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In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION  
COMMISSION

WCC #0912295  
Appellate Case No. 2016-000853

Nikolay Gul ..... Claimant, Appellant,

v.

Kohler Company ..... Respondent.

**REPLY BRIEF OF APPELLANT**

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## REPLY ARGUMENT

Appellant Nikolay Gul (hereinafter “Gul”) hereby replies and responds to Respondent Kohler Company’s (hereinafter “Kohler”) Initial Brief.

### **I. Gul’s appeal and arguments are properly preserved for review.**

The Appellate Panel of the Workers’ Compensation Commission (hereinafter “Appellate Panel”) ruled on January 12, 2016, as reflected in its filed March 23, 2016 Decision and Order, that Gul’s appeal to the Appellate Panel was proper, timely and appropriate.<sup>1</sup> While Gul’s *pro se* Form 30 notice may not have been written particularly artfully, the Appellate Panel appropriately exercised its discretion by construing Gul’s Form 30 appeal as an issue of credibility with respect to Dr. Feldman for which he may appeal.<sup>2</sup> The Appellate Panel thus did not err.

Furthermore, this Court recently ruled in *Wofford v. City of Spartanburg* that an appeal from the Workers’ Compensation Commission to the South Carolina Court of Appeals is proper even though the grounds for the appeal were not specified or noncompliance with the APA appeal regulations may have occurred, particularly when potential conflicts arise between the APA and Workers’ Compensation Commission rules and the South Carolina Appellate Court Rules. *Wofford v. City of Spartanburg*, 410 S.C. 102, 763 S.E.2d 53 (Ct. App. 2014). Because Gul’s Form 30 was construed by the Appellate Panel to include the issues on appeal with respect to the credibility of witnesses, particularly that of Dr. Feldman, and since Gul properly and timely appealed to the Court of Appeals in accordance with *Wofford*, Gul’s appeal and arguments before this Court are properly preserved for review.<sup>3</sup>

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<sup>1</sup> R. p. 71.

<sup>2</sup> R. p. 71.

<sup>3</sup> R. p. 71.

**II. Kohler's Initial Brief fails to sufficiently cite to the record and is, therefore, merely unsubstantiated argument.**

Kohler's Initial Brief is written extensively without citing or referencing the record in violation of Rule 208(b)(4) of the SCACR.<sup>4</sup> This leads to but one conclusion: the arguments made by Kohler mislead the Court by offering skewed facts, half-truths and unfounded assumptions. Examples of such arguments – important and salient to the central issue of this case – are delineated hereinafter below.

**A.) Kohler, by its own admission, *did argue* that, as a result of Dr. Feldman's (and Gul's supposed) Russian descent, Dr. Feldman was not credible by arguing he was supposedly biased.**

Kohler states in its Initial Brief that Gul offers “blatantly false accusations” and a “blatant allegation of xenophobia” when Gul points out that the attorneys for Kohler attempted to show that Dr. Feldman was not credible by repeatedly arguing Dr. Feldman was Russian.<sup>5</sup> However, Kohler's attorney did, in fact, argue this over and over not only in the hearing before Commissioner Beck on April 22, 2015, but also before the Appellate Panel on January 12, 2016.<sup>6</sup> Moreover, Kohler *explicitly admitted* in its Initial Brief that “the fact that Appellant's expert, Dr. Feldman, is of Russian origin was raised to show potential bias.”<sup>7</sup> Clearly, this attempt to show bias was aimed at Dr. Feldman's credibility because of his Russian origin. Common sense dictates that this was Kohler's purpose.

What is more troubling, however, is that Kohler's attorneys knew that Dr. Feldman and Gul originated from different countries, yet proceeded (and continues to proceed) with the

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<sup>4</sup> Respondent's Brief at 169.

<sup>5</sup> Respondent's Brief at 174 and 194.

<sup>6</sup> R. pp. 1217-1418 and R. pp. 1419-54.

