THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

---

WCC File No. 0912295

Court of Appeals Case No. 2016-000853

---

Nikolay Gul, Claimant .....Appellant,

v.

Kohler Company .....Respondent.

---

**FINAL BRIEF OF THE RESPONDENT KOHLER COMPANY**

---

Grady L. Beard
Nicolas Haigler
Jasmine D. Smith
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondent

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**State Statutes and Rules**

## STATEMENT OF ISSUES

I. Whether Appellant's arguments are preserved for review.

II. Whether substantial evidence supports the Full Commission affording "no weight" to the medical records, evaluations, and medical opinions of Dr. Gregory Feldman and finding Appellant does not have asthma.

III. Whether substantial evidence supports the Full Commission finding Appellant failed to establish any asthmatic condition he allegedly has was caused by, or arose out of, his employment with Kohler.

## STATEMENT OF THE CASE[1]

This is a workers' compensation appeal by Nikolay Gul (Appellant) from the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel (the Full Commission), filed on March 23, 2016, which unanimously upheld the Decision and Order of the Hearing Commissioner, Commissioner Scott Beck (Commissioner Beck). **(R. p. 86).**

On September 11, 2009, Appellant filed a claim against Respondent Kohler, alleging he suffered from occupational asthma caused by his inhalation of acetic acid[2] at Kohler on August 20, 2009. **(R. pp. 89-92).** Kohler denied the claim was compensable. Initially, Commissioner Derrick Williams heard the matter and found the claim was compensable as an injury by accident. **(R. p. 17).** Kohler appealed **(R. pp. 129-130)**, and after a hearing, the Full Commission vacated the Decision and Order of Commissioner Williams and remanded the matter for a *de novo* hearing. **(R pp. 27-30).** No appeal was taken by either party from that Order.

On remand, Commissioner Beck heard the matter and found, among other things not subject to this appeal, Appellant did not suffer from any asthmatic condition as of the alleged date of injury. **(R pp. 67-70).** Further, Commissioner Beck found that even if Appellant suffered from asthma on the date in question, Appellant failed to establish by a preponderance of the evidence Appellant's asthmatic condition was related to his employment with Kohler. **(R. p. 36).**

---

[1] As fully discussed in Section I(B) of this brief, contrary to Appellant's blatantly false accusations, Kohler never argued before Commissioner Beck or the Full Commission that Dr. Feldman lacked credibility because of his Russian descent. Furthermore, although Appellant repeatedly implies bias, dishonesty, and lack of integrity on the part of Commissioner Beck stemming from Kohler's counsel's prior representation of Commissioner Beck, Appellant *was fully aware* of counsel for Kohler's previous representation of Commissioner Beck prior to the hearing, and waived any issue with the prior representation. **(R. pp. 37, 1459-60).**

[2] Acetic acid is an organic compound. Vinegar is roughly 3-9% acetic acid by volume, making acetic acid the main component of vinegar apart from water; therefore, acetic acid is essentially vinegar. **(R. pp. 39, 52, 1236, 1409).**

Appellant filed a *pro se* Form 30 Notice of Appeal. **(R. p. 131).** After filing the Form 30, Appellant retained his current attorney who provided Appellant's brief and argued before the Full Commission on his behalf. Kohler argued the issues briefed by Appellant's new counsel were not the issues raised in Appellant's *pro se* Form 30 and therefore the issues were not preserved and Commissioner Beck's findings of fact and conclusions of law were the law of the case. **(R. pp. 84, 171, 182-84, 205, 1422, 1427-30).** Ultimately, the Full Commission considered the issues briefed, unanimously found Commissioner Beck's Decision and Order was supported by the greater weight of the evidence, and affirmed the Decision and Order in its entirety. **(R. p. 86).**

## STATEMENT OF FACTS

For a complete understanding of this case, a thorough recitation of the facts is necessary. Appellant began working at Kohler in 2004. **(R. pp. 38, 1227-28).** His last full shift was on July 20, 2009, though he worked for four hours on August 20, 2009. **(R. pp. 61, 67).** Appellant testified he first noticed the symptoms which led to this claim in or around late 2007 or early 2008. **(R. pp. 39, 61, 1231-32).** He testified his symptoms "definitely worsened" in 2008. ***(Id.)***

While working for Kohler, Appellant worked on several pieces of equipment, including the "kitchen sink," "cover 2," "cover 5," and "small machines." **(R. pp. 36, 61, 1228-29).** Initially, Appellant worked on the cover 2, cover 5, and small machines, each of which required minimal use of some acetic acid. **(R. pp. 39, 1234-35, 1359).** The exposures were brief as acetic acid was used in very small quantities and for a very specific purpose. ***(Id.)*** Kohler employees testified the machines had various "run times" during which Appellant would not have used or been exposed to acetic acid, and any acetic acid sprayed on the machine was "baked off" during the process. **(R. pp. 48, 1367-68, 1393-95).** The run times on the machines were approximately thirty minutes;

therefore, out of every hour, Appellant used acetic acid for less than two or three minutes and in minimal amounts. ***(Id.)*.**

In at least the four months preceding Appellant's departure from Kohler in 2009, Appellant worked on the kitchen sink machine. **(R. pp. 6, 9, 38, 1228-29).** Appellant admitted his job on the kitchen sink machine did not require the use of any acetic acid; however, he alleged that during his time on the machine, he would assist other employees on the cover 2 machine, and while doing so, he was occasionally exposed to acetic acid. ***(Id.)*** Yet, Appellant admitted that when substituting on the cover 2 machine, the employee he assisted would be the person who regularly sprayed acetic acid during this four-month period. **(R. pp. 1228-29).**

As to the machines requiring acetic acid, Appellant's testimony directly contradicted other Kohler employees' testimony describing acetic acid use on the machines. Contrary to the testimony of his supervisors, Appellant testified he essentially saturated the machines with acetic acid between runs. **(R. pp. 39, 48, 50-51, 1097-101, 1234-35, 1367-69, 1393-94, 1400-01).** Kohler conducted an industrial hygiene assessment to recreate Appellant's version of acetic acid use. **(R. pp. 696-701).** During the assessment, Kohler "soaked" the machines in acetic acid, though Appellant was not trained to apply the acetic acid in this manner. **(R. pp. 49, 696-701, 1002-03, 1097-101, 1151-52, 1379-80, 1382-83).** Despite saturating the machine with acetic acid for the assessment, the assessment results showed the levels of acetic acid were between one-tenth and one-hundredth the levels allowed by the Occupational Safety and Health Administration (OSHA). **(R. pp. 66, 698, 701).**

Even though Appellant alleged he knew at the time that the acetic acid was causing him health problems, Appellant did not report any complaints about eye, nose, throat, or lung irritation. **(R. pp. 46, 1323-25).** Further, the record does not include medical records or other documents

showing Appellant ever complained of or suffered from any pulmonary issues during the time he worked on the machines which required minimal use of some acetic acid. **(R. pp. 41-43, 46, 61-63, 1255, 1257-85).** Appellant asserted he asked Kohler for a respirator to wear while he used acetic acid but he was denied one. **(R. pp. 39, 1232-35).** By contrast, Kohler's employees testified Appellant never requested a respirator, Kohler had a respirator program, and had Appellant requested a respirator, he would have immediately been referred to the respirator program for fitting and given a respirator. **(R. pp. 47-8, 51, 977, 985, 1006, 1030-31, 1147-48,1401-06).**

Appellant's medical records revealed a multiple-year history of problems *unrelated* to his lungs and do not mention acetic acid in any way. Kohler conducted two routine lung function tests on Appellant prior to Appellant's September 23, 2009 visit with Dr. Feldman when Dr. Feldman diagnosed Appellant with asthma. **(R. pp. 56, 58, 889-91).** Kohler conducted the tests on May 9, 2006, and June 11, 2009. ***(Id.).*** By the time of Appellant's first test, Appellant had worked around acetic acid for approximately two years. Both tests produced completely normal results. **(R. pp. 889-91).**

