THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No.: 1316470
Appellate Case No.: 2016-000617

Elias Reyna .....Respondent,

v.

Fenerly Inc. / Tony's Place of Sumter LLC, Employer, and
Foremost Signature Insurance Co., Carrier..... Appellants.

FINAL BRIEF OF APPELLANTS

William R. Harbison, S.C. Bar 15041
Laura W. Jordan, S.C. Bar 100374
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

Brett H. Bayne
MCANGUS GOUDELOCK & COURIE, LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th floor (29201)
Columbia, South Carolina (29211)
Tel: 803.779.2300
Fax: 803.748.0526

ATTORNEYS FOR APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Workers' Compensation Commission err in finding and summarily concluding that Tony's Place of Sumter, LLC is a corporation and that its members, including Claimant Reyna, must "opt out" of workers' compensation coverage rather than "opt in"?

II. Did the Workers' Compensation Commission err in finding and concluding that Claimant Reyna is an employee of Tony's Place of Sumter, LLC despite his status as a member/partner of that entity and despite his failure to opt in to coverage?

INTRODUCTION

This Court should reverse the erroneous findings and conclusions of the Workers' Compensation Commission ("Commission") which held that Claimant Elias Reyna is an employee covered under his Employer's workers' compensation policy. At both the Single Commissioner and Appellate Panel levels, the analysis of this threshold jurisdictional question was infected by assumptions lacking any validity in law or fact, *to wit:* that the Employer limited liability company ("LLC") is a "corporation" and that Claimant Reyna, a member of the LLC, was covered unless he "opted out." South Carolina law does not support the Commission's treatment of Employer Tony's Place of Sumter, LLC ("Tony's Place LLC") as a corporation, nor the presumption that an LLC member must opt out rather than opt in to coverage. As this Court has previously indicated, South Carolina law treats LLC members as business partners who must affirmatively *opt in* to coverage in accordance with the provisions of S.C. Code Ann. § 42-1-130.

The evidence is undisputed: Claimant Reyna's employment relationship was with Tony's Place LLC, where the accident occurred, and he was an LLC member who did not elect to be covered under its workers' compensation policy. When these facts are viewed through the correct paradigm of S.C. Code Ann. § 42-1-130, there is only one conclusion: Claimant Reyna was not covered by a valid policy of workers' compensation insurance at the time of the accident.

STATEMENT OF THE CASE

This appeal solely concerns the subject matter jurisdiction findings and conclusions of the Commission, which were outlined in the Appellate Panel's January 12,

2016 Decision and Order that modified - and affirmed by a 2-1 vote - the Single Commissioner's June 15, 2015 Decision and Order.

On November 20, 2013, Claimant Reyna filed a Form 50, Request for Hearing, with the Commission alleging he sustained multiple injuries, including a physical brain injury, as the result of a September 27, 2013 work-related injury by accident. (R. pp. 31-33). After the Commission returned the Form 50 due to improper service, Claimant Reyna filed an Amended Form 50, Request for Hearing, on December 11, 2013 mirroring his original allegations and request for relief. (R. pp. 34-35).[1]

On January 30, 2014, the Employer/Carrier/Appellants formally notified the Commission and Claimant Reyna of their denial of the compensability of the workers' compensation claim. (R. pp. 36-37). On September 25, 2014, the Employer/Carrier/Appellants filed a Form 51 (Employer's Answer to Request for Hearing) again denying the compensability of the claim and asserting that Claimant Reyna, as a part-owner of Employer Tony's Place LLC, was not covered because he did not opt in to coverage under the Workers' Compensation Act ("Act") pursuant to S.C. Code Ann. § § and applicable case law. (R. pp. 38-40). On December 5, 2014, the Employer/Carrier/Appellants filed a Motion to Bifurcate requesting that the Commission conduct a thorough jurisdictional hearing prior to a full evidentiary hearing on compensability, particularly to consider the failure of Claimant Reyna to elect to be covered as a business owner under S.C. Code Ann. Section 42-1-130. (R. pp. 44-53).