<sup>7</sup> Respondent's Brief at 194.

argument that Dr. Feldman is not credible because they are both Russian. Nothing could be further from the truth, however. As Kohler's attorneys know, Dr. Feldman originates from Russia, having left there, legally, in the early 1980's from communist rule.<sup>8</sup> Gul, on the other hand, originates from the Ukraine, a completely separate and distinct country essentially at war with Russia.<sup>9</sup> In fact, even as of October of this year, Russian and Ukrainian relations have been extremely poor to the extent that even Wikipedia cites Reuters and other world news outlets in regards to the following:

On 5 October 2016, the Ministry of Foreign Affairs of Ukraine officially recommended that its citizens should avoid travel to Russia claiming Russian law enforcers' growing number of groundless arrests of Ukrainian citizens and that they often "rudely treat Ukrainians, use illegal methods of physical and psychological pressure, torture and other acts that violate human dignity."<sup>10</sup>

This Reply Brief is not the forum for providing a treatise on Russian and Ukrainian relations over the years, but the arguments utilized by Kohler's attorneys to show Dr. Feldman's alleged bias and lack of credibility is uninformed journalism at best and offensive racial tactics at worst.

Such arguments are also inaccurate for the purpose of helping Kohler's cause. If Kohler's attorneys are attempting to show bias and lack of credibility with respect to Dr. Feldman, attempting to show they are "in cahoots" by their racial heritage misunderstands the fact that people from these respective nationalities do not like each other and would not be inclined to help one another.<sup>11</sup>

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<sup>8</sup> R. p. 702.

<sup>9</sup> R. p. 1227.

<sup>10</sup> [https://en.m.wikipedia.org/wiki/Russia%E2%80%93Ukraine\\_relations](https://en.m.wikipedia.org/wiki/Russia%E2%80%93Ukraine_relations)

<sup>11</sup> [https://en.m.wikipedia.org/wiki/Russia%E2%80%93Ukraine\\_relations](https://en.m.wikipedia.org/wiki/Russia%E2%80%93Ukraine_relations)

Therefore, as mentioned above, Kohler's arguments about Dr. Feldman's national origin is but one example of Kohler misleading the Court by offering skewed facts, half-truths and unfounded assumptions.

**B.) Kohler's attorneys misunderstand medicine and asthma at best and mislead the Court at worst by repeatedly arguing Gul's "lungs were clear."**

In their Initial Brief, Kohler's attorneys keep arguing that Gul did not have asthma because "his lungs were clear on exam."<sup>12</sup> Kohler makes this reference at least six (6) times on two pages alone in their Initial Brief.<sup>13</sup> However, defined as follows, asthma is:

A disease caused by increased responsiveness of the *tracheobronchial tree* to various stimuli, which results in episodic *narrowing and inflammation of the airways*. Clinically, most patients present with wheezing and shortness of breath. Cough is also a common symptom. *Between attacks the patient may have normal respiratory function*. Although most asthmatics have mild disease, in some cases the attacks become continuous. This condition, called *status asthmaticus*, may be fatal.<sup>14</sup>

As such, asthma is *not* a medical problem because the lungs might have congestion, mucous or other fluid in the lungs (as Kohler's attorneys would have everyone believe), but, rather, is a medical problem of the bronchial tracts *constricting and narrowing*, therefore reducing the amount of air inspired into the lungs.<sup>15</sup> It is quite normal, actually, to have severe asthma *and* lungs clear on exam.<sup>16</sup>

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<sup>12</sup> Respondent's Brief at 177-78.

<sup>13</sup> Respondent's Brief at 177-78.

<sup>14</sup> Taber's Cyclopedic Medical Dictionary 187-188 (20<sup>th</sup> ed. 2005).

<sup>15</sup> Taber's Cyclopedic Medical Dictionary 187-188 (20<sup>th</sup> ed. 2005).

<sup>16</sup> <http://www.lakesidepress.com/pulmonary/10errors-asthma.htm>

This “sleight of hand” is the type of argument Kohler’s attorneys have made throughout this entire litigation and appeal, which is another example of Kohler misleading the Court by offering skewed facts, half-truths and unfounded assumptions.

**C.) Kohler’s attorneys are misleading the Court by attempting to show Dr. Feldman diagnosed Gul with asthma too soon and in a conclusory manner.**

Kohler’s attorneys are misleading the Court and misconstruing the evidence by continually arguing the point that Dr. Feldman essentially “jumped the gun” by allegedly diagnosing Gul with occupational asthma on his first visit on September 23, 2009.<sup>17</sup> Kohler states the following on page 11 of its Initial Brief:

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.<sup>18</sup>

Further, Kohler states on pages 19-20 in its Initial Brief the following, in relevant part:

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...Rather, the record simply includes a wholly unsupported conclusion reached by Dr. Feldman that Appellant suffered from occupational asthma...He did not wait until a more comprehensive examination was conducted that included lung function studies.<sup>19</sup>

There is no doubt that Kohler’s attorneys argue that Dr. Feldman is not credible because he allegedly diagnosed Gul with occupational asthma quickly and without a medical basis. Again, however, this is simply not true. It is a skewed fact and half-truth, and arguing it is misleading.