On July 22, 2009, Appellant saw Dr. Chris Nowatka, his family physician, and complained that he was unable to work because he was suffering from an irregular heartbeat. **(R. pp. 53, 571).** At this visit, Appellant made no complaints related to shortness of breath or any other pulmonary issues. ***(Id.).*** Medical records from the visit show his lungs were clear. ***(Id.).*** The records do not mention burning eyes, nose, or throat, which other physicians testified would be expected in someone who had a multi-year history of exposure to a chemical that purportedly caused occupational asthma. **(R. pp. 53-4, 559, 571).** Dr. Nowatka diagnosed him with bradycardia tachycardia, abnormal liver enzymes, and elevated blood sugars. **(R. pp. 54, 571).**

On July 27, 2009, Appellant saw Dr. Yogi J. Hiremath for a cardiac evaluation. **(R. pp. 54, 580-81).** Medical records from the visit show his lungs were clear on exam. **(R. pp. 54, 581).** Dr. Hiremath placed Appellant on a treadmill for seven minutes and Appellant completed this task without any complaints related to asthma or his lungs.[3] ***(Id.)*.**

On July 29, 2009, Appellant returned for a follow-up visit with Dr. Nowatka. **(R. pp. 54, 570).** Dr. Nowatka noted Appellant had problems with his heart and had developed some right flank pain that came on mostly at night or when he worked. ***(Id.)*.** A physical exam again revealed Appellant's lungs were clear. ***(Id.)*.** On August 11, 2009, Dr. Nowatka saw Appellant again for upper right quadrant and right flank pain. **(R. pp. 54, 569).** A physical exam revealed that his lungs were clear. ***(Id.)*.**

On August 25, 2009, Appellant returned to Dr. Nowatka again complaining of pain. **(R. pp. 54, 567).** Appellant stated he was unable to work for more than four hours because of his right upper quadrant pain. ***(Id.)*.** The record does not include evidence showing this quadrant pain was related to any pulmonary issues or acetic acid exposure. **(R. p. 54).** In fact, Dr. Nowatka noted the pain was *not* worsened by deep breathing. **(R. pp. 54, 567).** Appellant's lungs were clear on examination. **(R. pp. 54-5, 567).** Appellant specifically requested a pulmonary consult referral from Dr. Nowatka despite having no prior pulmonary complaints. **(R. pp. 55, 567).** In response to this request, Dr. Nowatka stated, "They are asking for [a] referral to the pulmonologist and I don't think that there is anything wrong with his lungs so we certainly could consider that but I think [they are] unlikely to find anything wrong." ***(Id.)*.** Dr. Nowatka felt Appellant's symptoms were

---

[3] Appellant's seven minutes exceeded the American Thoracic Society's recommended six-minute walk test when trying to produce symptoms of asthma. **(R. 555, 581).**

related to anxiety and stress rather than any pulmonary pathology. ***(Id.)*.** Chest films, which included the lungs, were unremarkable. ***(Id.)*.**

On August 31, 2009, Appellant was still complaining of pain, but Dr. Nowatka noted that he was having episodes of tachycardia, lightheadedness, and dizziness, all of which were cardiac in nature. **(R. pp. 55, 566).** Dr. Nowatka thought his abdominal pain was brought on by anxiety. ***(Id.)*** Appellant did not provide any pulmonary complaints during this visit. ***(Id.)*.**

In September 2009, Appellant reported to the South Carolina Department of Employment and Workforce that he was ready, willing, and able to work from September 2009 until September 2011, over two years after his termination from Kohler. **(R. pp. 44, 609-27, 1300).** He did not disclose any illnesses or disabilities with respect to his alleged occupational asthma. **(R. pp. 45, 634, 1302, 1304).** Further, he did not disclose that he was unable to work due to his alleged asthmatic condition. **(R. pp. 45, 634, 1302-03).** Because of these representations by Appellant, he received unemployment benefits during this entire time. **(R. p. 1300).**

On September 23, 2009, twelve days after retaining legal counsel, Appellant saw Dr. Feldman, the pulmonologist whose credibility is at issue in this case. **(R. pp. 55, 432-33, 717, 1455-57).** Dr. Feldman generated the following two documents from that visit: (1) an examination sheet which contained Appellant's basic information and stated "occupational asthma?," **(R. p. 432)** and (2) a document stating Appellant had asthma and it was possibly occupational. **(R. p. 433).** Though Dr. Feldman's note reflected a question about Appellant's asthma being occupational, he testified there was no doubt that on this day—the first day of his visit—Appellant had occupational asthma. **(R. pp. 720, 726, 760).** The record does not include evidence showing Dr. Feldman

conducted a physical exam or pulmonary function testing (PFT)[4] during this visit. **(R. pp. 432-33, 717-19).** In fact, Dr. Feldman could not produce an actual medical report from that date and had no basis for his failure to do so. **(R. pp. 55, 717-18, 759-60).**

Two days later, on September 25, 2009, Dr. Feldman performed a physical exam and lung function testing. **(R. pp. 55, 428-31, 719).** He performed three PFT trials on Appellant and determined his lung capacity was at 80% and his FEV1 was at 68% of its predicted value.[5] **(R. pp. 55, 531).** The three PFT trials produced wildly different results. **(R. pp. 557, 562, 762).** Dr. Feldman's records did not mention any prior pulmonary function testing Appellant had undergone at Kohler. **(R. p. 55, 729).** Further, Dr. Feldman's report stated, "*Caution: Only one acceptable maneuver was present*" and indicated that the report had to be interpreted "*with care.*"[6] (emphases added). **(R. pp. 55, 431, 762).** He did not conduct any post-bronchodilator testing—the administration of a bronchodilator to determine improvement in lung function following a bronchodilator. **(R. pp. 55, 567).** He noted Appellant had wheezing and shortness of breath with walking. **(R. pp. 56, 430).** Dr. Feldman testified that the inaccurate and inconsistent PFTs were of no concern to him in diagnosing Appellant because Appellant's wheezing was so bad that Dr. Feldman could make his diagnosis on that basis alone. **(R. p. 56, 720, 724, 727, 732).** Dr. Feldman could not testify to Appellant's work or medical history or explain why he accepted Appellant's invalid PFTs. **(R. pp. 722, 729, 731, 743, 758).**

Unbeknownst to Dr. Feldman, also on September 25, 2009, Dr. Archie Chandler, a cardiologist, performed a physical exam on Appellant. **(R. pp. 56, 515-17).** As part of the physical

---

[4] The terms "pulmonary function testing," "PFT," "lung function testing," and spirometry are used interchangeably throughout the record.

[5] FEV1 is the volume of air that can forcibly be blown out in one second, after full inspiration.

[6] The American Thoracic Society requires reproducible results or multiple tests resulting in similar outcomes. **(R. pp. 55, 58, 559-60).**

exam, Dr. Chandler performed auscultation of Appellant's lungs and evaluated any respiratory distress Appellant may have had. **(R. pp. 56-7, 516).** Dr. Chandler recorded Appellant's lungs were clear and noted Appellant was *not* in any respiratory distress. **(R. pp. 57, 516).** The record does not include evidence of any wheezing on this examination despite the fact that Dr. Feldman reported wheezing and respiratory distress so severe that he could render a diagnosis of asthma on this basis alone. . **(R. pp. 57, 515).** Moreover, the record does not include evidence of Appellant telling Dr. Chandler that he had an appointment with a pulmonologist, had already seen a pulmonologist, and had been diagnosed with asthma that very day. **(R. pp. 515-17).**

Kohler then scheduled Appellant for an independent medical exam with Dr. Charles Fogarty, a pulmonary expert, on December 29, 2009. **(R. pp. 57, 552-65).** Dr. Fogarty noted Appellant's allegations and reviewed Appellant's complete past medical history, including the records of Dr. Feldman. **(R. pp. 57, 552-57).** Dr. Fogarty also physically examined Appellant—an exam which was completely normal. **(R. pp. 57, 557-58).** Dr. Fogarty attempted to perform his own spirometry tests on Appellant but noted Appellant had difficulty taking a deep breath despite repeated coaxing. **(R. pp. 57, 557).** He noted Appellant appeared to stop short and refused to fully inflate his lungs. ***(Id.)*** He observed this by watching Appellant's purported attempts to breathe in air as Appellant's chest was not expanding. **(R. pp. 57-8, 557).** Even on the one instance in which Appellant did appear to give some effort, Dr. Fogarty noted Appellant refused to give a forceful exhalation effort. **(R. pp. 58, 557).**