On December 18, 2014, the Commission conducted a Single Commissioner Hearing to consider Claimant Reyna's Request for Hearing and Answer. (*See generally*

[1] Although Claimant Reyna withdrew his Request for Hearing on January 27, 2014, he later renewed it on September 3, 2014.

R. pp. 126-143). The Single Commissioner denied the Motion to Bifurcate, among other preliminary rulings, and then conducted an evidentiary hearing on all issues. (*See generally* R. pp. 126-143). On January 19, 2015, the Employer/Carrier/Appellants filed a Post-Hearing Motion Renewal/Motion to Reconsider reiterating their request that the Single Commissioner leave open the record for submission of additional evidence. (R. pp. 54-58). The Single Commissioner granted the request on February 13, 2015 and permitted the submission of additional evidence. (R. pp. 1-2).

On June 15, 2015, the Single Commissioner issued a Decision and Order ruling that Claimant Reyna was covered under the Act and had sustained a compensable work-related injury by accident for which he was entitled to benefits under the Act. (R. pp. 3-16). As relevant to this appeal, the Single Commissioner issued the following findings of fact:

- Finding of Fact No. 1: "It is undisputed that the Claimant was a minority shareholder in Tony's Place of Sumter, LLC."

- Finding of Fact No. 2: ""I find that in addition to owning a minority share of Tony's Place of Sumter, LLC, [Claimant] Reyna was also an employee of Tony's Place of Sumter, LLC pursuant to S.C. Code Annotated Section 42-1-130."

- Finding of Fact No. 3: "I find that [Claimant] Reyna did not waive entitlement to workers' compensation benefits as I find he did not sign the Corporate Officer Notice to Reject Form."

(R. p. 10).

On July 2, 2015, the Employer/Carrier/Appellants timely filed a Form 30 (Request for Commission Review) of the Single Commissioner's Decision and Order, requesting in pertinent part that the Appellate Panel determine:

- Whether the Single Commissioner erred in Finding of Fact No. 2 by determining Claimant Reyna was an employee of Tony's Place of Sumter, LLC pursuant to S.C. Code Ann. Section 42-1-130?

- Whether the Single Commissioner erred by failing to deny compensation because Claimant Reyna failed to opt-in to insurance coverage as required by S.C. Code Ann. Section 42-1-130?

(R. pp. 41-43).

On September 22, 2015, a three-member Appellate Panel of the Commission heard oral argument. (*See generally* R. pp. 144-155). In a Decision and Order dated January 12, 2016, the Appellate Panel affirmed the Single Commissioner's Decision and Order by a 2-1 vote but modified it by adding the following No. 1 Conclusion of Law: "Under § 42-1-130 Tony's Place of Sumter LLC is a corporation and the Claimant was an employee of the Corporation." (R. p. 27).

On January 22, 2016, the Employer/Carrier/Appellants timely filed a Motion to Alter or Amend Judgment, pursuant to Rule 59(e), SCRCP, S.C. Code Ann. § 1-23-380, and *Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 276, 772 S.E.2d 159, 161 (2015), requesting that the Commission alter or amend its January 12, 2016 Decision and Order. (R. pp. 91-94). The Motion argued, in pertinent part, that the Commission erred in the following findings:

- That Claimant was an employee of Tony's Place of Sumter, LLC pursuant to S.C. Code Ann. § 42-1-130 despite clear evidence Claimant was a minority shareholder and owner of Tony's Place of

Sumter, LLC, which is a partnership and under existing case law Claimant cannot be considered both a partner and an employee.

- That Claimant did not "opt out" of workers' compensation coverage when the issue before the Commission should be whether Claimant "opted in" to workers' compensation coverage as required by law for partnerships.

- The Commission failed to make any finding of fact, based on the evidence presented and in the Commission file, as to whether Tony's Place of Sumter, LLC is a partnership or a corporation. Defendants contend the only evidence in the record supports a finding of fact that Tony's Place of Sumter, LLC is a partnership.

- That, as a matter of law, Tony's Place of Sumter, LLC, which is a partnership, is actually a corporation pursuant to S.C, Code Ann. § 42-1-130.