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<sup>17</sup> Respondent’s Brief at 179; 187-92.

<sup>18</sup> Respondent’s Brief at 179.

<sup>19</sup> Respondent’s Brief at 187-92.

What *is* true is the fact that Dr. Feldman, as an expert in pulmonology medicine, diagnosed Gul with asthma on September 23, 2009, but *not occupational* asthma because he needed more time and information to do so.<sup>20</sup> Dr. Feldman waited patiently for Gul to fulfill the criteria for such a diagnosis.<sup>21</sup> Dr. Feldman stated in his deposition on October 24, 2013 – over four (4) years *after* Gul’s September 23, 2009 visit – that, retrospectively, Claimant definitely had occupational asthma on September 23, 2009.<sup>22</sup> And, at the time, Dr. Feldman needed to wait a few months – three (3) months – before making the diagnosis. He testified as follows:

A. August. Well, it requires three months in a row, okay, to be certain of occupational asthma such as RADS. So the patient has to be - so it’s September now. So we take August, September, October. So you have to have - for RADS, you have to have three months for symptoms.

Q. Okay.

A. So it, after three months, symptoms go away, that’s not RADS. Symptoms must be persistent for three months, at least. It could be longer. It could be permanent. But it should be three, three months. That’s a criteria, and the major criteria for diagnosis.

(Deposition of Dr. Feldman, 20:10-21). Dr. Feldman further testified as follows:

Q. So you had to wait until October to determine whether or not it was occupational asthma or not.

A. Yeah, I have to have in my records three months.

Q. All right. And so did you ultimately diagnose him with occupational -

A. Yes.

Q. - exposure -

A. Yes.

Q. - or RADS?

A. Yes.

(Deposition of Dr. Feldman, 22:6-15).

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<sup>20</sup> R. pp. 721-23.

<sup>21</sup> R. pp. 721-23.

<sup>22</sup> R. pp. 721-23.

Let the record be clear that Dr. Feldman followed the guidelines, prudently took his time evaluating Gul, and provided a diagnosis accordingly. Any insinuation by Kohler's attorneys that Dr. Feldman diagnosed Gul with occupational asthma the very first time he saw him is truly wrong, incorrect and misstates the record.

Kohler's argument that Dr. Feldman testified he had no doubt that Gul had occupational asthma on September 23, 2009 insinuates that Dr. Feldman that very day – September 23, 2009 – diagnosed him with occupational asthma. What is true, however, is that over four (4) years and many, many evaluations later, Dr. Feldman was deposed in this matter. By the time he was deposed, he had the benefit of years of experience, treatment and knowledge of Gul in particular to the extent that he could prudently and more accurately testify that Gul, no doubt, had occupational asthma on September 23, 2009. But he could *not* make the diagnosis that day because he needed more time, evaluations, tests and knowledge about his circumstances before doing so. In this regard, Dr. Feldman patiently and responsibly made the diagnosis.

Again, this is yet another example of Kohler's attorneys misleading the Court by offering skewed facts, half-truths and unfounded assumptions.

**D.) Kohler's argument that Dr. Fogarty and Dr. Sahn had a greater understanding than Dr. Feldman of Gul's medical situation doesn't pass the smell test.**

Kohler's attorneys state on page 32 in their Initial Brief that "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..."<sup>23</sup> Kohler's attorneys, in their Initial Brief, also discuss "common

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<sup>23</sup> Respondent's Brief at 200.

sense.”<sup>24</sup> They quote the Supreme Court of South Carolina on page 29 in their Initial Brief by stating that “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, 52 S.E.2d 744, 749 (1949)).<sup>25</sup>

Well, “common sense” dictates that Dr. Feldman – not Dr. Fogarty or Dr. Sahn – has had a greater understanding of Gul’s medical condition over the years and has been in a better position to diagnose him with occupational asthma. Without reciting the details of Gul’s Initial Brief, but by way of summary, the record is clear that Dr. Feldman has evaluated and treated Gul more than 50 times, some of which have been invasive procedures within Gul’s lungs, but Dr. Fogarty and Dr. Sahn merely saw Gul one time, for pay and during litigation.<sup>26</sup>