To get accurate results despite Appellant's repeated poor effort, Dr. Fogarty administered albuterol to Appellant for post-bronchodilator measurements. ***(Id.)***. Even after that medication, Appellant exhibited an "inconsistent effort" in performing the tests. ***(Id.)***. Dr. Fogarty noted Appellant's best effort was still significantly below the efforts given prior to the administration of

the albuterol—something wholly contrary to a diagnosis of asthma, as the administration of the albuterol should have improved his tests results. **(R. pp. 58, 557-58, 560).** Dr. Fogarty concluded Appellant did not suffer from asthma as of December 2009. **(R. pp. 58, 560).** Moreover, he concluded that the diagnosis made by Dr. Feldman was flawed and did not meet the American Thoracic Society's criteria for diagnosing asthma. ***(Id.).*** Finally, Dr. Fogarty concluded Appellant's history and alleged symptoms were inconsistent with that of occupational asthma. ***(Id.).***

Thereafter, by Consent Order, the parties sought a third opinion. **(R. pp. 1-2, 60).** Dr. Steven Sahn, a pulmonary expert at the Medical University of South Carolina (MUSC), provided the third opinion after he evaluated Appellant in October 2011. **(R. pp. 60, 501-06).** Aside from being obese, Dr. Sahn did not report any unusual findings on Appellant's physical exam. **(R. pp. 60, 505).** Dr. Sahn attempted to obtain pulmonary function testing from Appellant, but the results revealed Appellant either exerted submaximal effort or suffered from respiratory muscle weakness—not asthma. **(R. pp. 60, 506).** Dr. Sahn noted Appellant was unable to produce acceptable and reproducible spirometry. ***(Id.).*** Despite being administered albuterol, Appellant was still only able to produce one test that met the accepted protocols after four attempts. ***(Id.).*** After additional testing, Dr. Sahn ultimately concluded, as did Dr. Fogarty, Appellant did not suffer from *any* lung disease as of October 2011, and there was no evidence Appellant suffered from any work-related respiratory illness. ***(Id.).***

Subsequently, Commissioner Beck denied Appellant's claim **(R. p. 69)** and the Full Commission unanimously found Commissioner Beck's Order was supported by the greater weight of the evidence, and therefore affirmed the Order in its entirety. **(R. p. 86).** This appeal followed.

## STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs this Court's review of the Full Commission's decisions. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 384, 769 S.E.2d 1, 2-3 (2015) (quoting *Crisp v. South Co.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013)). "A decision of the Worker's Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record." *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached. *Waters v. S.C. Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996).

In workers' compensation cases, the Full Commission is the ultimate fact finder. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved exclusively to the Full Commission. *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of an appellate court to weigh the evidence as found by the Full Commission. *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981). Further, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999). Where the record includes conflicts in the evidence over a factual issue, the findings of the Full Commission are conclusive. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

However, an appellate court may reverse or modify a decision of the Full Commission "if the findings and conclusions of the [Full Commission] are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000); *see also* S.C. Code Ann. §1-23-380(A)(6)(d)(e) (Supp. 1997). "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); *Nelson v. Taylor*, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (2001).

## ARGUMENT

Appellant relied solely on Dr. Feldman's opinions to show he in fact suffered from asthma and his asthma arose out of and in the course of his employment with Kohler. On the contrary, however, multiple board-certified physicians concluded Appellant did not have asthma. Those physicians include Appellant's family physician, Dr. Nowatka, **(R. pp. 566-71)** who examined Appellant most contemporaneously with the alleged onset of symptoms, Dr. Fogarty **(R. p. 560),** and Dr. Sahn. **(R. p. 506).** Without the opinion of Dr. Feldman, Appellant is left trying to circumvent the substantial evidence rule by arguing the Full Commission's decision was affected by an error of law.

### I. Appellant's arguments are not properly preserved for review.

As an initial matter, Kohler submits Appellant's arguments are not preserved for review before this Court as the Full Commission erred in finding Appellant's arguments were preserved for review. Appeals to the Full Commission are governed in part by South Carolina Regulation 67-701(A)(3). This regulation states, "The grounds for appeal must be set out in detail on the Form 30

in the form of questions presented." Subsection (A)(3)(a) further requires that "[e]ach question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error."

Here, Appellant did not identify any specific findings of fact or conclusions of law in the grounds he included in his *pro se* Form 30 Notice of Appeal. **(R. p. 131).** Instead, in his Form 30, Appellant only alleged the following three errors: (1) "No Dr. Feldman medical records were never [sic] sent to MUSC-Dr. Sahn"; (2) he "[r]ecently found that Dr. Fogarty is in ongoing litigation with [his] treating physician Dr. Feldman and has big bias – not disclosed inaccurate medical conclusion"; and (3) "[i]neffective assistance of [his] attorney." **(*Id.*).** After filing the Form 30, Appellant retained his current attorney who briefed nine unrelated issues and argued before the Full Commission on his behalf. **(R. pp. 132-66, 1422-27, 1433-40, 1448-51).**

Kohler argued the issues briefed by Appellant's counsel were not the issues raised in Appellant's Form 30 and therefore the issues were not preserved and Commissioner Beck's findings of fact and conclusions of law were the law of the case. **(R. pp. 171, 182-84, 1422, 1427-30).** The Full Commission found Appellant "sufficiently raised issues in his Form 30 related to the credibility of the witnesses and physician testimony, records, or reports, including any issues of bias, to the extent such bias could impact the credibility of the witnesses before" Commissioner Beck. **(R. p. 85).** Therefore, the Full Commission "considered all of the evidence in light of the issues raised by [Appellant] that the [Commissioner Beck] erred in his credibility determinations." **(R. p. 86)** The Full Commission erred as matter of law.

The facts of this case are similar to a recent South Carolina Supreme Court case, *Hilton v. Flakeboard Am. Ltd.*, Op. No. 27670 (S.C. Sup. Ct. filed Oct. 12, 2016) (Shearouse Adv. Sh. No. 39 at 19). In *Hilton*, after an unfavorable decision by the single commissioner, the employer

appealed to the full commission raising four "'General Exceptions' and 102 specific exceptions to the single commissioner's order." *Id.* "Neither the four general exceptions nor the 102 specific exceptions raised issues of competency, the appointment of a Guardian ad Litem, or any claim that [the employer] had been denied its right to have Hilton evaluated by a physician of its choice." *Id.* Nevertheless, the full commission vacated and remanded the matter to the single commissioner for the single commissioner to make a determination as to Hilton's competency and his need of a Guardian ad Litem. *Id.* The full commission also ordered the employer to send Hilton to a neurologist of its choice for an evaluation. *Id.*

Hilton appealed and our supreme court remanded "the matter to the Commission for consideration *only* of [the employer]'s 102 specific exceptions to the single commissioner's order raised in the Form 30." *Id.* (emphasis added). The Court rejected the employer's claim that its four general exceptions raised these issues to the Commission, finding that argument "is contrary to this Court's jurisprudence." *Id.* at n.2. The Court noted, "Each issue raised to the Commission must be done with specificity, not through blanket general exceptions." *Id.*

Here as in *Hilton*, Appellant's three alleged errors listed on the Form 30 were so broad that it was impossible to interpret the form as actually appealing any of Commissioner Beck's findings of fact and conclusions of law. **(R. p. 131).** Although Appellant completed the Form 30 *pro se*, he was expected to complete it in compliance with the workers' compensation rules and regulations. *See State v. Owens*, 124 S.C. 220, 117 S.E. 536, 537 (1922) (quoting 8 R. C. L., p. 83, § 39) ("[A] trial conducted by the defendant himself is to be treated in every way as though he had been represented by counsel."). Moreover, the nine separate grounds for appeal included in the Full Commission brief of Appellant were not even remotely close to the issues Appellant raised in the Form 30. **(R. pp. 131-166).** Therefore, Appellant's issues were not properly preserved for review

by the Full Commission and Commissioner Beck's findings of fact and conclusions of law became the law of the case. "Only issues raised to the Commission within the application for review of the single commissioner's order are preserved for review." *Hilton*, at *19; *see also Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) (holding all findings of fact and law by a single commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission); *Brunson v. Am. Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding the findings of fact and law by the single commissioner become and are the law of the case unless excepted to by appellant (*abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013))); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the single commissioner become the law of the case, unless within the scope of the appellant's exception to the single commissioner's order (*abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013))).

