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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

JUN 15 2015
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

W.C.C. File No. 1308837

Appellate Case No. 2015-000191

Esvin Leonel Lopez Perez, Employee, Appellant,

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the Employer have sufficient Employees to be subject to the Act?

STATEMENT OF THE CASE

Claimant filed a Form 50 on June 13, 2013 alleging burns to his face and hands as a result of a propane explosion at the pizza restaurant where he worked. Employer Answered, denying an Employer-Employee relationship, that the accident arose out of and in the scope of Claimant's employment, that Claimant gave timely notice of the accident and that Employer was subject to the Act. Following a hearing on April 23, 2014 the Hearing Commissioner found the Employer not to be subject to the Act. Timely appeal was filed and the full Commission affirmed. This appeal followed.

FACTS

Appellant, a Guatemalan immigrant, worked for Respondent for five years in its Pizza Restaurant in North Myrtle Beach. On May 22, 2013 at the direction of his supervisor Appellant was cleaning refrigerator coils in the kitchen of the restaurant using compressed propane. An explosion and fire ensued injuring both Appellant and his supervisor who were transported to the local hospital. Appellant was subsequently transferred to the burn center at Doctor's Hospital in Augusta, Georgia. Appellant requested Workers Compensation benefits and Respondent denied it was subject to the Act.

ARGUMENT

STANDARD OF REVIEW

Judicial review of a Workers' Compensation decision is governed by the substantial evidence rule of the Administrative Procedures Act. Baxter v. Martin Bros., Inc., 368 S.C. 510, 513, 630 S.E.2d 42, 43 (2006); Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). However, if the factual issue before the Commission involves 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); Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d, 585, 586 (1993); Porter v. Labor Depot, 372 S.C. 560, 643 S.E.2d 96 (Ct.App. 2007); Cooke v. Palmetto Health Alliance, 367 S.C. 167, 173, 624 S.E.2d 439, 441 (Ct. App.2005); Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct.App.2004); Simons v. Longbranch Farms, Inc., 345 S.C. 277, 280, 547 S.E.2d 500, 502 (Ct.App.2001); Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 654 (Ct.App.1998). Consequently, this Court's review is not bound by the Commission's findings of fact on which jurisdiction is based. Canady v. Charleston County Sch. Dist., 265 S.C. 21, 25, 216 S.E.2d 755, 757 (1975). A reviewing court has both the power and duty to review the entire record, find jurisdictional facts without regard to conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of evidence. Id.; see also Kirksey, 314 S.C. at 45, 443 S.E.2d at 804 (holding this court can find facts in accordance with the preponderance of evidence when determining a jurisdictional question in a Workers' Compensation case); Sanders v. Litchfield Country Club, 297 S.C. 339, 342, 377 S.E.2d 111, 113 (Ct.App.1989) (deciding where a jurisdictional issue is raised, this court must review record

and make its own determination whether the preponderance of evidence supports the Commission's factual findings bearing on that issue).

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. DynaColor/ 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); Horton v. Baruch, 217 S.C. 48, 59 S.E.2d 545 (1950); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996); McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct.App.1984)).

In determining such jurisdictional questions, it must be kept in mind that the basic purpose of the Workmen's Compensation Act is the inclusion of employers and employees within its coverage and not their exclusion, and doubts of jurisdiction will be resolved in favor of inclusion rather than exclusion. However, a construction should not be adopted that does violence to the specific provisions of the Act. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964). Hernandez-Zuniga, v. Tickle 374 S.C. 235, 647 S.E.2d 691 (2007).

The Commission found no relationship between the two other Gino's Pizza locations in Horry County and the Employer. The record reflects:

1. The Sorce family owns all three locations of Gino's Pizza. (R. p. 38, lines 6-10), and is opening a fourth location (R. p. 32, lines 7-11, p. 33, line 9).
2. The Sorce family resides at 144 Brookgate Drive (R. p. 39, lines 15-18, p. 40, lines 17-19), owned by Nancy & Francesco Sorce (R. p. 222).
3. The Sun News directory lists "Gino's Real New York Pizzeria" with three locations

(R. p. 41, lines 6-23), noting “Due to their popularity, Gino’s Real New York Pizzeria recently opened their third location in the Carolina Forest Section of Myrtle Beach” (R. p. 157).

4. Employer’s 30(B)(6) designated agent testified no effort had been made to disabuse the newspaper of the notion that one entity operated all three locations (R. p. 41, lines 20-23).

5. When Employer obtained Workers Compensation coverage after the accident two different Gino’s Pizzas were covered on one policy, (R. p. 46, lines 6-20) the second location giving the same address as the Sorce family, 144 Brookgate Drive. (R. p. 158).