(R. pp. 91-94). The Commission, without holding oral argument, denied the Motion to Alter or Amend Judgment on February 22, 2016. (R. p. 30). The Order was received by counsel for the Employer/Carrier/Appellants on February 22, 2016, and a timely Notice of Appeal was filed on March 23, 2016 challenging the Commission's rulings.

STATEMENT OF FACTS

The Workers' Compensation Policy at issue in this case (the "Policy") is Policy Number 0005537321, which was issued by Foremost Signature Insurance Company (the "Carrier"). (R. pp. 156-185). The Policy insured two entities – "Fenerly Inc. D/B/A Tony's Pizza" and "Tony's Place of Sumter LLC" – with effective dates of April 12, 2013 through April 12, 2014. (R. pp. 157, 163; R. p. 113, line 25–p. 114, line 11 (explaining that he covered both entities under one policy on the advice of his insurance agent); R. p. 120, lines 3-19 (explaining that, as the agent who sold the Policy, "I insure through our companies Tony's Place, Tony's Pizza, two different entities.").).

As indicated on the Policy's "Schedule of Insureds and Locations," both insureds are located in Sumter, South Carolina, but in two different locations. Fenerly Inc. D/B/A

Tony's Pizza operates as a restaurant located at 301 North Main Street, and Tony's Place LLC operates as a restaurant located at 1870 Hwy 15 South. (R. p. 164). The South Carolina Secretary of State website shows that Fenerly, Inc. is a domestic corporation organized under the laws of the State of South Carolina, while Tony's Place, LLC is classified as domestic limited liability company with the South Carolina Secretary of State and a partnership with the Internal Revenue Service.[2] (R. pp. 187-189)).

Claimant Reyna initially was employed by Tony's Place LLC as a cook when the restaurant opened in 1999. (R. p. 99; line 17-p. 100, line 18). In April 2012, Claimant Reyna became an LLC member and 30 percent partner/operating manager of Tony's Place LLC. (R. p. 101, lines 9-25; R. p. 121, lines 18-25; R. pp. 190-196). The 70% owner of Tony's Place LLC, and Claimant Reyna's business partner, is Pete Peidis. (R. p. 101, line 11-p.102, line 21). Peidis also owns Fenerly Inc. D/B/A Tony's Pizza. (R. p. 101, line 11-p. 102, line 21). Claimant Reyna had "[n]o interest whatsoever" in "Fenerly Inc. D/B/A Tony's Pizza." (R. p. 102, lines 3-8).

The Policy defines the insured parties as follows:

* * *

> **B. Who is Insured**
> You are Insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

(R. p. 167). The Policy also contains an Exclusion Endorsement that specifically

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[2] The Internal Revenue Service classifies a domestic LLC with at least two members as a partnership for federal income tax purposes, unless the LLC files Form 8832 and affirmatively elects to be treated as a corporation. There is no evidence in this case that Tony's Place LLC filed a Form 8832 with the IRS to remove it from partnership status.

excludes "Partners, Officers and Others" from bodily injury coverage, including Claimant Reyna. (R. p. 173). Although the Exclusion Endorsement generally identifies the excluded persons as "officers," the Endorsement applies equally to "Partners" and "Officers" and the listed officers were not officers "in the legal terms" of the entities as organized. (R. p. 113, lines 12-23; R. p. 115, lines 2-7; R. p. 117, line 15-p. 117(a), line 25; R. p. 118, lines 18-19).[3] Reyna's payroll was not included in the Policy premium.

On September 27, 2013, Claimant Reyna was robbed and beaten while leaving the premises of Tony's Place LLC, located on Highway 15 in Sumter. He was allegedly struck several times by the assailant, and he suffered injuries to his head, brain, psyche, eyes, ears, hearing and left leg. Thereafter, he sought workers' compensation coverage under the Policy. There is no dispute that Claimant Reyna's injuries would entitle him to temporary total disability benefits, were he a covered employee under the Policy.