The issues raised on appeal are not the three specific issues raised in Appellant's Form 30 **(R. p. 131)**; therefore, they should not have been considered by the Full Commission. Accordingly, Appellant's current arguments also are not preserved for review before this Court. *See Hilton,* at *19 ("This Court has also held that general exceptions, such as 'the commission erred in making an award,' are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review." (quoting *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944))); *see also Wall v. C. Y. Thomason Co.*, 232 S.C. 153, 156, 101 S.E.2d 286, 288 (1957) (holding appeals from the Commission are governed by the same principles that apply in ordinary civil actions, and appellate "courts can consider only matters that were before the Commission and as to which error has been specifically assigned").

II. **The Full Commission's determinations that Appellant does not have asthma and to afford "no weight" to the medical records and medical opinions of Dr. Feldman are not affected by an error of law and should be affirmed because they are supported by substantial evidence.**

A. **Substantial evidence in the record supports the Full Commission's finding regarding the weight to be given to Dr. Feldman's medical records and medical opinions.**

After reviewing the totality of the evidence, including the medical records and testimony of numerous physicians, and live testimony of Appellant himself and several other Kohler witnesses, the Full Commission properly found Dr. Feldman's reports and testimony "to be highly suspect" and "lacking in credibility." **(R. pp. 65, 78, 86).** Likewise, it correctly concluded Dr. Feldman's opinions should be afforded "no weight." ***(Id.)*** Substantial evidence in the record supports the Full Commission's decision; therefore, this Court should affirm. *See Howell*, 291 S.C. at 471, 354 S.E.2d at 385 (holding findings of the Full Commission may not be overturned by a reviewing Court unless clearly unsupported by substantial evidence); *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005) (holding it is well established that the final determination of witness credibility and the weight to be accorded evidence is reserved for the Full Commission).

Importantly, evidence in the record reveals Dr. Feldman diagnosed Appellant with asthma on the first visit, September 23, 2009, without performing any actual medical examinations during the visit. **(R. pp. 432-33, 719-22, 727, 732, 760).** Additionally, he diagnosed Appellant with occupational asthma without reviewing Appellant's work history, exposure, or even what substance Appellant worked around that allegedly resulted in his occupational asthma. ***(Id.)*.** He admitted he never looked at Appellant's past medical history. **(R. 729, 731, 743).** Rather, the record simply includes a wholly unsupported conclusion reached by Dr. Feldman that Appellant suffered from occupational asthma. **(R. pp. 432-33).** Dr. Feldman's testimony and records reveal he diagnosed Appellant with occupational asthma because of a cough and wheezing without any other

examination. (*Id.*) He did not wait until a more comprehensive examination was conducted that included lung function studies. **(R. pp. 719, 724, 727, 732, 760).** During Appellant's second visit on September 25, 2009, Dr. Feldman again diagnosed Appellant with occupational asthma. **(R. pp. 429-430).** As with the September 23 visit, his medical records from the second visit lack any history of Appellant's exposure to any substance whatsoever and contain no medical history of Appellant. **(R. p. 428-30).** Moreover, Dr. Feldman's PFTs state the results should be interpreted with care because Appellant failed to provide reproducible spirometry and his lung function values were wildly variable. **(R. p. 431, 762).** Dr. Feldman, apparently aware of the fact that even the spirometry machine itself was suspicious of Appellant's testing, testified that his diagnosis was based upon "severe wheezing" which was so severe that he could ignore or discount the inconsistent lung function tests. **(R. pp. 728, 731-32, 760).** However, his alleged finding of severe wheezing was completely undermined by Dr. Chandler, who saw Appellant the same day, performed a full cardiac evaluation, and noted Appellant did not have *any* wheezing, let alone severe wheezing. **(R. p. 515).** Dr. Feldman testified this severe wheezing was the first, and most important, criteria he used in determining whether an individual has asthma. **(R. p. 725).** Yet, Appellant's "severe wheezing" was *not* noted on *any* medical records from *any* doctors prior to his visit with Dr. Feldman even though Appellant testified he had been having these symptoms, and they were worsening, for no less than eighteen months prior to the visit.

Furthermore, Dr. Feldman's September 25, 2009 medical record contained no discussion of the following: (1) the percentage of acetic acid Appellant allegedly used, (2) how frequently Appellant used the acetic acid, (3) when Appellant began using it, (4) whether Appellant was still using it, (5) the fact that Appellant had not been around acetic acid in any form since July 20, 2009, and (6) the fact that Appellant had not used acetic acid regularly since April 2009. **(R. pp. 428-**

**30).** Dr. Feldman testified that although he normally completed a more thorough report of his patients, he could find no such report for either the September 23, 2009 visit or the September 25, 2009 visit. **(R. pp. 717-19, 759).**

In addition to the lack of any documented medical records discussed above, Dr. Feldman's deposition testimony revealed he had no real understanding of Appellant's actual exposure to acetic acid, and even at one point testified that he thought Appellant's symptoms were based upon a large, one-time exposure, which was not the case. **(R. pp. 746, 758-59).** He stated he relied upon a temporal relationship in determining occupational asthma in Appellant, but again, he had no knowledge of Appellant's prior work or medical history sufficient enough to establish a temporal relationship. **(R. pp. 743-46).** He did not even know Appellant had not worked at the plant for almost two months at the time he first saw Appellant. **(R. p. 755).** Indubitably, Dr. Feldman could not testify about the irritant properties or concentration levels in the workplace because he did not know this information. **(R. pp. 743-44, 776).**

Along with having very little knowledge of Appellant's work history, Dr. Feldman was evasive throughout the entire deposition and provided responses which never actually answered the questions posed to him. For example, he was evasive when Kohler asked him whether he would expect Appellant to have had an increase in symptoms during the time Appellant worked with acetic acid between 2007 and 2009—when Appellant alleged his condition worsened—even though no asthma symptoms were recorded in Appellant's medical records during that period. The following exchange occurred:

> [Kohler]. But if he's continued to be exposed to acetic acid and [Appellant] tells Dr. Fogarty that he believes he had the symptoms starting in 2007, would you not expect

an exacerbation of those symptoms prior to seeing you in September of 2009?

[Dr. Feldman]. Well, let me answer this question the best I can. I would never blame a patient. Ever.

**(R. p. 792).** He never answered this question and commented several more times about not blaming a patient. **(R. pp. 792-794).**

Furthermore, Dr. Feldman's testimony did not match his records. For example, he testified that on September 23, 2009, he examined Appellant, performed breathing tests, and diagnosed him with asthma. **(R. pp. 717-18).** However, his notes reflect none of that; rather, the first lung function studies were conducted on September 25, 2009. **(R. p. 431, 719, 732).** Again, he claimed to have an extensive office note with a history but could not produce it and had no idea if it actually existed. **(R. p. 759).** Despite having a note from September 23, 2009, which had no actual examination information on it, Dr. Feldman testified that he concluded on this date Appellant was suffering from occupational asthma "definitively." **(R. p. 720).**

Dr. Feldman also could not testify as to when Appellant first reported any symptoms. **(R. pp. 720-22).** Yet, he stated Appellant had to have symptoms for three months in a row after the last date of exposure before a diagnosis of reactive airways dysfunction syndrome could be established, which as Dr. Feldman noted, would not have allowed a definitive diagnosis before October 2009, in actuality, November 2009. **(R. pp. 721-22).** Therefore, even by his own standards, his September 23, 2009 diagnosis was two months too soon and yet he reached his conclusions "definitively." **(R. p. 720).**

Notably, Dr. Feldman placed no real importance on spirometry, even though Dr. Fogarty and Dr. Sahn relied upon it to determine the status of Appellant's lung functioning. **(R. pp. 505-**