6. The commercial premises where Claimant was injured were not leased by an LLC but rather by Nancy Sorce of 144 Brookgate Drive (R. p. 38, line 6 – p. 39, line 11).

7. Nancy Sorce at 144 Brookgate Drive is the registered agent for both Gino’s Classic New York Pizza Company, Inc. and Gino’s The King of Pizza, LLC (R. pp. 249-250), both at 144 Brookgate Drive.

8. Gino’s Real New York Pizza, LLC (Close to the Sun News Directory’s “Ginos Real New York Pizzeria” (R. p. 157) has as its registered agent Nancy Sorce’s son-in-law (R. p. 221, p. 49, line 18- p. 50, line 11), who works at the Carolina Forest location.

9. Because all three locations are in precisely the same business employees were exchanged between the locations (R. p. 84, line 17 – p. 85, line 14).

10. The Gino’s Real New York Pizza Facebook Page includes comments by “Gino’s Real New York Pizza” giving the Gino’s Highway 501 telephone number and includes the announcement of the opening of “Carolina Forest Gino’s” (R. pp. 215-218).

The Commission erroneously concluded there was “no relationship” between Gino’s various LLC’s, all in the pizza business in Horry County, with common address, registered agents and close family relatives as members. Employer admits one employee was moved from

one location to another. Principals of Gino's not only knew they were represented to the public to be one company but actively participated in the social media that created that impression. As our court noted in Ost. v. Integrated Products, Inc., 296 S.C. 241, 371 S.E.2d 796 (1988) when finding "sister corporations" were engaged in the same business activities in South Carolina and therefore their employees were included in the count for the purpose of establishing Jurisdiction:

"...interpretation of the exemption statute should be controlled by the underlying purpose of the Act. The Worker's Compensation Act's primary objective is to create and preserve rights of employees who may sustain personal injuries in the course of their employment." Moss v. Davey Tree Expert Co., 245 S.C. 127, 139 S.E.2d 825, 828 (1939)."

Here the various Gino's are engaged in exactly the same activity in the same county and are regarded by the public and represented to the public to be a single entity. Just as it would be unfair to permit an owner to evade the Act by creating a series of subcontractors so equally would it be unfair to achieve the same result by creating a series of "sister" LLC's to engage in precisely the same business in the same locale.

11. The North Myrtle Beach location was open eighty four hours per week (R. p. 44, lines 12-14) and made bank deposits totaling \$27,800.87 the month of the injury (R. p.195), \$31,542.66 the preceding month (R. p. 193) despite the fact that all of the illegal alien employees were paid cash which was not included in the bank deposits (R. p. 60, lines 7-21).

12. Claimant testified he worked four to five days per week, 11 hours per day for \$100 per day cash (R. p. 96, line 17- p. 97, line 13) for a period of five years, receiving \$60 per day cash until two years before the accident.

13. Edwin Molina worked at the same location for three years, four or five days per week, 11 hours per day, for \$110 cash per day. (R. p. 97, lines 14-22, p. 101, line 23-p. 102, line 14, p.103, lines 13-16).

14. Ernesto Hernandez worked at the same location when Claimant was injured for \$130 per day for four years, 11 hours per day four or five days per week. (R. p. 99, line 24 – p. 100, line 7, p. 102, line 15- p. 103, line 16).

15. Carlos Perez-Perez worked at the same location, five to six days per week, 11 hours per day, for two or three years for \$80 per day. (R. p. 103, line 17 – p. 104, line 7), Employer testified she wasn't sure if Carlos worked there (R. p. 84, lines 8 – 16).

16. Hipolito Rivera, a U.S. Citizen, worked at the same location for two years, six days per week (R. p.105, lines 9 – 16).

17. An employee named Alan worked at the same location five days per week for seven months. (R. p. 105, line 17 –p. 106, line 1).

18. On the day of the accident employees Edwin, Ernesto, Carlos, Francesco and Claimant were present and working. (R. p. 107, lines 1-12).

19. Employer's 30(B)(6) witness admitted Francesco Sorce, Nancy Sorce, and Hipolito Rivera were employees on the date of Claimant's injury (R. p. 42, lines 3 – 14).

20. Employer's 30(B)(6) witness admitted three or four employees would typically be on duty (R. p. 44, lines 12-19).

21. Employer's 30(B)(6) witness admitted Ernesto, Edwin, Hipolito and Claimant all worked at the North Myrtle Beach location, in addition to Nancy & Francesco Sorce.

22. Employer's 30(B)(6) witness admitted Claimant, Edwin and Ernesto were illegal aliens who were paid in cash (R. p. 45, lines 8 – 13) and no federal income tax, state income tax, Medicare premiums, nor Social Security contributions were withheld nor did Employer match contributions for Medicare and Social Security. (R. p. 53, line 3 – p. 54, line 6, p. 55, lines 18-25).