Prior to the incident giving rise to his workers' compensation claim, Claimant Reyna had never spoken to anyone employed with the Carrier about Policy, nor had he told his Tony's Place LLC business partner (Pete Peidis) or his insurance agent (Byron Kinney) that he wanted to be covered by the Policy. (R. p. 95, lines 20-21) (stating he did not know agent Byron Kenny [phonetic]); R. p. 96, lines 12-14 (stating he never met

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[3] Although the record below also included evidence of a "Corporate Officer Notice to Reject" form (the "Corporate Rejection Form") that formed the basis of the Commission's finding that Claimant Reyna was covered because he did not execute the opt out form (R. pp. 5, 11-12; R. pp. 20, 24-25), whether or not this form was signed is not relevant to this appeal because LLC members must opt in – not opt out. *See* discussion *supra* pp. 11-12, 16. The insurance agent who sold the policy to Tony's Place LLC clarified that he understood LLC members were automatically excluded, so the Corporate Rejection Form was a superfluous form – an unnecessary "extra layer" that "we've always done [] in our agency . . . [as] protection for an insured, to have the officer sign the form to say they are choosing to be excluded even though they are automatically excluded [as LLC members]." (R. p. 121, line 18-p. 125, line 12).

with the insurance agent); R. p. 97, line 24-p. 98, line 1 (stating he never went to the agent's office to execute a form). *See also* R. p. 138, lines 18-23 (stating he never discussed with Kinney whether or not he should reject coverage); R. p. 141, lines 6-13 (stating he never told his partner Peidis that he wanted coverage under the company's policy)). There is no evidence that Claimant Reyna elected to be covered as a partner or LLC member under the Policy.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation decision is directed by the Administrative Procedures Act, S.C. Code Ann. § 1-23-380, and typically governed by the substantial evidence rule. *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 – as it does in this case, the 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 issue of whether the claimant was a covered employee is a jurisdictional issue. *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997); *South Carolina Workers' Compensation Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995); *Marlow v. E. L. Jones & Son, Inc.*, 248 S.C. 568, 569, 151 S.E.2d 747, 747 (1966).

When reviewing the purely-jurisdictional issues in this appeal, this Court 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). This 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." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 243, 647 S.E.2d 691, 695 (Ct. App. 2007); *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 of whether the preponderance of evidence supports the Commission's factual findings bearing on that issue).

Because subject matter jurisdiction is a question of law, this Court may reverse an appeal from the Workers' Compensation Commission where – as here – the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5); *Gray v. Club Group, Ltd.*, 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct. App. 2000); *Roper Hosp. v. Clemons*, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997)).

ARGUMENT

I. The Commission erred in finding and summarily concluding that Tony's Place of Sumter, LLC is a corporation and that its members, including Claimant Reyna, must "opt out" of workers' compensation coverage rather than "opt in."

Despite undisputed evidence that Claimant Reyna's employment relationship was as a working member of a limited liability company, the Commission assumed - without analysis or supporting findings of fact – that Tony's Place LLC was a "corporation" and that Claimant Reyna was covered unless he opted out of the Policy. These unsupported and erroneous findings and conclusions require reversal.

Under the South Carolina Workers' Compensation Act ("the Act"), the threshold inquiry of who is an "employee" is defined as "every person engaged in an employment . . . but excludes a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer." S.C. Code Ann. § 42-1-130. Workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident – but only if those injuries arise out of and in the course of the employment. S.C. Code Ann. § 42-1-310; *Bentley v. Spartanburg Cty.*, 398 S.C. 418, 422, 730 S.E.2d 296, 298 (2012).

The Act further specifies that "[a]ny sole proprietor or partner of a business whose employees are eligible for benefits under this title may elect to be included as employees under the workers' compensation coverage of the business if they are actively engaged in the operation of the business and if the insurer is notified of their election to be included." S.C. Code Ann. § 42-1-130. If such an election is made, the sole proprietor or partner will be entitled to "employee" benefits under the Act. S.C. Code Ann. § 42-1-130. *See Carver v. Bill Pridemore & Co.*, 278 S.C. 235, 237, 294 S.E.2d 419, 420 (1982) (recognizing that the purpose of this section "is to expand coverage of the Act by making its benefits available to working partners and sole proprietors who are actively engaged in another's enterprise, and thereby exposed to its risks, and whose employees are covered under the Act, but who would be otherwise excluded because of their status").

The opposite procedure applies to officers of a corporation, who are included as "employees" under the Act to the extent they are engaged in "employment" by the corporation. Pursuant to S.C. Code Ann. Regs. 67-402A, a corporate officer may reject coverage under the Act by completing and filing with the employer's insurance carrier a

Form 5, Corporate Rejection Form, or a form with substantially the same information. S.C. Code Ann. Regs. 67-402A.

It is axiomatic that a workers' compensation award will not be made unless an employment relationship existed between the claimant and employer at the time of the alleged injury for which the claim is made. *Spivey v. D. G. Constr. Co.*, 321 S.C. 19, 21, 467 S.E.2d 117, 118 (Ct. App. 1996); *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 469, 313 S.E.2d 38, 39 (Ct. App. 1984). Notably, "[t]he burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence." *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015)(citing *Marlow*, 248 S.C. at 570, 151 S.E.2d at 748). "In addition, an injured worker's employment status, as it affects jurisdiction, is a matter of law for decision by the court and includes the findings of fact which relate to jurisdiction." *Gray*, 339 S.C. at 183-84, 528 S.E.2d at 440-41.

A. The Commission erred by concluding that an LLC functions as a corporation for purposes of the South Carolina Workers' Compensation Act.

While the Act does not explicitly address the proper classification for limited liability companies in its definition of statutory "employees", this Court has previously indicated that members of limited liability companies are to be treated as partners who must elect to be included as employees for workers' compensation purposes. *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233, 244 n.5, 750 S.E.2d 97, 103 n.5 (Ct. App. 2013)("We exclude Stallings from this analysis because, although he worked for Employer as well as being the sole member of its limited liability company, the record does not indicate he elected to be included as an employee for workers' compensation

purposes."). The Commission has also equated members of an LLC to sole proprietors or partners who must elect to receive coverage under the Act. *See Nitin Shah v. Satya, LLC & Selective Ins. Co.*, 2003 SC Wrk. Comp. LEXIS 666; 2003 WL 23335132, at *4 (SCWCC Full Commission Panel) (recognizing that because a member of an LLC "did not elect to be included as a covered employee under the workers' compensation policy," the LLC member was not a covered employee).[4] Indeed, the Commission specifically has recognized that a member of an LLC "must make such an election to be included [as a statutory employee] or he is automatically excluded from [workers' compensation] coverage." *Id.*

It is abundantly clear from the Single and Appellate Panel Hearing Transcripts and Orders that the Commission employed an improper paradigm by viewing Tony's Place LLC as a corporation.[5] Despite finding that the Employer is Tony's Place LLC and that Claimant Reyna is a part-owner in Tony's Place LLC, and despite citation to § 42-1-130 which specifically addresses treatment of partnerships, the Appellate Panel

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[4] Although not binding, the Commission's treatment of LLC members is persuasive and consistent with the approach adopted by this Court in *Hartzell*.

[5] It is perhaps not all that surprising that the Commission conflated and/or transposed the terminology for corporations and limited liability companies. (R. p. 144, line 15-p. 151, line 12; R. p. 152, lines 4-5; R. p. 153, lines 9-10; R. p. 154, line 14-p. 155, line 9). The insurance agent Byron Kinney appears to also have been confused about the proper terminology, and the hearing transcripts reveal that the terminology applicable to a corporation (i.e., minority shareholder and officer) was used interchangeably with the terminology applicable to an LLC (i.e., member/partner/owner). Claimant Reyna's almost complete lack of memory about his pre-assault circumstances further contributed to the confusion about the corporate organization of his Employer. (R. p. 134, line 11-p. 136, line 18). However, no matter how muddled the terminology, the facts and law are clear. Tony's Place LLC is a limited liability company *not* a corporation. And, a limited liability company is *not* a corporation under the South Carolina Workers' Compensation Act. Like a partnership, its members must opt in to coverage – not opt out from coverage like corporate officers.

summarily concluded: "Under § 42-1-130 Tony's Place of Sumter LLC is a corporation." (R. p. 27; *see also* R. p. 10). The lack of any factual support or accompanying analysis for this erroneous jurisdictional finding is – standing alone – grounds for reversal as a manifest error of law. *See, e.g., Brayboy v. Clark Heating Co., Inc.*, 306 S.C. 56, 58-59, 409 S.E.2d 767, 768 (1991)(finding that "[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings" and determining that "a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues").

