

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No.: 0809520

Yurri Valderrama **Respondent,**

v.

Kohler Company **Appellant.**

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

Mr. Valderrama suffered an admitted accident on June 24, 2008, to his left knee. He underwent two surgeries to the left knee and one surgery to the right knee. He developed low back pain from the gait disturbance caused by use of crutches and overcompensation following his multiple surgeries. He was placed on narcotic pain medications, muscles relaxers, and anti-inflammatories which damaged his stomach resulting in an ulcer, and caused damage to his liver with increased liver enzymes. He was referred to a gastroenterologist for authorized care. He also developed skin pigmentation problems as a result of his causally-related prescriptions and was referred to an authorized dermatologist. (R. pp. 114-116) Finally, as a result of ongoing pain and the consequences of Defendant/Appellant's ("Kohler") repeated failures to provide benefits and medical treatment in accordance with several Consent Orders, he developed anxiety and depression.

Kohler agreed to provide medical treatment and benefits to Mr. Valderamma in four consecutive Consent Orders. (R. pp. 58-64)

A Motion for Sanctions had to be filed against Kohler after each Consent Order.

(R. pp. 75-80) A third Motion to Compel and Motion for Sanctions was pending along with the Form 50 at the time of the hearing. (R. pp. 81-84) Mr. Valderrama was out of work for extended periods following each of his three surgeries. There was a five month period in 2009 in which Kohler disputed that his right knee was causally-related. Despite a statement from the authorized treating surgeon and sworn deposition testimony from the same surgeon, Kohler placed Mr. Valderrama on unpaid FMLA leave and refused to provide treatment until the day prior to a hearing scheduled on Mr. Valderrama's Form 50. (R. pp. 228, 412-413) Having been without any income or

medical treatment for five months caused a significant financial and emotional hardship on Mr. Valderrama. His home was placed in foreclosure during this time and he began having marital problems. (R. p. 364, lines 23-25 and p. 365, lines 1-7)

After his right knee was finally authorized and he underwent surgery, he was allowed to return to work in a temporary light duty capacity. Kohler eventually laid off Mr. Valderrama in September 2011, while he remained on light duty. Two weeks prior to his lay off, Kohler inexplicably terminated temporary partial disability benefits it was paying. After the lay-off, Kohler failed to start temporary total disability benefits. Mr. Valderrama was again denied psychological treatment despite all the prior Consent Orders. Mr. Valderrama was only able to survive on the charity of his family and friends. The loss of income and denial of medical treatment following his termination significantly aggravated his anxiety and depression.

Approximately a month after being terminated from his job, Mr. Valderrama reached Maximum Medical Improvement, but the authorized doctor noted that he would need ongoing treatment for all of his causally-related problems, to include psychological counseling. (R. p. 114). At the time of the hearing on November 2, 2011, Mr. Valderrama had been out of work without pay for over six weeks. He still had not been provided the medical treatment agreed to in three prior Consent Orders. In particular, Kohler never provided the psychological care with Dr. Tollison or physical therapy for his back as agreed to in the Consent Order of September 19, 2011. (R. pp. 58-59)

A psychological evaluation and vocational assessment were performed after Mr. Valderrama's termination. These reports confirmed Mr. Valderrama's hearing testimony that his anxiety and depression had significantly worsened since the denial of income

benefits and medical treatment following his termination. (R. pp. 110-113; p. 380; and p. 384, lines 12-22)

On December 13, 2011, Commissioner G. Bryan Lyndon found that Mr. Valderrama was totally and permanently disabled pursuant to S.C. Code Ann. §42-9-10. He also found that Kohler had improperly stopped his temporary partial benefits on September 10, 2011 and failed to start temporary total benefits at the time of his termination. Commissioner Lyndon also found that Mr. Valderrama should be immediately provided with the psychological treatment previously agreed to in multiple Consent Orders. (R. pp. 39-57)

On December 27, 2011, Kohler appealed portions of the Hearing Order. (R. pp. 85-87) On January 18, 2012, Mr. Valderrama filed a Motion for Penalties based on Kohler's failure to pay temporary benefits or provide psychological treatment in accordance with the un-appealed portions of the Hearing Order. (R. pp. 68-70)

On March 12, 2012, Commissioner Roche issued an Order Imposing Sanctions finding Kohler was required to pay past due temporary benefits, as well as provide authorized psychological treatment, and reimburse Claimant for medical treatment in accordance with the Hearing Order. No appeal was taken from this Order. (R. pp. 33-37)

On May 2, 2012, Mr. Valderrama filed a Motion for Sanctions due to Kohler's failure to comply with the un-appealed Order Imposing Sanctions issued by Commissioner Roche on March 12, 2012. (R. pp. 38, 71-74)