23. Employer admitted Edwin and Ernesto continued to work at the North Myrtle Beach location at the time of the deposition (R. p. 45, lines 8-17).

Section 41-10-30 (A) S.C. Code (1990) mandates that all Employers in South Carolina provide written notice to Employees of the hours and wages agreed upon, the time and place of payment and any deductions to be applied. Subsection B requires retention of "... records of names and addresses of all employees and of wages paid each payday and deductions made for three years.", and Subsection C mandates that "Every employer shall furnish each employee with an itemized statement showing his gross pay and the deductions made from his wages for each pay period." Although Claimant testified there was a folder kept in a drawer which he believed contained a record of employees' work Employer denied its existence and maintained that it had not complied with the statutory recordkeeping requirements.

24. Throughout the record there is no evidence Employer's sole witness ever worked even one day at the North Myrtle Beach location.

25. Employer admitted to failing to withhold, report, pay or match state and federal income taxes, medicare, social security and unemployment insurance premiums for most of its employees.

26. Employer's sole witness was produced in response to a deposition notice requesting a witness with knowledge of a.) The relationship between A. Geno's New York Style Pizzeria, B. Gino's Real New York Pizzeria, C. Gino's Classic New York Pizza Company, LLC, D. Gino's The King of Pizza, LLC, E. Midnite Corporation, Inc., F. Geno's New York Pizzeria, LLC, G. Gino's Real New York Pizza, LLC, H. Geno's New York Pizzeria; b.) Ownership, past and present, of the above entities; c.) Workers Compensation coverage, past and present, of the entities; d.) Procurement, marketing and payroll operations of the above entities; e.) Operations

by any of the above entities outside the State of South Carolina but, upon examination, Employer's witness asserted she was not the president of the Employer, an officer, an employee, a CPA, nor a public accountant (R. p. 30, line 25- p. 31, line 7).

27. Employer's sole witness testified she had no records of the actual payments to Claimant, Edwin and Ernesto (R. p. 76, lines 2-19).

28. Employer denied the Employer-Employee relationship, denied the work related nature of the injury and denied notice of the injury (Form 51) until deposed, when they were admitted (R. p. 77, line 8 – p. 78, line 7).

29. Employer's counsel prepared the Form 20 (Form 20), when asked the source of the information used to complete the form, Employer's sole witness indicated it was an estimate "off of what we were usually paying him" (R. p. 76, line 4) but no records of actual payments exist. (R. p. 76, lines 8 – 10) and the same was true of Edwin and Ernesto (R. p. 76, lines 11-12).

30. Employer's S.C. Dept. of Employment and Workforce form UCE 120's for the period in question reflect the identity of all wage earners whose incomes were taxed for unemployment insurance premiums. No wages were reported for Claimant, Edwin, Ernesto or Carlos, (R. pp. 197-206), nor were taxes paid by the Employer on their earnings.

31. Employer testified Hipolito Rivera worked "five or six days" the entire year of 2013 (R. p. 134, lines 19-25, p. 139, lines 14-19) yet Employer's UCE-120's reflect wages earned of \$2,500.00, \$6,200.00, and \$3,800.00 in the three quarters ending with the accident. (R. pp. 202, 204, 206).

Employer's statutorily required payroll records for Claimant, Edwin, Ernesto, Carlos, and Alan were either nonexistent, (Employer's testimony) or withheld. Employer admits unlawfully

failing to withhold income tax, social security and Medicaid contributions. Significantly, Employer admits knowingly employing several “unauthorized aliens” as defined in §41-8-10, Code of Laws of S.C. (2008) and abandons the pretense of ignorance as to their status for the last several years. Employer also admits violating the notice requirements of the Payment of Wages Act, §41-10-10 et seq. Code of Laws of S.C. (1986) with impunity to date.

The Hartzell analysis of Regularity of Employment:

a.) Employment of the same number of persons, although not necessarily the same individuals:

For the relevant period, the quarter in which the injury occurred, the record reflects employees as follows:

1. Hipolito K. Rivera, 2. Carlos A. Sorce, 3. Francesco Sorce, 4. Nancy Sorce, 5. Claimant, 6. Edwin Molina, 7. Ernesto Hernandez, 8. Carlos Perez.

For the preceding quarter the record reflects employees as follows:

1. Hipolito K. Rivera, 2. Carlos A. Sorce, 3. Francesco Sorce, 4. Nancy Sorce, 5. Claimant, 6. Edwin Molina, 7. Ernesto Hernandez, 8. Carlos Perez.

b.) During the relevant period of time.