B. The Commission erred by summarily concluding that Tony's Place of Sumter LLC is a corporation when the undisputed evidence demonstrates it is a limited liability company.

Moreover, the Commission's perfunctory treatment of Tony's Place LLC as a corporation is contrary to the record evidence, which shows that Claimant Reyna was an LLC member and 30 percent partner/operating manager of Tony's Place LLC, (R. p. 101, lines 9-25; R. p. 121, lines 18-25; R. pp. 187-196), with "[n]o interest whatsoever" in the corporation "Fenerly Inc. D/B/A Tony's Pizza," (R. p. 102, lines 3-8).[6] Tony's Place

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[6] There is no evidence that Claimant Reyna ever worked for the Tony's Pizza location on North Main Street owned by Fenerly, Inc. Tony's Place LLC was Claimant Reyna's only Employer and the only insured entity with which he had an employment relationship.

Nor was there any evidence presented by Claimant (who bore the burden) to demonstrate joint employment, parent/subsidiary status, or an alter-ego relationship. There is no evidence of control or overlapping business activities, and Peidis made clear that the two restaurants were maintained as separate locations and were organized as different entities of different types. In fact, the only thing the two insured entities have in common is that they are both restaurants and they share one owner (Peidis) in common.

LLC is a domestic LLC – an entity created by state statute – that is classified as a partnership for federal income tax purposes when, as in this case, no Form 8832 has been produced that indicates an affirmative request for treatment as a corporation. There is no evidence that Tony's Place LLC was operating as a corporation contrary to its registered designation as a "limited liability company" with the Secretary of State. (R. pp. 187-

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This is not enough to meet the heavy burden required to establish joint employment, parent/subsidiary status, or an alter-ego relationship. *See, e.g.*, 5-68 Larson's Workers' Compensation Law § 68.04 (Joint Employer)("It is important in these cases to insist that all the elements of joint employment be present before imposing joint liability. In particular, it should be observed that the mere advancing of one potential employer's interests, accompanied even by some sharing in payment, is not enough in the absence of some element of control in addition . . . , [and even if] there is a mutual business interest between the two employers, and perhaps even some element of control, joint employment as to one employer cannot be found in the absence of a contract with that employer."); *Poch v. Bayshore Concrete Prods./S.C., Inc.*, 405 S.C. 359, 371, 747 S.E.2d 757, 763 (2013) (Alter Ego and Parent/Subsidiary)(citing John D. DeDoncker, Note, *Adopting an Economic Reality Test When Determining Parent Corporations' Status for Workers' Compensation Purposes*, 12 J. Corp. L. 569, 577 (1987), which analyzed different theories to assess parent-subsidiary relationship for workers' compensation purposes and stated "[t]he alter ego theory functions on the premise that when two corporations operate essentially as one, they should be considered as one for workers' compensation purposes"). Nor did Claimant Reyna presented any evidence suggesting that the "eight factors that courts should consider in determining whether two related businesses are separate and distinct corporations for workers' compensation purposes" weigh in his favor:

1) Did the two businesses maintain separate corporate identities?
2) Did the two businesses maintain separate Boards of Directors?
3) Did the two businesses transact business from different locations under different managers?
4) Did the two businesses hire and pay their own employees?
5) Did the two corporations hold themselves out to their employees as two separate identities?
6) Did the two corporations engage in different business activities?
7) Did the two corporations maintain separate books, bank accounts, and payroll records?
8) Did the two corporations file separate tax returns?

Poch, 405 S.C. at 372-73, 747 S.E.2d at 764. All of the record evidence indicates that these two entities maintained separate corporate identities.

196).

