

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Opinion No. 2016-UP-084 (S.C. Ct. App. Filed February 24, 2016)

Esvin Leonel Lopez Perez, Employee, Petitioner,

v.

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

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S.C. SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 1

Question Presented 1

Statement of the Case 1

Argument

 1. The Court of Appeals erred in affirming a finding of an insufficient number of employees under the Worker’s Compensation Act. 2

Conclusion 4

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 24, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming a finding of an insufficient number of employees under the Worker’s Compensation 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.

The Court of Appeals affirmed the Workers Compensation Commission. Esvin Leonel Lopez Perez v. Gino's The King of Pizza Unpublished Opinion No. 2016-UP-084 (S.C. Ct. App. Filed Feb. 24, 2016). Petitioner seeks a Writ of Certiorari to review that decision.

ARGUMENT

1. The Court of Appeals erred in affirming a finding of an insufficient number of employees under the Worker's Compensation Act.

A. The Court of Appeals erred in rewarding statutory violations and incentivizing the employment of undocumented foreign workers.

Claimant, an undocumented worker from Guatemala, worked for Gino's Pizza in North Myrtle Beach, South Carolina together with several other undocumented workers from Central America. Gino's paid them cash and denied the existence of any records of their hours worked, wages paid or schedules (R. p. 43). Ginos' sole witness was not physically present at the North Myrtle Beach location.

When Ginos' manager directed Claimant to clean refrigerator coils with compressed propane an explosion and fire ensued, seriously injuring both the Claimant and the manager. Both suffered disfiguring burns and were hospitalized, first at Grand Strand Medical Center then at the Burn Center of Doctor's Hospital in Augusta, Georgia.

The North Myrtle Beach location of Gino's deposited a monthly average of \$1,000.00 per day in the bank after paying the undocumented workers from the day's cash proceeds. Gino's was open eighty four hours per week during the tourist season when the explosion and fire occurred (R. p. 44).

Although there was evidence of eight regular employees for the two quarters including the date of the explosion and fire, Gino's maintained that three were exempted as members of the LLC which owned that location and opted not to be covered by the Act, one was part time and the other undocumented workers were "casual" and therefore not counted for jurisdictional purposes.

Employer admits knowingly employing undocumented workers and denied the Employer-Employee relationship with the Claimant until trial (R. pp. 18, 45).

Our Supreme Court warned in Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E. 2nd 482 (2007) that if undocumented immigrants were not afforded Workers Compensation benefits "... unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers." Id. at 484. This is precisely what Gino's attempts to do herein and the ruling of the Court of Appeals effectuates this result.

B. Gino's should face an adverse inference for failure to comply with statutory record keeping requirements.

As our Supreme Court enunciated in Andersen v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) when considering the burden of proof in overtime cases:

"When the employer has kept proper and accurate records the employee may easily discharge his duty by securing the production of these records. But where the employer's records are inaccurate or inadequate ... a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the ... extent of ... work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty." Id. at 687.

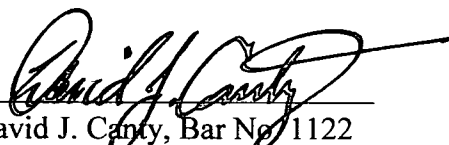
The Court therein held that upon a sufficient showing by the Employee the burden shifted to the Employer and, upon a failure to come forward with evidence to “negative the reasonableness of the inference to be drawn from the employee’s evidence” (Id. at 688), the Employee prevails.

Presumably the General Assembly incorporated record keeping requirements in the Code for valid reasons and, further, expected the Courts to respect and give weight to such requirements rather than disregard them and their effect when weighing evidentiary matters, Further, when the purpose and effect of such disregard is to achieve yet another statutorily prohibited end (employment of illegal workers) the injury is doubled. It is compounded herein by Gino’s failure to pay its share of payroll, sales, and income taxes.

CONCLUSION

The entire scheme of Worker’s Compensation is slanted towards finding coverage rather than not. This Employer premises its defense on an insufficient number of employees to be subject to the Act, net of its several claimed exclusions, a premise readily proven or disproven by the statutory mandated records it failed to keep (or at least to acknowledge and produce). For the reasons stated the Petitioner asks the Court to grant the petition for a writ of certiorari.

Myrtle Beach, S.C.
September 20, 2016



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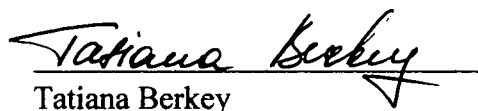
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v.

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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari of the Petitioner on South Carolina Uninsured Employers Fund by depositing a copy of it in the United States Mail, postage prepaid, on September 20, 2016, addressed to the attorney of record, Clarke W. McCants, III, Nance, McCants & Massey, Attorneys & Counselors at Law, P.O. Box 2881, Aiken, S.C. 29802-2881.


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