Claimant would point out that the next preceding quarter is identical so the number of employees did not change in the three quarters ending with the accident.

c.) With some constancy.

The number of employees remained unchanged during the relevant period.

d.) Not by chance or for a particular occasion.

These employees worked 44-55 hours per week every week for years.

e.) Without regard to the regularity of the days or hours worked.

Because the employment was "Constant" the particular days or hours worked are irrelevant.

The Commission erroneously found the other unauthorized aliens and Hipolito Rivera to be, at most, casual employees under the Act and therefore not regularly employed. The Commission misapprehends both the definition of a casual employee and, more importantly, that to be excluded for the purpose of the Act the employee must be both "...casual AND not in the course of the trade, business or occupation of his employer." Section 42-11-30 Code of Laws of S.C. (2002) (emphasis added). Here no evidence whatsoever was offered to show that these employees were engaged in anything other than the retail pizza trade, they were therefore not casual by definition, Johnson v. Jackson, 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012), Carrier v. Westvaco Corp., 806 F. Supp. 1242 (D.S.C. 1992).

Conclusion

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, 538 S.E. 2d 276, 279 (Ct. App. 2000) aff'd. 349 S.C. 579, 564 S.E. 2d 110 (2002).

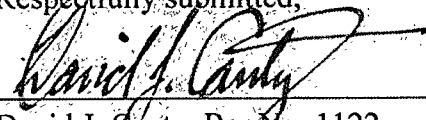
For the Commission to find that these employees worked "sporadically, occasionally, indefinitely and on a very limited basis" flies in the face of the record, particularly with regard to Hipolito whom they admit they paid \$2,500, \$6,200 and \$3,800 in the three quarters ending with that of the accident. Employer's failure to produce statutorily mandated payroll records gives rise to a presumption that those records would corroborate Claimant. Halyburton v. Kershaw, 3 DeSauss. Eq. 105 (1810), Blake's Ex'rs v. Lowe, 3 DeSauss. Eq. 263 (1811), Smith v. Southern

Ry. Co., 121 S.C. 94, 113 S.E. 465 (1922), Wisconsin Motor Corp. v. Green, 224 S.C. 460, 79 S.E. 2d 718 (1954). Employer cannot hope to profit by its unlawful conduct.

The Commission's finding of no jurisdiction must be reversed and the matter remanded with instructions to ascertain the benefits due Appellant.

March 23, 2015

Respectfully submitted,



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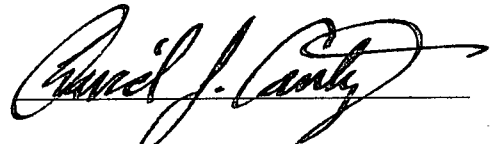
v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 12, 2015



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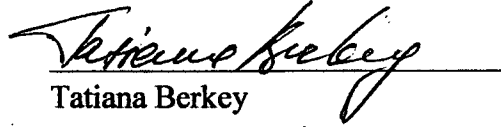
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I certify that I have served 15 copies of Appellant's Final Brief along with 15 copies of the Record on Appeal on Hon. Jenny Abbott Kitchings, Clerk of Court of Appeals, by depositing the copies in the United States Mail, postage prepaid, on June 12, 2015, addressed to South Carolina Court of Appeals P.O. Box 11629 Columbia, S.C. 29211.


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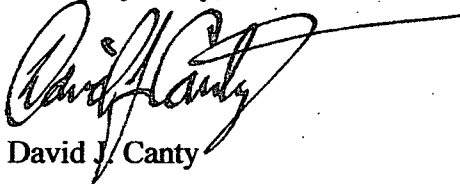
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Dear Counsel,

Enclosed please find Appellant's Final Brief, together with the proof of service upon opposing counsel.

Thanking You and With Best Wishes,
Yours Very Truly,



David J. Canty

encl: stated

cc: Hon. Jenny Abbott Kitchings

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SC Court of Appeals

**Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211**

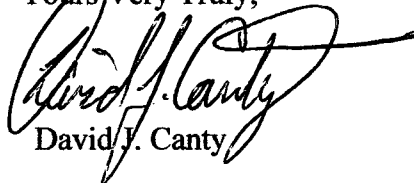
Re: Esvin Leonel Lopez Perez v. Gino's The King of Pizza
Appellate Case No.: 2015-000191

Dear Madam Clerk,

Enclosed please find 15 copies of Appellant's Final Brief along with 15 copies of the Record on Appeal along with the proof of service upon opposing counsel.

Thanking You and With Best Wishes,

Yours Very Truly,



David J. Canty

cc.: clt.

Daniel Ray McCoy, Esq.
Robert C. Calamari, Esq.
Lisa G. Glover, Esq.
Clarke W. McCants, III, Esq.