Indeed, the only evidence before the Commission that relied on corporation-specific terminology is the Policy's "Partners, Officers and Others Exclusion Endorsement", but it does not offer support for the Commission's finding that Tony's Place LLC is a corporation in disguise. The Exclusion Endorsement applies equally to "Partners" and "Officers" and Peidis clarified that persons listed as "officers" were not officers "in the legal terms" of the entities as organized. (R. p. 113, lines 12-23; R. p. 115, lines 2-7; R. p. 117, line 15-p. 117(a), line 25; R. p. 118, lines 18-19). Nor does the "Corporate Rejection Form" – which was found to be invalid and unexecuted by the Commission in any event – have any bearing on the Employer's existence as a limited liability company. The insurance agent who sold the policy to Tony's Place LLC clarified that he understood LLC members were automatically excluded, so the Corporate Rejection Form was a superfluous form – an unnecessary "extra layer." (R. p. 121, line 18-p. 125, line 12). It certainly does not change the designated status of a limited liability company registered as such with the South Carolina Secretary of State.[7]

C. There is no evidence that Claimant Reyna elected to be covered as a business partner and/or notified the Carrier of that election.

Because the undisputed evidence demonstrated that Claimant Reyna was a business partner – a "member" in limited liability company terminology – of his

[7] The Commission erred by even considering the Corporate Rejection Form in the context of a limited liability company. The inclusion of the form only served to further muddy the waters as to the real determination which, as set out above, was simply whether or not Claimant Reyna, as a business partner, notified Carrier of his opt in to coverage. The Corporate Rejection Form is immaterial to this determination for two reasons: (1) the form is only applicable to corporations and (2) it is irrelevant whether the form was signed because § 41-2-130 requires an affirmative opt in by business partners and doesn't contemplate an opt out of coverage.

Employer Tony's Place LLC, the sole jurisdictional issue for the Commission to determine was whether Claimant Reyna, as a business partner, elected to be included as an employee under the workers' compensation coverage of the business as required by S.C. Code Ann. § 42-1-130:

> Any sole proprietor or partner of a business whose employees are eligible for benefits under this title may elect to be included as employees under the workers' compensation coverage of the business if they are actively engaged in the operation of the business and if the insurer is notified of their election to be included. Any sole proprietor or partner, upon this election, is entitled to employee benefits and is subject to employee responsibilities prescribed in this title.

The plain language of § 42-1-130 makes evident that a business partner is not covered by workers' compensation coverage – and is not considered an employee of the business – unless three prerequisites are satisfied. First, the business partner must affirmatively elect to be included as an employee under the workers' compensation coverage of the business. Benefits are not available until such an election occurs. *See* S.C. Code Ann. § 42-1-130 ("Any sole proprietor or partner, *upon this election*, is entitled to employee benefits . . . . ")(emphasis added). Second, the business partner must be "actively engaged in the operation of the business" such that he is acting as an employee (i.e., coverage is not available for a silent or uninvolved partner). Third, the insurer must be notified of the partner's election to be included. In the absence of such a notification – which did not occur in this case – there is no coverage. Here, there was no election of coverage by Claimant Reyna and there was no notification to Carrier that

Claimant Reyna wished to be covered.[8] Rather, the evidence demonstrated that Claimant Reyna has never spoken with anyone at Carrier, nor has he ever spoken to Carrier's insurance agent Byron Kinney.

South Carolina law is consistent and clear: The requirements of § 42-1-130 are to be strictly construed and exacting compliance is necessary for coverage. As this Court previously held when interpreting § 42-1-130:

> Courts must apply the terms of a clear and unambiguous statute according to their literal and ordinary meaning . . . . Section 42-1-130 is clear and unambiguous. When we apply the terms of Section 42-1-130 according to their literal and ordinary meaning, we can only conclude that, to be included as an employee under workers' compensation coverage, the statute...requires a partner...to notify the insurer of his election to be included as an employee. The partner may give the notice either orally or in writing.