On June 7, 2012, Commissioner Roche issued another Order finding Kohler in violation of her Order Imposing Sanctions of March 12, 2012, and requiring it to pay \$26,000.00 in penalties for failure to provide prescriptions, \$18,000.00 for failure to

authorize medical treatment, and \$900.00 in attorney's fees. No appeal was taken from this Order. (R. pp. 26-32)

On July 2, 2012 the Full Commission affirmed Commissioner Lyndon's Order of December 13, 2011, finding Mr. Valderrama Permanently and Totally disabled. (R. pp. 5-18)

On July 16, 2012, Commissioner Roche's un-appealed Order of June 7, 2012, was filed with the Spartanburg County Clerk of Court and a judgment lien was entered against Kohler. (R. pp. 19-25)

On July 31, 2012, a hearing was held on Mr. Valderrama's Motion for Lump Sum Payment of the Award or in the Alternative Lump Sum Payment of Attorney's Fees. The parties submitted documents at the Motion Hearing and consented to proceed without opening the record. The Hearing Commissioner ruled from the bench that Mr. Valderrama was entitled to lump sum payment of the award and directed Claimant's attorney to prepare an Order.

On August 1, 2012, Kohler filed a Notice of Appeal with this Court, appealing the Full Commission Order of July 2, 2012, that affirmed the Permanent and Total Disability award.

STATEMENT OF FACTS

Mr. Valderamma is married with four children, two boys and two girls. The boy's ages are 17 and 14 and the girl's ages are 15 and 10. All four are students. His wife does not work and he is the sole provider for his family. He had worked for Kohler for 7 years prior to his accident on June 24, 2008. Mr. Valderrama is originally from Mexico and requires a Spanish interpreter.

Mr. Valderamma injured his left knee at work which resulted in authorized surgery by Dr. Mary Black. Following the surgery, Dr. Black returned him to work at light duty over his objections. Eventually, Dr. Black succumbed to Mr. Valderamma's continuing complaints and sent him for a second MRI which showed a tear. Dr. Black recommended another surgery to the same knee immediately. However, Mr. Valderamma objected to Dr. Black performing the second surgery in light of her disregard for his complaints and failure to repair his knee the first time. He was referred by Kohler to Dr. Keith at Orthopaedic Associates. Dr. Keith performed the second authorized surgery to his left knee. (R. pp. 269-270) Dr. Keith then determined he needed surgery for his right knee. (R. pp. 230-231)

Dr. Keith placed him under light duty restrictions for his right knee until surgery could be approved. (R. p. 229) At that time, Kohler placed him on unpaid FMLA leave, and refused to allow him to return to light duty work. Since Kohler was disputing the right knee, it also refused to pay any temporary benefits. On September 17, 2009, Dr. Keith completed a Medical Questionnaire confirming that Mr. Valderamma's right knee problems were causally-related to his workers' compensation claim. (R. p. 228) A copy of the Medical Questionnaire was immediately provided to Kohler's attorney, but Kohler insisted it needed to hear from Dr. Keith in a deposition. On January 14, 2010, the parties took the deposition of Dr. Keith, who again confirmed that Mr. Valderamma's right knee problems were causally-related. (R. p. 403, lines 13-25; p. 404, lines 16-25; p. 405, lines 1-25; p. 411, lines 16-24; p. 412, lines 18-23) Unfortunately, Kohler continued its refusal to authorize treatment or pay benefits. On January 19, 2010, the day prior to the scheduled Form 50 hearing to address his claim for temporary benefits and right knee

treatment, Kohler agreed to enter a Consent Order. The Consent Order provided:

“Defendants agree to pay to the Claimant Temporary Total Disability Benefits beginning August 29, 2009 and continuing until agreement of the parties, further order of the Commission, or until the statutory maximum has been reached”.

The Consent Order also authorized surgery for the right knee by Dr. Keith. (R. p. 63) Mr. Valderamma went without income from August of 2009 until February 1, 2010 as a result of Kohler’s refusal to authorize surgery or pay benefits. During that time, his house went into foreclosure and he experienced significant personal and emotional problems almost resulting in divorce. (R. p. 364, lines 18-24; p. 365, lines 1-7)