Notably, Kohler’s attorneys state on page 33 of their Initial Brief that “Appellant alleges Dr. Sahn never received his medical records, but Appellant has never offered any proof Dr. Sahn did not receive those records.”<sup>27</sup> Amazingly, Kohler’s attorneys assert this argument despite the fact that they provided the very evidence supporting Gul’s claim in this regard.<sup>28</sup> Specifically, the attorneys for Kohler took the deposition of Dr. Feldman on October 24, 2013 which revealed the following exchange with regard to the deficiencies of the incomplete medical evaluations of Dr. Sahn and Dr. Fogarty:

Q. All right.

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<sup>24</sup> Respondent’s Brief at 200.

<sup>25</sup> Respondent’s Brief at 200.

<sup>26</sup> R. pp. 1241-43.

<sup>27</sup> Respondent’s Brief at 201.

<sup>28</sup> R. p. 782-85.

- A. I don't believe that he [Dr. Sahn] was treating physician, was he?  
 Q. No.  
 A. Oh, okay. So he just has an opinion.  
 Q. Yes.  
 A. Oh, okay.  
 Q. He examined him one time.  
 A. He didn't do any bronchoscopy, he didn't see very inflamed airways.  
 Q. He just did spirometry.  
 A. But he didn't see none of it.  
 Q. Right.  
 A. Did he see my reports?  
 Q. I don't know.  
 A. He never see my reports, never comment on my report?  
 Mr. Dantin: He did not.  
 A. Oh, okay. I believe Dr. Sahn did not have enough sufficient information -  
 Q. Okay.  
 A. - to opine.

(Deposition of Dr. Feldman, 81:9-82:5). Dr. Feldman further testified as follows:

- A. ...Dr. Fogarty, Dr. - others saw him one time. Okay? That's insufficient. Okay? They did not review my records. Those people who reviewed my records and made diagnosis of something else, based on what? On seeing the patient one time? On some spirometry? I don't know. Okay. All I'm trying to tell you, as a clinician, I'm going to testify today that diagnosis of asthma is not in doubt, that it's based on physical examination, differential diagnosis, tests, like spirometry and bronchoscopy, and exclusion of other findings. That will be my testimony.

(Deposition of Dr. Feldman, 83:22-84:7).

"Common sense" dictates that Dr. Feldman should and does know more about Gul as a patient than Dr. Fogarty and Dr. Sahn, and "common sense" dictates that the arguments by Kohler's attorneys in their Initial Brief does not pass the smell test when there is, in fact, evidence that Dr. Sahn did not receive the full set of medical records, known by Kohler's attorneys because they were present for and asking questions during the deposition of Dr. Feldman when such evidence was revealed.

Once again, Kohler's Initial Brief is replete with examples of Kohler's attorneys misleading the Court by offering skewed facts, half-truths and unfounded assumptions. There are simply too many to list in this Reply Brief.

### CONCLUSION

Kohler's attorneys continue to argue skewed facts, half-truths and unfounded assumptions to support their defense that not only did Gul fail to have occupational asthma, but that he failed to have asthma at all. This strategy has been successful for Kohler since the time after Gul was initially awarded Workers' Compensation benefits, but it should stop. A fair reading and understanding of this entire case, from the first time it was litigated until this present appeal, should show that Gul has been unfairly adjudicated by the latter stages of the Workers' Compensation system, propounded by Kohler's attorneys. Based on all of the evidence before the Court, and the arguments made by Gul, this Court should reverse the decision of the Appellate Panel and Commissioner Beck's Decision and Order, accordingly.

Respectfully submitted,

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February 2, 2017

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the final Reply Brief of Appellant complies with Rule 211(b), SCACR.

February 2, 2017



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PROOF OF SERVICE

I certify that I served the final Reply Brief of Appellant on Kohler Company and the Workers' Compensation Commission by depositing a copy of same in the United States Mail, postage prepaid, on February 2, 2017, addressed to Kohler Company's attorneys of record, Grady L. Beard, Nicholas L. Haigler, and Jasmine D. Smith, P.O. Box 11449, Columbia, SC 29211, and to Ms. Amy A. Bracy, Judicial Director, South Carolina Workers' Compensation Commission, P.O. Box 1715, Columbia, SC 29202-1715.

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