See, e.g., Johnson v. Pennsylvania Millers Mut. Ins. Co., 292 S.C. 33, 37, 354 S.E.2d 791, 793 (Ct. App. 1987)(holding that a partner/general manager of a partnership was not covered under the partnership's workers' compensation policy, which expressly stated it covered "local managers," because he filed no election to be covered as an employee in the first instance and also did not notify his insurer of any such election); *Smith v. Squires Timber Co.*, 311 S.C. 321, 324-25, 428 S.E.2d 878, 880 (1993)(holding that § 42-1-130 sets out a "narrow exception to the general rule"); *Carver*, 278 S.C. at 237, 294 S.E.2d at 420 (holding that "§ 42-1-130 expands coverage to allow persons working for the benefit of Pridemore, as owner, to elect to be classified as an 'employee' for purposes of receiving compensation coverage"). Because "[t]he obvious purpose of this section is to

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[8] Indeed, all of the evidence presented indicated that neither business partner involved in Tony's Place of Sumter, LLC desired for Claimant Reyna to be included in coverage.

expand coverage of the Act by making its benefits available to working partners and sole proprietors who are actively engaged in another's enterprise, and thereby exposed to its risks, *id.*, it must be strictly construed. In this case there was no strict compliance and, in fact, no compliance at all.

II. The Commission erred in finding and concluding that Claimant Reyna is an employee of Tony's Place of Sumter, LLC despite his status as a member/partner of that entity and despite his failure to opt in to coverage.

South Carolina law is clear: A "partner" under the Act cannot also be an "employee" unless he opts in to inclusion. These roles go hand-in-hand when the Employer is a partnership, and a partner cannot make an end run around the opt-in requirement by arguing that he is an "employee" standing apart from his partner status. As the South Carolina Supreme Court has held, "'[w]orking partners' are not employees.'" *Marlow*, 248 S.C. at 571, 151 S.E.2d at 748 (quoting Larson's Workers' Compensation Law §§ 54.30-54.32)("However, we find no support in the evidence for the commission's conclusion that claimant was an employee of either or both of his associates. While Brown was the contact man with Jones, as between themselves the three roofers were on an equal basis and regarded each other as partners.").

Both the Single Commissioner and Appellate Panel Orders find – contrary to South Carolina law – that Claimant Reyna was somehow both a business partner and an employee of Employer. (R. p. 23, Finding of Fact No. 2; R. p. 10, Finding of Fact No. 2). This inconsistent result is simply not possible within the context of both *Marlow* and § 42-1-130. Claimant Reyna, as a partner/member in an LLC, is only eligible to be considered as a working business partner who must opt in under the Act; he can never be considered an actual employee of Employer who is required to neither opt in nor opt out.

Because Claimant is a working business partner, and because working partners are not employees, Claimant was obligated to opt in to coverage, and because he failed to do so, no coverage is available to him under the Act.

CONCLUSION

There is no question Claimant Reyna has serious injuries, extensive medical bills, and will require future medical care. However, the Commission cannot abrogate the clear and unambiguous opt-in requirement S.C. Code Ann. § 42-1-130 imposed on him simply because this is a serious injury case. The General Assembly enacted § 42-1-130 with the specific intent to exclude business partners from coverage unless they affirmatively opt in by notifying the insurer, and the Commission is required to give clear and unambiguous statutes their plain and literal meaning. The Commission erred when it deviated from this analysis by inappropriately treating Tony's Place LLC as a corporation that required Claimant Reyna to opt out of coverage, and these erroneous findings and conclusions must be reversed.

November 7, 2016 By: _____

William R. Harbison, S.C. Bar 15041
Laura W. Jordan, S.C. Bar 100374
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

Brett H. Bayne
MCANGUS GOUDELOCK & COURIE, LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th floor (29201)
Columbia, South Carolina (29211)
Tel: 803.779.2300
Fax: 803.748.0526
ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No.: 1316470
Appellate Case No.: 2016-000617

Elias Reyna ..... Respondent,

v.

Fenerly Inc. / Tony's Place of Sumter LLC, Employer, and
Foremost Signature Insurance Co., Carrier..... Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellants' Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

November 7, 2016 By: _____

William R. Harbison, S.C. Bar 15041
Laura W. Jordan, S.C. Bar 100374
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

Brett H. Bayne
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Meridian, 1320 Main Street, 10th floor (29201)
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Tel: 803.779.2300
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ATTORNEYS FOR APPELLANTS