Following his three knee surgeries, Mr. Valderamma was allowed to return to work at a temporary light duty position. He was unable to perform his previous job. He was also paid at a lower hourly rate than he was being paid at the time of his accident. His light duty job was as a laboratory assistant. However, he did not perform all the same duties as other laboratory assistants. He described that “they would let me sit and walk when I was feeling good. I did the partial job, not like the others who did it completely. The hard jobs I didn’t do like lifting and going up stairs.” (R. p. 366, lines 11-14) During the 18 month period while he was out of work either awaiting authorization for treatment or recovering from his three knee surgeries, he developed back pain due to an antalgic gait from overcompensating and using crutches and a boot. Dr. Keith prescribed numerous medications during his course of treatment for pain, inflammation, and muscle relaxation. One of those medications, Arthrotec, caused damage to the Claimant’s liver. Additionally, the combination of medications damaged Claimant’s stomach, resulting in development of an ulcer. A steroid medication affected

his skin pigmentation. He also became more and more anxious and depressed. Dr. Keith referred him to Dr. Cole for his stomach problems, elevated liver enzymes, and depression. He was referred to Dr. Behr for his back problems. After filing another Form 50 hearing request and deposing Dr. Keith a second time, Kohler agreed to provide the recommended treatment by another Consent Order, to include referral to a gastroenterologist, dermatologist, and psychologist. (R. pp. 61-62)

Mr. Valderamma paid for medications for his stomach, and for his anxiety and depression out of pocket because Kohler continued refusing to authorize these, despite the Consent Orders. He had to forego some causally-related prescribed medications completely because he was unable to afford them and Kohler failed to authorize them. Additionally, he was denied physical therapy for his back, despite repeated referrals from Dr. Behr. The physical therapy was also expressly agreed to by Consent Order. He never received any psychological counseling. He was never provided an appointment with Dr. Tollison, despite multiple referrals by the authorized treating doctor, and Kohler also expressly agreeing to provide treatment with Dr. Tollison by Consent Order. (R. pp. 58-59) During the time he was working light duty in the laboratory, three separate motions were filed against Kohler for failing to provide authorized medical treatment and prescriptions. At the time of the hearing which is the subject of this appeal, a third motion was pending.

Due to his reduced wages, Mr. Valderamma began receiving Temporary Partial benefits while performing the temporary light duty lab positions. His temporary partial disability amount was \$101.62 per week. Kohler unilaterally stopped paying his temporary partial benefits on September 10, 2011. At the hearing, Kohler's attorney

acknowledged the reason for stopping his benefits was unknown.

Mr. Valderamma was laid off two weeks later. He spoke with his supervisor and a personnel manager on the day of his lay off. He was called to Joe Brown's office and was told they wanted to send him to a different position in the Dry Finish room. He explained to them that he was familiar with the job and it required standing 8 hours a day. The personnel manager spoke with the supervisor who confirmed that was accurate. His job restrictions from the authorized knee surgeon prohibited him from being on his feet that long. Mr. Valderamma was then told by the supervisor that he would check other jobs and see what was available, but that he was being laid off effective immediately.

At the time he was laid off, Mr. Valderamma was not at Maximum Medical Improvement and remained under work restrictions by the authorized doctors. Kohler was required by law to initiate temporary total benefits following the lay off, but it failed to do so. Kohler did not submit Mr. Valderrama's name for payment of Unemployment benefits as it did with its other laid off employees. Mr. Valderamma could not apply for Unemployment as he was ineligible due to his physical restrictions. Kohler again refused to authorize medical treatment following the lay off in violation of the several Consent Orders. As such, Mr. Valderamma did not receive any income or temporary benefits and he was denied medical treatment from the time of his lay off until the hearing in November.

About a month after the layoff, Dr. Cole provided his opinion that Mr. Valderamma had reached Maximum Medical Improvement (MMI), but that he would need ongoing medical treatment for his various medical problems, to include anti-depressants and counseling. (R. p. 114) A Psychological Evaluation and Vocational

Assessment was also performed by Dr. Robert Brabham after the lay off. He noted Mr. Valderamma's psychological condition had worsened significantly due, in part, to his lay off and the denial of treatment and benefits. He also noted the combination of his physical and psychological problems rendered him unable to perform gainful employment. (R. pp. 101-113)

Kohler did not depose Dr. Cole or Dr. Brabham. Kohler did not dispute Dr. Cole's MMI opinion. Kohler did not obtain its own Vocational Evaluation to refute the opinion of Dr. Brabham. Kohler did not obtain any Independent Medical Examinations or medical opinions refuting Mr. Valderrama's psychological condition, physical restrictions, or impairment ratings.

Mr. Valderamma was the only witness to provide testimony at the hearing, although Mike Tolleson, Kohler's Safety Manager, was in attendance at the hearing.

