

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.

RETURN TO ESVIN LEONEL LOPEZ PEREZ'S PETITION FOR REHEARING

INTRODUCTION

In Opinion No. 216-UP-084 filed February 24, 2016, a Panel of this Court affirmed the judgment below holding that Gino's the King of Pizza, LLC (Gino's) was not subject to the Workers' Compensation Act because Gino's did not regularly employ four or more persons. Appellant Esvin Leonel Lopez Perez (Petitioner) has petitioned for rehearing. As shown herein, this Court has previously considered and rejected the arguments offered by Petitioner in his petition for rehearing and Petitioner seeks for this Court to simply revisit the same issues. In addition, one of the issues was admittedly argued for the first time on appeal by Petitioner and was not properly reserved for consideration by this Court. Hence, Mr. Perez's petition for rehearing should be denied.

Argument

Petitioner has requested that this Court allow him a rehearing on his argument related to public policy and his argument related to whether Gino's complied with employment laws. First, the Panel should deny Mr. Perez's petition because he improperly asks the Panel to reconsider his failed arguments related to public policy and the duty to maintain wage records. See Kennedy v. S.C. Retirements Sys., 349 S.C. 531, 552, 564 S.E.2d 322, 322 (2001) (holding that a party cannot use a “petition for rehearing to have the case tried in the appellate court a second time”). This Court considered those arguments and rejected them.

Notwithstanding the above, Petitioner's arguments still lack any merit. First, Petitioner asserts that a rehearing is necessary on his public policy argument that allowing this decision to stand would somehow incentivize employers to hire undocumented workers. However, the legal status of the people involved in a Workers' Compensation claim has no affect on whether they are regularly employed. The decision of this Court was simply that Gino's did not regularly employ four or more persons. Because the legal status of the workers does not come into play during the jurisdictional evaluation, the end decision does not act as an incentive or disincentive to the hiring of undocumented workers.

Second, Petitioner argues that this decision sends the message that employment laws may be disregarded by an employer. Petitioner argues that this Court should rely on *Halyburton v. Kershaw*, 3 DeSauss. Eq. 105 (1801) and *Blake's Ex'rs. V. Lowe*, 3 DeSauss. Eq. 263 (1811) in analyzing whether the lack of wage records creates an inference that those records would be adverse to Gino's. At the hearing, Petitioner's Counsel admitted to Judge Thomas that he had not made this argument prior to the appeal and raised it for the first time on appeal. For that reason, the issue is not properly preserved and should not be considered.

Even if the issue was properly preserved, it would still fail. As recognized by this Court during oral arguments, both cases are from the 1800's and neither case cited by Petitioner is related to the Workers' Compensation issue in front of this Court. In *Halyburton*, the Court was evaluating whether admissions made by a defendant in its Answer would bind it with regard to the terms of a contract in a real estate transaction where the defendant had destroyed the actual contract. In *Blake's Ex'rs.*, the plaintiff filed an action for an accounting to identify assets of the defendant to satisfy a judgment. While conducting the accounting, that Court opined that it would not let a party benefit from his actions of destroying evidence.


Here, this Court was solely determining whether Gino's regularly employed four or more people. While Petitioner is asserting that Gino's alleged failure to maintain general records should create a negative inference against Gino's in this instance, whether Gino's maintained proper records is irrelevant to the jurisdictional analysis. Gino's offered its bookkeeper to testify at the hearing in front of the single commissioner. Gino's bookkeeper provided all of the information related to the involvement of each person alleged by Petitioner to have been regularly employed.

CONCLUSION

Based on the foregoing, and on all briefing and prior arguments, which are hereby incorporated herein by reference, Esvin Leonel Lopez Perez's petition for rehearing should be denied.

Respectfully submitted,

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By:  _____

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March 25, 2016

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In The Court of Appeals

MAR 28 2016

SC Court of Appeals

APPEAL FROM WORKERS COMPENSATION COMMISSION
WCC# 1308837

Appellate 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 Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Gino's The King of Pizza, Employer, Respondent, 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):

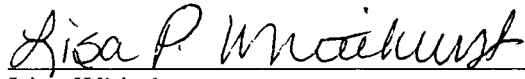
Pleadings: Respondent's Return to Appellant's Petition for Rehearing

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March 28, 2016

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SC Court of Appeals

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March 28, 2016

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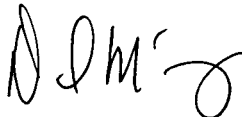
The Honorable Jenny Abbott Kitchings
CLERK OF COURT
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Esvin Leonel Lopez Perez, Employee, Appellant v. Gino's The King of Pizza,
Employer, Respondent
SC WCC No. 1308837
SC Appeal Case No. 2015-000191
Our File No.: 41963/01500

Dear Ms. Kitchings:

Enclosed please find one original and six (6) copies of the Respondent's Return to Appellant's Petition for Rehearing along with Proof of Service on all counsel of record in the above-captioned matter. Please contact me should you have any questions.

Very truly yours,



Daniel R. McCoy

DRM:dpatsel

Enclosures

cc: David J. Canty, Esq.
Clarke W. McCants, III, Esq.
Lisa C. Glover, Esq.