06, 557-59). The American Thoracic Society also uses spirometry to diagnose asthma. **(R. pp. 559-60).** Dr. Feldman's testimony begs the question—if spirometry was so unimportant to the diagnosis, why did he do it in the first place, as he stated he did not rely upon it? **(R. pp. 724, 727).** With respect to the unreliability of his varied test results, he responded that a doctor should interpret the lung functions studies with care if the doctor has never seen the patient, but since he was Appellant's doctor, the "interpret with care" warning did not apply to him. **(R. pp. 727-28).** Unquestionably, Dr. Feldman ignored the fact that on the day he neglected the "interpret with care" warning, he had seen Appellant only one other time, two days earlier, for an examination that, based upon his notes, did not actually include an exam that could legitimately result in a diagnosis of asthma. **(R. pp. 717-19, 721-22, 760).** In reality, he presumably did not know Appellant from a stranger on the street and yet testified that he intentionally chose to ignore the spirometry warnings because he was Appellant's doctor. **(R. pp. 727-28).**

Further, Dr. Feldman was unable to identify any other differential diagnoses Appellant may have had that first day despite the fact that he testified differential diagnosis was useful in determining whether a patient had asthma. **(R. pp. 730-31).** He could not recall anything in particular about his first visit, but then boldly stated Appellant could not undergo spirometry testing because he was coughing. **(R. p. 732).** Moreover, despite the standards of the American Thoracic Society requiring reproducible results—i.e., multiple tests resulting in similar results—he stated that only one test was good enough for a "clinician like himself." ***(Id.)*** When confronted with the pulmonary function testing conducted at Kohler, he simply testified those test results did not matter. **(R. p. 729).** Further, he testified that the levels of acetic acid were irrelevant because acetic acid cannot be measured in the air, despite OSHA standards to the contrary. **(R. p. 743-44).** Essentially,

Dr. Feldman testified OSHA standards were worthless because nothing airborne can be measured. **(R. p. 744).**

Dr. Feldman's other opinions were so far-fetched and without any basis in fact that they further casted doubt on any of his testimony, including his testimony that Appellant was unable to work at any job. **(R. p. 741).** It is apparent from his medical records and deposition testimony that his conclusions were not supported by any substantive facts because he simply did not know them or even seek them. Consequently, the Full Commission correctly determined Dr. Feldman's opinions were "highly suspect." **(R. p. 78).** In fact, his opinions were so without basis that they could be easily classified as conjecture or speculation. *See Nicholson*, 411 S.C. at 384, 769 S.E.2d at 2-3 ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation."). Accordingly, Kohler submits the credibility and weight given to Dr. Feldman's testimony by the Full Commission is supported by substantial evidence in the record. *See Howell*, 291 S.C. at 471 354 S.E.2d at 385 (holding that findings of the Full Commission may not be overturned by a reviewing Court unless clearly unsupported by substantial evidence).

In his brief to the Full Commission, Appellant correctly acknowledged the Full Commission is the ultimate finder of fact. **(R. p. 138).** Specifically, Appellant "request[ed] that the Full Commission duly exercise its discretion in reviewing the evidence for purposes of providing an independent decision as to whether the underlying denial by Commissioner Beck, and specifically the issues raised on appeal, are supported by the greater weight of the evidence under the law of South Carolina." ***(Id.)*** The Full Commission properly exercised its discretion and its decision must

be affirmed.[7] Because the Full Commission simply did not agree with Appellant after exercising its discretion, he chooses to argue to this Court the Full Commission abused its discretion.

**B. The Full Commission's credibility determination was not the result of bias or prejudice.**

Appellant makes unfounded allegations that the Full Commission's credibility determination of Dr. Feldman was the result of bias arising from counsel for Kohler's prior representation of Commissioner Beck, and is an improper ground for impeachment. Both allegations are without merit. Pursuant to Canon 3(E)(1)(a) of Rule 501, SCAR, "a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." However,

> it is not enough for a party seeking disqualification to simply *allege bias or prejudice*. The party *must* show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal.

*State v. Jackson*, 353 S.C. 625, 578 S.E.2d 744 (Ct. App. 2003) (emphases added). Appellant offers no evidence showing Commissioner Beck acted with bias or prejudice. Moreover, it is apparent Appellant's counsel was fully aware of counsel for Kohler's prior representation of Commissioner Beck at the time of the Full Commission hearing, and yet he never voiced a concern by Motion or otherwise until his Initial Brief to this Court. **(R. pp. 37,1459-60).** Appellant makes unfounded

[7] Appellant's remaining arguments are completely meritless and warrant no further discussion; however, out of an abundance of caution, Kohler responds to the arguments in turn.

accusations of impropriety on the part of Commissioner Beck and counsel for Kohler, while at the same time omitting the following key facts: (1) Appellant knew of the prior representation, (2) Appellant consented in writing to Commissioner Beck adjudicating this claim through his prior counsel, even after receiving the knowledge of prior representation, and (3) Appellant specifically indicated there was "no need for recusal." **(R. pp. 1459-60).** Appellant presents no evidence to support his allegation that Commissioner Beck acted with bias or prejudice in adjudicating his claim and finding Dr. Feldman's opinions and testimony lacked credibility.

Appellant further attempts to create the appearance of error where there is none by alleging the Full Commission considered improper arguments regarding Dr. Feldman's credibility based solely on his nationality. In his Statement of the Case, Appellant grossly mischaracterizes Kohler's statements and alleges Kohler argued to Commissioner Beck and to the Full Commission that "Dr. Feldman was not credible because of his Russian origin." **(Appellant's Final Brief pp. 5-6).** Appellant limits this blatant allegation of xenophobia to his Statement of the Case without further discussion. Moreover, despite Appellant's mischaracterization and current position, he did not object at the time as would be required to raise such claims now.

Under the South Carolina Rules of Evidence, "[b]ias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. The mere fact that a witness originates from a country other than the United States is clearly not a ground for impeachment because it in no way suggests untruthfulness. Here, the fact that Appellant's expert, Dr. Feldman, is of Russian origin was raised to show potential bias, as both Appellant and Dr. Feldman originate from the former Soviet Union, relocated to South Carolina, and speak Russian. **(R. pp. 759, 765, 805).** In the hearing before Commissioner Beck, Dr. Feldman's nationality, along with other potential bias, was

raised during cross-examination of Appellant after it was revealed that Appellant received free medications from and treated with Dr. Feldman approximately fifty times over six years without ever paying for treatment. **(R. pp. 27, 862-63, 1356-57).** At the Full Commission hearing on January 12, 2016, Kohler argued it is relevant in weighing credibility and bias that Appellant's current counsel or law firm represented Dr. Feldman, and that after Commissioner Beck found Dr. Feldman was not credible, Appellant somehow came to be represented by his current counsel. **(R. p. 1442).** While Kohler could continue to cite additional facts that raise issues as to Dr. Feldman's potential for bias, as previously discussed, it is apparent based upon the record viewed as a whole, substantial evidence supports finding the Full Commission properly determined Dr. Feldman was not a credible witness.

### C. The Commission properly weighed the evidence and correctly found Appellant was not entitled to benefits under the Act.

Appellant argues the Full Commission erred in giving "no weight" to the testimony of Dr. Feldman because Dr. Feldman has treated Appellant since 2009, has diagnosed Appellant with asthma, and is imminently qualified to diagnose and treat asthma.

Kohler does not take issue with the fact that Dr. Feldman is a licensed medical doctor who specialized in the field of pulmonary medicine and thus, is generally qualified to diagnose and treat asthma. Instead, Kohler contends Dr. Feldman's opinions and records lack credibility in this case because he reached his diagnosis and conclusions without sufficient knowledge of Appellant's work, medical, and exposure history to form a credible opinion. Dr. Feldman's lack of credibility is shown by the scarcity of pertinent information recorded in his medical records and by his deposition testimony, where his answers to questions were either evasive, based upon a misunderstanding of the facts, or actually revealed a lack of knowledge of the facts in this case.