Mr. Valderamma testified that he liked his light duty job in the lab and tried hard to do a good job. He would rather have continued to work. He would like to think that he would have been able to continue working at that job had he not been terminated. However, since his termination, his situation worsened all around. His depression and anxiety were a lot worse. (R. p. 367, lines 16-23; p. 374, lines 12-18; p. 378, lines 2-4; p. 380, and p. 384) He did not trust Kohler. He never received the counseling and psychological care Kohler had repeatedly agreed to provide by Consent Orders. (R. p. 373, lines 21-23) He never received physical therapy for his back despite Kohler agreeing to provide it. (R. p. 373, lines 24-25, p. 374, line 1) He was still purchasing his own medications, at least those he could afford. He had a check book and all of the bills were current up until the time of his most recent lay off. (R. p. 368, lines 12-13) He had been

able to rescue his house from foreclosure after Kohler cut off his benefits in 2009, but he was afraid the same thing was happening again and this time he would lose. (R. p. 368, lines 4-6) He explained the strain on his family caused by the loss of any income and having to pay for his medications out of his own pocket. (R. p. 372, lines 9-25; p. 373, lines 1-18) He did not feel he would be able to return to work again because of all of his medical problems and due to his severe depression and anxiety. (R. p. 374, lines 2-18; p. 367, lines 16-23; p. 374, lines 12-18; p. 378, lines 2-4; p. 380, and p. 384) His physical limitations prevent him from remaining on his feet for an extended period of time. (R. p. 364, lines 14-18; p. 369, lines 23-24; p. 374, lines 8-11) He has chronic back pain, pain in both knees, and his depression affects his ability to concentrate. (R. p. 374, lines 2-18)

The Hearing Commissioner requested some clarification on certain issues. Specifically, he asked Kohler's attorney if a job was available for Mr. Valderrama that met his restrictions. (R. p. 386, lines 7-8) Kohler's attorney asked if he could confer with the Safety Manager; to which Commissioner Lyndon responded "we can put him up". (R. p. 386, lines 7-18) Kohler's attorney declined to have the Safety Manager, Mike Tolleson, testify. However, after he conferred with Mr. Tolleson it was stipulated that the only position available at Kohler was the one that had been offered to Mr. Valderamma, and that position required a worker to remain on his feet for an entire 8 hour shift. (R. p. 390, lines 1-25, p. 391, lines 1-13)

A Hearing Order was issued on December 13, 2011, ordering Kohler to provide medical treatment, pay temporary benefits for the periods that these were improperly stopped, and finding Mr. Valderamma to be Permanently and Totally Disabled in

accordance with S.C. Code §42-9-10. (R. pp. 39-57)

The Hearing Order was affirmed in its entirety by the Full Commission in its Order of July 2, 2012. (R. pp. 5-18)

ARGUMENT

The record contains substantial evidence to support an award of Permanent and Total Disability. As it has done throughout the course of this claim, Kohler attempts to ignore the evidence and then pretend it does not exist. Mr. Valderamma developed substantial psychological issues during the course of this claim. Psychological issues which may have never developed had he been provided medical treatment as directed by Kohler's authorized physicians. Psychological issues which may have never developed had Kohler paid temporary benefits in a timely manner. As a result of the denial of temporary benefits, Mr. Valderrama's home went into foreclosure and his marriage was nearly ruined. (R. p. 364, lines 23-25, p. 365, lines 1-7) His back and stomach problems only developed because of his prolonged use of crutches and prescription medication while Kohler repeatedly denied medical treatment.

In September of 2011, Kohler tried to force Mr. Valderamma to take a new job that violated the physical work restrictions provided by their authorized doctor. (R. p. 368, lines 17-25; p. 369, lines 1-25) Mr. Valderrama was not required to attempt to perform a job that violated his restrictions. He specifically advised Kohler that the job violated his restrictions, a fact it does not dispute. When Mr. Valderamma would not agree to take the new job, he was terminated and his income was cut off. Once again, Kohler did not pay Mr. Valderamma, nor did they provide treatment recommended by authorized doctors and agreed to in prior Consent Orders.

The undisputed, un-contradicted medical and vocational evidence submitted at the hearing showed that after being fired for not taking a job that violated his medical restrictions; being refused psychological treatment recommended by the authorized doctor and agreed to by Consent Orders; and, having his income illegally cut off again: Mr. Valderamma, the sole bread-winner for his family of six, became more anxious and depressed. Shocking! (R. p. 367, lines 16-23; p. 374, lines 12-18; p. 378, lines 2-4; p. 380, and p. 384)

Mr. Valderamma testified at the hearing that he was able to perform a modified version of a lighter job at Kohler until his termination. (R. p. 366, lines 8-14) He testified that he enjoyed working and would have liked to continue in that job. However, since being fired, having his income cut off by Kohler for an extended period again, and being denied psychological treatment recommended by the authorized doctors, he had lost trust in his employer. He became more depressed about his situation. (R. p. 367, lines 16-23 ; p. 374, lines 12-18; p. 378, lines 2-4; p. 380, and p. 384)) He now felt he could not perform any type of work. The psychological evaluation and vocational assessment supported his testimony. Kohler presented nothing to refute this.

Substantial evidence exists in abundance to affirm the Order of the Full Commission. "Only the Commission is authorized to pass on the weight of the evidence in a workers' compensation case." Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E. 2nd 288 (1962).

Kohler argues Mr. Valderamma was required to seek employment in order to be awarded Permanent and Total Disability. This is a misstatement of the law. Appellant's reliance on Shealy v. Algernon Blair, Inc., 250 S. C. 106, 110, 156 S.C. 2nd 646, 648

(1967) is misplaced. In Shealy, medical evidence established that the claimant was able to perform work. That is not the situation *sub judice*. The medical evidence herein establishes that Mr. Valderrama is disabled from any gainful employment. If a claimant has physical and psychological limitations that prevent him from being able to perform any gainful employment, submitting a job application would not change that. The relevant question was not whether Mr. Valderamma could perform comparable employment on the date he was terminated, but whether he was capable of doing so after he reached Maximum Medical Improvement. The evidence established that after his termination, Mr. Valderamma's psychological condition worsened. (R. p. 367, lines 16-23; p. 374, lines 12-18; p. 378, lines 2-4; p. 380, and p. 384)The vocational evidence established that the combination of his psychological condition and physical limitations following his termination has resulted in his inability to perform gainful employment of any kind.

Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. Wynn v. Peoples Natural Gas Co., 228 S.C. 1, 118 S.E. 2nd 812 (1961). The generally accepted test of total disability is inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable, stable market for them does not exist." *Id.*

Kohler argues that Mr. Valderamma developed a new skill set while performing the modified light duty job at Kohler that "may afford him other financially comparable job opportunities" (Appellant's Brief pg. 9) Kohler provided no evidence to support this assertion. What are these new skills? The only vocational evidence submitted at the hearing specifically contradicts this assertion. No new skills were identified. No vocational

evaluation was submitted by Kohler. More importantly, Kohler ignores the evidence that Mr. Valderamma's psychological condition worsened following his termination. (R. p. 367, lines 16-23; p. 374, lines 12-18; p. 378, lines 2-4; p. 380, andp. 384) The Record is void of any evidence whatsoever contradicting the fact that Mr. Valderamma's psychological condition worsened after his termination. Commissioner Lyndon found his worsened psychological problems alone were sufficient to render him permanently and totally disabled. (R. p. 53)

Evidence that the claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2nd 471 (Ct. App. 1989).

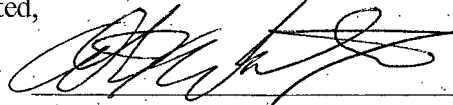
Finally, Appellant fails to address the other sustaining grounds for the Hearing Order. Conclusion of Law Number 8 provides:

Pursuant to *South Carolina Code Ann.* § 42-9-10, Kennedy v. Williamsburg County 242 SC 477, 131 SE2d 512 (1963); and Getsinger v. Owens-Corning Fiberglas Corp., 335 SC 77, 515 SE2d 104 (Ct. App 1991), Claimant's anxiety and depression which were induced by his admitted physical injury at work have rendered him Permanently and Totally Disabled.

CONCLUSION

Based on the foregoing, Mr. Valderrama respectfully requests this Court to affirm the Full Commission's Order in its entirety.

Respectfully submitted,



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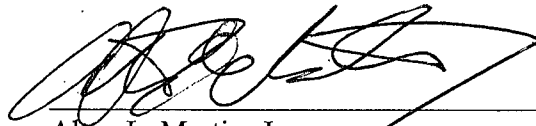
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PROOF OF SERVICE
(Respondent's Final Brief)

I certify that I have served the **RESPONDENT'S FINAL BRIEF** upon the Appellant by and through its attorney of record and the South Carolina Workers' Compensation Commission, by depositing a copy of it in the United States Mail, postage prepaid, on this the 18th day of April, 2013, addressed as follows:

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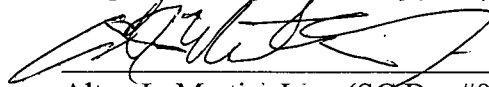
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Kohler Company.....**Appellant,**

CERTIFICATE OF COUNSEL

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

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