge Hill noted, while the Court of Appeals 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 that the application of the regulation conflicted with Section 42-17-50. (R. p. 27, footnote). *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 Section 42-17-50.

*Martin* involved the proffer of evidence as "after discovered" under the Regulation. This was without any claim that application of that Regulation conflicted with Section 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. The Court of Appeals 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. Nobody in *Holcombe* or *Martin* argued that they had presented "good grounds" so as to require the Commission to admit the evidence under the statute.

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. In this case, because the Fund chose not to respond to Claimant's Form 52 and filed no Pre-Hearing Brief, it was not until the hearing was convened that Claimant was apprised that the Fund would contest whether the Employer

had the requisite number of employees to be subject to the Act. Thus, while the Regulation is not invalid on its face, application of the "newly discovered evidence" rule thereunder conflicted with the plain language of Section 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*.

Section 42-17-50 provides that 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 Section 42-17-50 is not mandatory upon a showing of good grounds, then the Regulation further conflicts with the statute.

The Fund points to Section 1-23-320 of the South Carolina Code as providing that Mr. Pal's affidavit did not constitute "evidence" under the APA. (Petition, p. 14). First, the Fund never made this argument below and Judge Hill 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* (Rule 59 applies when a

circuit court sits in an appellate capacity).

Second, Section 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.

S.C. Code Ann. § 1-23-320 (Supp. 2012). There is nothing in Section 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 petition.

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 meets the statute's standards. *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 set forth a statement of facts which is sworn as the truth of the statements contained therein. It is thus "testimony" which may be considered under the statute.

The Fund further argues that under Section 1-23-320(e), "opportunity must be afforded to all parties to respond." (Petition, p. 14). Again, this argument was not made to

or ruled upon by Judge Hill, and the Fund did not seek a ruling by post-judgment motion. Rules 52 and Rule 59, SCRCP; *City of Rock Hill v. Suchenski*. Second, 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, or even offer evidence. Commissioner Huffstetler gave the Fund every opportunity to respond and present evidence and argument on all issues.

The Court should deny review as it was unnecessary for the Court of Appeals to address the merits of this issue. 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 the matter to the Commission with instructions to reconsider its ruling in light of Mr. Pal's affidavit, were the appropriate rulings.

### B. The Issue of the Admission of the Pal Affidavit is Now Moot

Even if the issue is preserved for review, and even if Judge Hill ruled erroneously about the admission of the Pal affidavit, that issue is now moot. At the hearing before Commissioner Wilkerson, Claimant presented not only the Pal affidavit but Mr. Pal's live testimony. That testimony established beyond doubt that Mr. Pal employed four or more employees so as to be subject to the Act. This Court should therefore deny review.

Judge Hill's order said nothing about Mr. Pal testifying. Rather, Judge Hill found that, under the unique posture of the case, Claimant established "good grounds" for the Commission to accept Mr. Pal's affidavit under Section 42-17-50. (R. pp. 26-27). The decision to permit Mr. Pal's live testimony was a decision Commissioner Wilkerson

made within his own discretion. That decision was not challenged before the Court of Appeals. *See* Brief of Appellant, pp. 7-13.

Following the remand from the Court of Appeals, Mr. Pal 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 to the Appellate Panel adequately raised any issue in Commissioner Wilkerson permitting Mr. Pal to testify live at the hearing on remand. (R. pp. 87-90). *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 Commissioner Wilkerson receiving Mr. Pal's live testimony. *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 was not properly before the Appellate Panel. It was also not properly before the Court of Appeals. It should not be available before this Court.

On the merits, Mr. Pal's testimony plainly establishes that Avni Grocers employed four or more employees. The Appellate Panel properly affirmed Commissioner Wilkerson's ruling in light of Mr. Pal's affidavit as well as his live testimony. That evidence established by a preponderance of the evidence that Avni Grocers included both locations (Vance and North Charleston), that there were five to seven employees during the relevant times, and that when Mr. Chaudhari is counted with the killer and her two victims, there were at least four employees at the location where the murders occurred.

(R. p. 152, l. 6 - p. 154, l. 4; p. 160, l. 20 - p. 164, l. 25).

Any complaint now about allowing Mr. Pal's affidavit is moot because 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) (R. p. 40, Stipulation 4). Mr. Pal's testimony contains the same facts as the affidavit and provides further explanation of whom Mr. Pal employed at Avni Grocers. Mr. Pal's unchallenged live testimony moots any challenge to his affidavit.[6]

The Fund complained on appeal only of Judge Hill's ruling that the Commission's decision denying Claimant's motion to permit the additional evidence violated Section 42-17-50. The fact that Commissioner Wilkerson permitted Mr. Pal to testify live, and that the ruling is not appropriately challenged on appeal, renders moot the Fund's appeal.

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[6] Even so, Judge Hill held that *apart from the Pal affidavit* the record contained a preponderance of the evidence that Avni Grocers employed four or more employees. The Fund did not challenge *that* finding in either the prior appeal to the Court of Appeals or the proceedings following that Court's remand. That ruling is, therefore, the law of this case. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (an unappealed ruling, right or wrong, is the law of the case). This unappealed alternative ground also serves as an independent basis upon which to affirm. *See State v. Branham*, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) (an unappealed alternative ground that constitutes an independent basis to uphold the decision is the law of the case and mandates affirmance).

At bottom, the Fund seeks to prevail where its own behavior (failing to file required pleadings or a Pre-hearing Brief in the first hearing) lulled Claimant into believing falsely that the number of employees would not be an issue. There was *no* argument that Avni Grocers did not, in fact, employ four or more employees – rather, the Fund contended it should win by default because the evidence establishing the requisite facts should not have been admitted. This argument is offensive at every level. The Commission grounded its decision on remand on the actual facts in evidence.

Accordingly, the Court should deny review of the Court of Appeals' decision affirming the circuit court order denying review of the order of the Appellate Panel, which affirmed Commissioner Wilkerson's ruling that Employer was subject to the Act.

## V. The Court of Appeals Correctly Found the Preponderance of the Evidence Supports Judge Hill's Decision to Reverse the Commission's Ruling That Avni Grocers Did Not Employ Four or More Employees

The Fund contends Judge Hill erred in reversing the Commission's finding that the record did not establish that Avni Grocers regularly employed four or more employees so as to be subject to the Act. (Petition, pp. 6-10). The Court of Appeals correctly affirmed. This Court should deny review.

South Carolina Code Ann. § 42-1-150 (1976) 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), 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 Claimant's assertion that the Employer had four 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. 114, ll. 21-23). 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. 114, ll. 21-23). The Commission's Division of Coverage and Compliance Division 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 Act and was uninsured. (R. p. 206). Claimant therefore arrived at the hearing unaware that there would be any challenge to the number of employees.

The ambush was completed by the Fund's failure to file a response to Claimant's Form 52, or a 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 shall be deemed a general

denial of liability for the benefits claimed and the employer and its representative by the failure to respond "shall forfeit each special and affirmative defense allowed by the Act").

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, Claimant provided undisputed, uncontradicted testimony at the hearing as to the number of employees, and that the number exceeded four. Mr. Chaudhari testified by deposition that his deceased wife worked seven days a week for Employer. (R. p. 273, lines 7-16; R. p. 278, lines 4-8). Mr. Chaudhari testified at the hearing that there were two locations of the Employer's store, one in Vance, South Carolina, and one in Charleston. (R. p. 123, ll. 5-8, ll. 12-18). Mr. Chaudhari worked at both locations on some days and both locations were operated under the same company name, Avni Grocers. (R. p. 127, lines 15-24). The Fund offered *no* evidence to contradict this testimony.

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 (see incident and newspaper articles, APA #'s 5, 6, 7, 8, 9 and 11) (R. pp. 252, 253-256, 257-259, 260, 261-265, 280-292), and that Mr. Chaudhari was an employee. This totals four employees regularly employed at the same store, one of whom went back and forth between the two stores. 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. 123, lines 5-11). Neither Commissioner Huffstetler nor the first Appellate Panel found Mr. Chaudhari's testimony to not be credible. The only evidence, therefore, was that Avni

Grocers was subject to the Act.

The Fund attempts to create a question of ownership by alleging that because one of the stores sold Amoco gas, the store was owned by Amoco. (Petition, p. 8). 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. 127, lines 15-24). 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. (R. p. 131, lines 5-19). 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. (Petition, p. 8). 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 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 employees. (Petition, p. 9). However, that case actually supports the circuit court's ruling in this case. (See argument, Brief of Respondent, pp. 28-33).

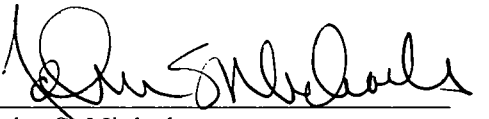
The preponderance of the evidence established that Mr. Pal owned both locations of Avni Grocers, that four or more employees worked for Avni, that four or more

employees worked at the location where the murders occurred, and that Employer was subject to the Act. This Court should deny review of the Court of Appeals unpublished opinion.

## CONCLUSION

This Court should deny the Fund's petition for writ of certiorari to the Court of Appeals and should instruct the Court of Appeals to remit the matter for the circuit court to enter an appropriate judgment.

Respectfully submitted,



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May 4, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

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Opinion No. 2015-UP-051 (S.C. Ct. App. filed Jan. 28, 2015)

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Anita Chaudhari, Deceased, Employee,
and Dharmendra Chaudhari, Claimant, . . . . . Respondents,

v.

Avni Grocers, Employer, Defendant, and The
South Carolina Uninsured Employer's Fund,

of whom

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

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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