Appellant argues it is impossible to afford Dr. Feldman's opinions "no weight" in "fairly and honestly" attempting to decide this case based upon the years of treatment he provided to Appellant. However, the issues to be decided were whether Appellant had asthma at the time of the alleged date of injury and if Appellant had asthma, was his asthma caused by his exposure to acetic acid at work. On these issues, based upon the record as a whole, the Full Commission was well within its discretion to afford Dr. Feldman's opinions "no weight," as his opinions were supported by either no facts or erroneous facts. Therefore, the Court should rule the decision of the Full Commission was not affected by an error of law, was supported by substantial evidence, and must be affirmed. *See Broughton v. S. of the Border*, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999) ("It is not within [an appellate court's] province to reverse findings of the Commission which are supported by substantial evidence.").

**D. The Full Commission correctly weighed the evidence with respect to the normal pulmonary function testing conducted in June 2009 versus the abnormal pulmonary function testing conducted in September 2009.**

In support of his position on this issue, Appellant merely reargues spirometry is not necessary in diagnosing asthma. However, as testified to by Dr. Fogarty, the American Thoracic Society relies upon spirometry in diagnosing asthma. **(R. p. 879).** Further, Dr. Fogarty and Dr. Sahn also attempted spirometry in determining whether Appellant had asthma. **(R. pp. 505-06, 557-60).** Dr. Feldman was never aware of, and never saw, the June 2009 spirometry conducted at Kohler. **(R. p. 729).** He never compared it to the 2006 spirometry conducted at Kohler to determine what three years of acetic acid had done to Appellant's lung function—the answer to which is nothing, as both PFTs were normal. In fact, the 2009 PFT showed better lung functioning than the 2006 PFT. **(R. pp. 557-60).** This was contrary to Appellant's own testimony that in late 2007 or early 2008 he began developing pulmonary symptoms. Moreover, the June 2009 lung function test

was performed eighteen months after Appellant testified his symptoms had worsened and yet that PFT was normal. ***(Id.)***

As has been noted by our Supreme Court with respect to the role of the fact-finder, "the facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced therefrom as common sense dictates." *Gastineau v. Murphy*, 331 S.C. 565, 570, 503 S.E.2d 712, 714 (1998) (citing *Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204-205, 51 S.E.2d 744, 749 (1949). Common sense dictates that if Appellant began suffering from pulmonary complications in 2007 or 2008, and the cause of his problems was acetic acid, his PFTs in June 2009 would not have been better than the PFTs three years earlier, and his PFTs three months later would not have shown a 30% decrease in lung functioning after Appellant had stopped working around acetic acid on a daily basis five months earlier and had stopped working entirely two months before his September 2009 spirometry. *Id.* **(R. pp. 552-53, 886-92).** Appellant's PFTs in 2006 and 2009 were performed at Kohler, in the parking lot at a mobile PFT unit, where he would have been exposed to acetic acid on the very day he would have undergone these PFTs. **(R. pp. 886-92).** By contrast, the PFTs at Dr. Feldman's office were performed two months after Appellant had any possible exposure to acetic acid. **(R. p. 721).** As Dr. Fogarty testified, when the irritant is removed from someone suffering from occupational asthma, the patient improves. **(R. p. 891).** Appellant alleged a worsening of his condition due to acetic acid despite the fact he was no longer around it. Again, this defies both logic and Dr. Fogarty's unrefuted medical opinion that Appellant should have improved after no longer working at Kohler, not worsened. **(R. p. 891-92).**

As to Dr. Feldman's testimony that spirometry cannot be faked **(R. p. 733)**, Kohler would note both Dr. Fogarty and Dr. Sahn opined Appellant appeared to be using less than full effort in conducting the test. **(R. pp. 505-06, 557-60).** As Dr. Sahn observed, Appellant either had chest

wall weakness or he was attempting to manipulate the outcome. **(R. p. 505).** Dr. Fogarty noted Appellant would not take a deep breath as instructed, as he could visually observe Appellant's lungs not inflating. **(R. p. 557).** Dr. Fogarty likewise believed Appellant was not blowing with sufficient force upon exhaling, and documented that in the records. **(R. pp. 557-58).** The fact that Dr. Feldman believed otherwise goes to the weight of the evidence, which Commissioner Beck found weighed in favor of Dr. Fogarty's and Dr. Sahn's testimony. **(R. pp. 64-66).** *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony."). Moreover, as Appellant points out, Appellant was allegedly being treated by Dr. Feldman at the time he was seen by Dr. Fogarty and Dr. Sahn, a fact that would make it more likely he could complete his PFTs without complications, unless, of course, he was attempting to manipulate the outcome—something suspected by both Dr. Fogarty and Dr. Sahn. **(R. pp. 505-06, 557-560).**

Appellant alleges the Full Commission failed to consider the literature Dr. Feldman provided and that could have explained Appellant's drop in lung function over a three-month period—a three-month period during which Appellant worked only sporadically around acetic acid. Appellant made this argument to the Full Commission—that Commissioner Beck had failed to consider the literature. **(R. pp. 145, 1449).** The Full Commission stated it considered Appellant's arguments; however, it disagreed with Appellant, choosing to believe the opinions of Dr. Fogarty and Dr. Sahn to the contrary. **(R. pp. 84, 86).** Furthermore, the articles Appellant cites are inadmissible hearsay, as the researchers were not called as witnesses to this proceeding. The authors have no knowledge of the facts of this case and offered no opinions in this case. They were not cross-examined by Kohler regarding their opinions. The record does not include evidence that

the articles were ever peer-reviewed or that the opinions set forth in the articles are applicable to the facts of this case. Consequently, any articles referenced in Appellant's brief are irrelevant to this appeal.

Moreover, Appellant's drop in lung function should not be considered in a vacuum; rather, it should be considered in light of Dr. Feldman's own test results which showed the tests were not reliable and should be interpreted with care. **(R. p. 431).** Nothing about Dr. Feldman's testimony explained Appellant's drop in lung function, as Dr. Feldman was not even aware of the June 2009 lung function studies. **(R. p. 729).** Dr. Feldman never testified as to why Appellant's lung function studies worsened by 30% after Appellant's exposure to the alleged irritant ceased two months earlier, other than to say some individuals with asthma had normal PFTs. **(R. pp. 724, 727).**

As Dr. Fogarty noted, if acetic acid was the cause of Appellant's alleged illness, Appellant should have felt better after having not been around acetic acid for two months; however, Appellant testified his symptoms worsened. **(R. pp. 891-92).** Logically, this would lead to the conclusion that it was not the acetic acid that caused Appellant's alleged problems. The Full Commission properly found that the greater weight of the evidence provided no plausible explanation for this drop in lung functioning, or that this drop in lung functioning was related to his employment at Kohler and acetic acid. **(R. pp. 77-78).** Accordingly, the Full Commission's reliance upon the opinions of Dr. Fogarty and Dr. Sahn resulted in it correctly concluding Appellant failed to meet his burden under the South Carolina Workers' Compensation Act (the Act). **(R. pp. 80-81, 83)** *Howell*, 291 S.C. at 471, 354 S.E.2d at 385.

**E. Dr. Chandler's records do, in fact, undermine Dr. Feldman's records, as found by Commissioner Beck.**

Contrary to Appellant's arguments, Commissioner Beck and the Full Commission correctly determined Dr. Chandler's records undermine Dr. Feldman's records. As noted above, Dr.

Chandler and Dr. Feldman both saw Appellant on the same day—September 25, 2009. **(R. pp. 428, 515).** Dr. Chandler, a cardiologist, examined Appellant from a cardiac standpoint, but he performed auscultation of the lungs and noted that they were clear with no wheezing. **(R. pp. 515-16).** Dr. Fogarty opined a cardiologist is as in tune to the lungs as a pulmonologist as a cardiologist is concerned about the interplay between the heart and the lungs. On the same day as the visit with Dr. Chandler, Dr. Feldman *definitively* diagnosed Appellant with occupational asthma based on his "severe" wheezing and coughing, which, according to Dr. Feldman, were so severe that it impacted Appellant's ability to complete the pulmonary function testing. **(R. pp. 720, 728, 732).** Given Appellant was seen on the same day by Dr. Chandler who reported Appellant's lungs were clear without wheezing, and Dr. Feldman's findings that Appellant had severe wheezing, Commissioner Beck did not err in determining what weight to give Dr. Chandler's report and Dr. Feldman's testimony. *See Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (holding when there are conflicts in the evidence over a factual issue, the findings of the Full Commission are conclusive).

**F. The Full Commission properly determined Appellant did not suffer from an asthmatic condition on the alleged date of injury.**

Two of the three pulmonologists—Dr. Fogarty and Dr. Sahn—determined Appellant did not suffer from asthma at the time of their examinations in December 2009 **(R. p. 560)** and October 2011. **(R. p. 506).** They both concluded there was no evidence on which to base a diagnosis of asthma, and that in any event, there was no evidence Appellant had occupational asthma that was caused by his employment at Kohler. **(R. pp. 506, 560).** The two opinions provide more than substantial evidence to support the Full Commission's decision. *See Hargrove v. Titan Textile Co.*, 360 S.C. 276, 296, 599 S.E.2d 604, 614 (Ct. App. 2004) ("Although there is evidence from which

the Appellate Panel could have gone the other way, there is clearly evidence which would allow reasonable minds to reach the conclusion the Panel reached.").

The record includes sufficient evidence to conclude Dr. Fogarty and Dr. Sahn had a better understanding of Appellant's medical history and work history to reach a conclusion as to whether Appellant suffered from asthma related to his employment at Kohler and whether acetic acid was the cause of the alleged asthma. Appellant's argument that Dr. Fogarty and Dr. Sahn lacked available medical information in forming their opinions again goes to the weight of the evidence, which was within the province of Commissioner Beck and the Full Commission. In fact, Dr. Fogarty and Dr. Sahn both (1) took histories from Appellant, (2) examined Appellant, (3) attempted to perform PFTs on Appellant, (4) found Appellant was attempting to manipulate the testing or the PFTs were otherwise not accurate, (5) found that his history did not temporally match that of occupational asthma, and (6) felt Appellant was not suffering from an asthmatic condition at the time they examined him. **(R. pp. 501-06, 552-565).** Dr. Fogarty had all of Appellant's medical records available to him and did a thorough report regarding Appellant and Dr. Fogarty's opinions. **(R. pp. 552-565).** Appellant alleges Dr. Sahn never received his medical records, but Appellant has never offered any proof Dr. Sahn did not receive the records. Moreover, had Appellant wanted to ensure Dr. Sahn's opinions were based upon Appellant's entire medical history, he could and should have provided these records to Dr. Sahn at any time between his examination and the hearing date. As noted, Dr. Sahn was chosen by both parties to examine Appellant, in part because of his excellent reputation in the community as a pulmonologist. **(R. pp. 781, 1458).**

Appellant's recitation of Dr. Feldman's testimony about Appellant's condition worsening with time actually weighs in favor of Appellant *not* having occupational asthma. The last full day Appellant worked around acetic acid on a routine basis was in or around April 2009, when he was

placed on the kitchen sink machine. **(R. p. 61).** The last day Appellant would have been around acetic acid at all was July 2009. **(R. p. 38).** Dr. Feldman testified that in 2013 Appellant's asthma was still getting worse every day, which would lead to the conclusion that even if Appellant had developed asthma, his asthmatic condition was unrelated to his employment and acetic acid, as Appellant had not been around acetic acid for more than four years when Dr. Feldman was deposed in 2013. It defies logic, much less medical certainty, that Appellant could have worked for over four years with frequent and daily exposure to acetic acid and develop no symptoms related to the exposure and then use it infrequently and sporadically and suddenly develop severe occupational asthma, especially in light of the fact that his lung capacity testing was normal just three months before Dr. Feldman diagnosed him with severe asthma. **(R. pp. 552-53).**

Additionally, Appellant and Dr. Feldman relied upon Appellant's two hospitalizations as further evidence that he was suffering from occupational asthma. However, these hospitalizations were not contemporaneous to, or temporal with, the period of time Appellant worked around acetic acid at Kohler, and, thus, are of little-to-no value in determining the issues in this case. The first hospitalization was in August 2010, more than thirteen months after Appellant had last been exposed to acetic acid, and the second hospitalization was in July 2011, two years after Appellant's last exposure to acetic acid. These two hospitalizations actually weigh against Appellant's allegations of occupational asthma because asthma secondary to a known irritant improves or resolves when the person is not in contact with the known irritant according to the testimony of Dr. Fogarty. **(R. pp. 891-92, 915-916, 921).**

Appellant cites *Corbin v. Kohler Co.*, 351 S.C. 613, 623, 571 S.E.2d 92, 98 (Ct. App. 2002), in support of his position. However, this case is of no help because in *Corbin*, the claimant prevailed before the Hearing Commissioner and the Full Commission, and under the substantial evidence

standard of review, it was the employer who had to convince the Commission the appellant had failed to meet his burden. The Court of Appeals noted that although some doctors stated the claimant did not have silicosis, one doctor did. *Id.* at 624, 571 S.E.2d at 98. The Court noted that it was the Commission who determines the weight and credibility given to expert testimony and once admitted, it can be considered like all other testimony. *Id.* In *Corbin*, the Commission found one expert more credible over the others, and that decision was affirmed on appeal. *Id.* Kohler would submit that in this case, the substantial evidence presented supports the Full Commission's decision that the more credible experts in this case were Dr. Fogarty and Dr. Sahn when viewed in light of all the evidence as determined by the Full Commission. In fact, Dr. Feldman is not credible.

Moreover, it is ironic for Appellant to rely solely upon Dr. Feldman's opinions of occupational asthma and causation when Dr. Feldman's opinions were rendered on September 23, 2009, without a medical history, a work or exposure history, an examination, or PFTs. **(R. pp. 432-33).** While at the same time, Appellant attempts to discredit Dr. Fogarty and Dr. Sahn who did more comprehensive examinations, attempted PFTs, and had a greater medical, work, and exposure history of Appellant when they formed their opinions. Appellant focuses upon the report of Dr. Joseph Mobley to refute the report of Dr. Sahn. Dr. Sahn believed Appellant's problems were more likely cardiac, but he certainly did not opine that to a reasonable degree of medical certainty, as Dr. Sahn is not a cardiologist. **(R. p. 506).** Dr. Sahn is an expert in pulmonology and rendered a pulmonology opinion—nothing about Dr. Sahn's referral to a cardiologist impacts or delegitimizes his opinions regarding Appellant's alleged asthma merely because the cardiologist did not find a cardiac cause of Appellant's alleged issues.

Accordingly, although the record includes conflicting evidence demonstrating Appellant suffered from a lung disease and the alleged lung disease was causally related to his employment,

the Full Commission resolved the conflict in Kohler's favor. **(R. p. 86).** Substantial evidence supports the Full Commission's decision; therefore, the Court should affirm. *Hargrove*, 360 S.C. at 289, 599 S.E.2d at 610-11; *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999) (holding the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence); *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony."); *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 85-86, 681 S.E.2d 595, 600 (Ct. App. 2009) (stating the Full Commission is the sole fact finder in workers' compensation cases and any questions of credibility of witnesses must be resolved by the Full Commission).

## III. Substantial evidence supports the Full Commission's finding that Appellant failed to establish any alleged asthmatic condition was caused by, or arose out of, his employment with Kohler.

The Full Commission did not err in finding Appellant failed to establish that any alleged asthmatic condition was causally related to, or arose out of and in the course of, his employment. *See* S.C. Code § 42-11-10 (2015) (defining an "occupational disease" as one "arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged" and requiring the disease be causally related via "medical evidence" which is stated to a reasonable degree of medical certainty).[8]

[8] The six elements required to establish an occupational disease are set forth in *Fox v. Newberry County Memorial Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995).

South Carolina case law is well settled that the phrase "arising out of" refers to the injury's origin and cause. *Houston v. Deloach & Deloach*, 378 S.C. 543, 553, 663 S.E.2d 85, 90 (Ct. App. 2008). For an injury to "arise out of" employment, the injury must be proximately caused by the employment. *Id.*; *see also Fowler v. Abbott Motor Co.*, 236 S.C. 226, 230, 113 S.E.2d 737, 739 (1960) (holding an accident "arises out of" employment when it arises because of it, as when the employment is a contributing proximate cause). The injury does not have to be foreseen or expected but the injury must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

The phrase "in the course of the employment" refers to the time, place, and circumstances under which the accident occurred. *Owings v. Anderson County Sheriff's Dep't*, 315 S.C. 297, 433 S.E.2d 869 (1993); *Loges v. Mack Trucks, Inc.*, 308 S.C. 134, 417 S.E.2d 538 (1992). An injury occurs "in the course of" employment within the meaning of the Act when it occurs within the period of employment at a place "where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto." *Houston*, 378 at 554-55, 663 S.E.2d at 91.

The issue of causation is typically an issue of fact for the fact-finder. *See Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943) (noting "the sole question to be determined by this Court is whether there was any relevant, competent evidence to support the finding that there was a causal connection between the strain to which the decedent was subjected, and his death less than four weeks later"). Additionally, Appellant has the burden of establishing compensability, including causation. *See Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 143 S.E.2d 376 (1965) (holding burden was on the claimant to establish causal connection between work injury and death

by cancer); *Hughes v. Easley Cotton Mill,* 210 S.C. 193, 42 S.E.2d 64 (1947) (holding the burden was on claimant to establish cancer of the neck was causally related to a serious fall); *Ashley v. S.C. Highway Dep't*, 213 S.C. 354, 49 S.E.2d 505 (1948) (holding burden was on the claimant to establish headaches were causally related to car accident).

On the issue of causation, Appellant relied upon his own testimony and the testimony of Dr. Feldman. However, substantial evidence supports the Full Commission finding both Appellant and Dr. Feldman had considerable issues with their credibility which impacted the weight ultimately given to their testimony. As to Appellant, Commissioner Beck found that at the conclusion of his employment with Kohler, Appellant was working on the kitchen sink machine which did not require the use of acetic acid and thus, Appellant's use of acetic acid diminished the last few months of his employment. **(R. p. 61).** Appellant sought treatment for chest pain and blood pressure issues in 2008, around the time Appellant alleged that he was suffering from increased acetic acid exposure. ***(Id.).*** Appellant, however, never mentioned the issue of acetic acid to any of his medical care providers. ***(Id.).*** Appellant's medical records do not document any complaints of respiratory problems in 2008 forward despite his testimony that he was suffering from breathing problems at that time. Appellant reported he made these complaints, but alleged each of his doctors, at each of his visits, neglected to record the complaints. **(R. p. 62).** Moreover, Appellant's lungs were clear on every examination from 2007 until Dr. Feldman's September 2009 visits. ***(Id.).*** Appellant testified he was on ibuprofen from Russia during this time, but he sought a refill of his Russian medication while in the United States, and this Russian medication was identified by the hospital as Inderal; Appellant, however, denied he was taking Inderal. ***(Id.).*** Hospital records also provided Appellant stated Inderal was the only medication that helped him in the past. ***(Id.).***

Additionally, for over a year, starting in mid-2008 through mid-2009 Appellant did not seek any medical care for any problems, but for the flu on one visit, let alone problems related to his lungs. **(R. p. 63).** Again, Appellant's testimony contradicted each of his medical records that were unfavorable to him. **(R. p. 62).** Accordingly, the Full Commission correctly determined Appellant's testimony affected his credibility and the weight to be given to his testimony. **(R. p. 75).** Appellant never appealed this finding and conclusion. **(R. p. 131).**

As to Dr. Feldman, Kohler has already set out the issues with his testimony, including his credibility issues as affirmed in full by the Full Commission and set forth in Findings of Fact Numbers 17 through 27 of the Order. **(R. pp.76-78).** To the extent Appellant relied upon Dr. Feldman's opinions for causation, Commissioner Beck gave no weight to those opinions for the reasons set forth in the Decision and Order—a decision supported by the greater weight of the evidence. **(R. pp. 63-65).** Also, Appellant never appealed these findings and conclusions. **(R. p. 131).**

Importantly, as previously discussed, although Dr. Feldman determined Appellant had asthma and attributed Appellant's alleged asthma issues to work, Dr. Sahn and Dr. Fogarty disagreed. Therefore, to the extent Dr. Feldman's testimony conflicts with Dr. Sahn and Dr. Fogarty, the Full Commission was free to weigh the conflicting evidence accordingly. *See Lockridge v. Santens of Am., Inc.*, 344 S.C. 511, 518, 544 S.E.2d 842, 846 (Ct. App. 2001) ("While Dr. Walker may have attributed the cause of Lockridge's heart attack to overexertion at work, Dr. Gaucher either would not or could not. Thus, to the extent Dr. Gaucher's testimony contradicts Dr. Walker's testimony, the commission was free to weigh the conflicting evidence accordingly."); *id.* ("Given the conflicting testimony as to the precipitation of Lockridge's heart attack and our scope of review, we find substantial evidence in the record to support the commission's findings regarding

causation"); *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) ("The existence of any conflicting opinions between the doctors is a matter left to the Commission.").

## CONCLUSION

Kohler contends Appellant's issues on appeal were not preserved for the Full Commission's consideration, and as such, are not properly preserved for this Court's review. Alternatively, Kohler contends substantial evidence in the record supports the decision of the Full Commission that Appellant did not suffer from asthma on the date alleged and that, even assuming *arguendo* Appellant suffered from asthma at the time alleged, substantial evidence in the record establishes Appellant's employment at Kohler was not the proximate cause of the asthma. Finally, Kohler submits the Full Commission did not abuse its discretion in the findings, conclusions, or opinions it reached. In fact, Appellant specifically requested the Full Commission to exercise its discretion in his Full Commission Brief. For these reasons, Kohler respectfully submits that the decision of the Full Commission should be affirmed.

Respectfully,

Grady L. Beard
Nicolas L. Haigler
Jasmine D. Smith
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of the Respondent complies with Rule 211(b), SCACR.

Grady L. Beard
Nicolas L. Haigler
Jasmine D. Smith
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

February 13, 2017

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED
MAR 21 2017
SC Court of Appeals

WCC File No. 0912295

Court of Appeals Case No. 2016-000853

Nikolay Gul, Claimant ..... Appellant,

v.

Kohler Company ..... Respondent.

**PROOF OF SERVICE**

I certify that I have served a copy of correspondence filing corrected Final Brief of the Respondent, on the following: David L. Williford, Esquire, Davis, Snyder & Williford, P.A., 5 Hawthorne Park Court, Greenville, SC 29615 (via U.S. Mail), Honorable Jenny Abbott Kitchings, Judicial Director, South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201 (via hand-delivery), on March 21, 2017.

Emily Andrews
Legal Assistant
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorneys for Respondent Kohler

Columbia, South Carolina
March 21, 2016

SOWELL GRAY
ROBINSON
Litigation + Business

GRADY L. BEARD
Direct Dial 803 231.7824
Direct Fax 803 231.7874
Email gbeard@sowellgray.com

RECEIVED
MAR 21 2017
SC Court of Appeals

March 21, 2017

**VIA HAND DELIVERY**
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Nikolay Gul v. Kohler Company
WCC File No.: 0912295
Date of Accident: 08/20/09
Appellant No.: 2016-000853
Our File No.: 6457/8002

Dear Ms. Kitchings:

Please find enclosed herewith the corrected thirteen copies of the Respondent's Final Brief in the above-referenced matter. We would appreciate your returning a clocked-in copy of the same to us via our courier.

By copy of this letter and aforementioned documents to the claimant's attorney, we are serving him with a copy of the filed correspondence.

Very truly yours,

Grady L. Beard

GLB:esa
Enclosures
cc: David L. Williford. Esquire (via U.S. Mail)
Ms. Tracey McDonald (via email)
Mr. Mike Tolleson (via e-mail only)
Mr. Dean Yagodinski (via e-mail only)
Ms. Brenda Gay (via email)
Ms. Staci McCaffrey (via e-mail only)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

---

WCC File No. 0912295

Court of Appeals Case No. 2016-000853

---

Nikolay Gul, Claimant ..... Appellant,

v.

Kohler Company ..... Respondent.

---

# FINAL BRIEF OF THE RESPONDENT KOHLER COMPANY

---

Grady L. Beard
Nicolas Haigler
Jasmine D. Smith
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondent