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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Workers' Compensation Commission's Single Commissioner and Appellate Panel clearly erred, abused their discretion or exercised arbitrary or clearly unwarranted discretion in determining Appellant does not have asthma by failing to consider, and affording "no weight" to, the medical records, evaluations and medical opinions of Dr. Feldman, Appellant's long-time treating physician?

II. Whether the Workers' Compensation Commission's Single Commissioner and Appellate Panel clearly erred, abused their discretion or exercised arbitrary or clearly unwarranted discretion by concluding as a matter of law that Appellant's asthma did not arise out of, and in the course of employment of, his employment with Respondent Kohler Company?

STATEMENT OF THE CASE

This is a Workers' Compensation case. Appellant Nikolay Gul (hereinafter "Gul") was initially awarded Workers' Compensation benefits in 2013 for contracting the occupational disease of asthma from his use of Acetic Acid as required by his job at Respondent Kohler Company, as ordered by Commissioner Derrick L. Williams, whose Decision and Order granting compensation was filed on January 25, 2013.[1]

Commissioner Williams ordered Kohler Company (hereinafter "Kohler") to pay Gul Workers' Compensation benefits beginning on September 18, 2011 in the amount of Four Hundred Seventy-Nine Dollars and 82/100 ($479.82) per week and ordered Kohler to pay Gul's medical, hospital, surgical, doctors' and nurses' bills incurred as a direct result of Gul's work-induced asthma.[2] Commissioner Williams also ordered Kohler to be responsible for medical costs directly related to his occupational asthma.[3]

Specifically, and in terms of the basis for his Decision and Order, Commissioner Williams found that "it is undisputed that Claimant worked with Acetic Acid in his job at Kohler on a regular basis."[4] Commissioner Williams then found that "The greater weight of the evidence supports that Claimant has met his burden of establishing that he suffered compensable injuries to his lungs resulting from his exposure to Acetic Acid during the course and scope of his duties at Kohler."[5] As a basis for his Decision and Order, Commissioner Williams

[1] R. p. 17.

[2] R. p. 17.

[3] R. p. 17.

[4] R. p. 15.

[5] R. p. 16.

considered and weighed the evidence, including the medical opinions of Dr. Greg Feldman, Dr. Charles Fogarty and Dr. Steven Sahn, and concluded that

> Claimant's treating physician, Dr. Feldman (pulmonologist), has treated Claimant extensively since 2009, and continues to treat Claimant for asthma. Dr. Feldman's testing and treatment clearly shows Claimant has an asthmatic condition, and that this condition was caused by his exposure to Acetic Acid at Kohler. Dr. Feldman's diagnosis of asthma is further supported by records from Spartanburg Regional Medical Center, where claimant was diagnosed with asthma on three occasions and underwent bronchoscopies in 2010 and 2011.
>
> The undersigned Commissioner does not discount the opinions of Dr. Fogarty and Dr. Sahn. However, Dr. Feldman's testing and treatment were nearer to the exposure, and Dr. Feldman was not paid to offer any opinions in this instance.[6]

By the time Commissioner Williams awarded Workers' Compensation to Gul, Dr. Feldman had already seen, evaluated and treated Gul for work-related asthma numerous times.[7] However, Gul had only been evaluated by Dr. Fogarty and Dr. Sahn one time each, respectively, due to the insistence of Kohler's attorneys.[8]

After Kohler terminated its original attorneys handling the case and subsequently hired different attorneys, Kohler appealed Commissioner Williams' Decision and Order.[9] The Appellate Panel of the Workers' Compensation Commission thereafter, on September 10, 2013, vacated the Decision and Order of Commissioner Williams and ordered a *de novo* hearing before another Single Commissioner, due to, *inter alia*, any additional discovery the new attorneys for Kohler apparently deemed necessary to defend Kohler.[10]

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[6] R. pp. 15-16.

[7] R. pp. 10-16.

[8] R. p. 443 and R. p. 467.

[9] R. p. 19.

[10] R. p. 30.

After the Appellate Panel's Order allowed the parties (and Kohler's new attorneys) to conduct additional discovery as necessary for a further *de novo* hearing in front of a different Single Commissioner, Gul continued to seek medical care and treatment for his work-related asthma as provided by Dr. Feldman, his treating physician.[11] However, after having the opportunity to do so, Kohler and its new attorneys never requested that Gul be evaluated again by any other physician, including Dr. Fogarty or Dr. Sahn.[12]

By the time the *de novo* hearing occurred in front of Single Commissioner T. Scott Beck on April 22, 2015, no new medical evaluations by Dr. Fogarty or Dr. Sahn took place.[13] The only additional medical evidence included further evaluations and treatment by Dr. Feldman for Gul's continued work-related asthma.[14]

Despite the fact that no new medical evaluations were conducted at the request of Kohler or its new attorneys (other than the increasing evidence by Dr. Feldman's care of Gul's work-related asthma), Commissioner Beck not only found that Gul's asthma did not arise out of, and in the course of, his employment with Kohler, Commissioner Beck ruled that Gul did not even suffer from asthma at all.[15] Further, Commissioner Beck relied exclusively on Dr. Fogarty's and Dr. Sahn's one-time medical evaluations conducted by pay, during litigation, and at the request of Kohler's attorneys.[16] In other words, no new medical evidence supportive of Kohler's

[11] R. p. 318.

[12] R. pp. 1242-43.

[13] R. pp. 1242-43.

[14] R. p. 318.

[15] R. pp. 67-69.

[16] R. pp. 65-67.

position occurred between Commissioner Williams' award of compensation to Gul and Commissioner Beck's denial of compensation to Gul.

Not only did Commissioner Beck effectively reverse the decision of Commissioner Williams, Commissioner Beck based his Decision and Order on the exact same medical evidence considered by Commissioner Williams with no new supporting medical evidence weighing in Kohler's favor.[17] Commissioner Beck did not even consider Dr. Feldman's numerous evaluations and extensive treatment for Gul's work-related asthma, as Commissioner Beck gave Dr. Feldman's medical evaluations, extensive treatments and medical opinions "no weight."[18] Commissioner Beck also considered arguments from Kohler's new attorneys inferring that Dr. Feldman was not credible because of his Russian origin.[19] As a result of these considerations, Commissioner Beck denied Workers' Compensation benefits to Gul.[20] Of note, Commissioner Beck had previously been represented by and was a former client of Kohler's new attorneys.[21]

Gul timely filed a Form 30, appealing Commissioner Beck's filed August 7, 2015 Decision and Order.[22] After briefs for Gul and Kohler were timely filed, the Appellate Panel held a Review Hearing on January 12, 2016 in Columbia, SC, during which, once again, Kohler's new attorneys essentially argued that, *inter alia*, Dr. Feldman was not credible because of his Russian origin.[23] On March 23, 2016, the Appellate Panel of the Workers' Compensation

[17] R. pp. 32-70.

[18] R. p. 65.

[19] R. pp. 1356-57.

[20] R. pp. 69-70

[21] R. p. 37.

[22] R. p. 131.

[23] R. pp. 1442-44.

Commission filed its Decision and Order, denying Gul his initially-awarded Workers' Compensation benefits and adopting "as if repeated verbatim" Commissioner Beck's August 7, 2015 Decision and Order.[24]

This appeal by Gul timely followed.[25]

STATEMENT OF THE FACTS

Gul worked at Kohler from 2004 through August 25, 2009 as a machine operator.[26] Much of his time working at Kohler – in fact, daily – involved his direct use of, and exposure to, Acetic Acid in the workplace.[27] Specifically, Gul worked on the Kitchen Sink machine during the last four (4) months he worked at Kohler.[28] He did not use Acetic Acid on this machine, but he directly used it on other machines with which he was helping other coworkers during this period.[29] For one and a half (1½) years prior to the Kitchen Sink job, Gul worked on Cover Machine #5, and he directly used Acetic Acid with this machine.[30] For one and a half (1½) years prior to the Cover Machine #5 job, Gul worked on Small Machines, and he directly used Acetic Acid during that job.[31] For one and a half (1½) years prior to the Small Machines job, Gul worked on Cover Machine #2, on which he directly used Acetic Acid.[32] For almost the entirety

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[24] R. p. 71.

[25] R. p. 1465.

[26] R. p. 1227-28.

[27] R. pp. 1031-33.

[28] R. pp. 1228-29.

[29] R. pp. 1228-29.

[30] R. p. 1167.

[31] R. p. 1167.

[32] R. pp. 1167-68.

of his time working at Kohler from 2004 to 2009, Gul directly used Acetic Acid as required by Kohler.[33]

Gul stopped working at Kohler because he started developing medical problems.[34] His symptoms appeared to be cardiopulmonary-related, and he began seeking medical care to diagnose his concerns.[35] At first, it appeared his medical problems may have been cardiac-related, but multiple and extensive workups from multiple physicians, including cardiologists, eventually revealed that he did not have a cardiac problem.[36] Rather, the evidence shows that Gul had a pulmonary (lung) problem instead.[37] All of his lung problems started while he worked for Kohler.[38] According to the medical records, Gul has been diagnosed with severe asthma.[39] Gul did not have asthma before working at Kohler.[40] He began having symptoms while working for Kohler, and the only exogenous (external) agent causing lung problems in his life was Acetic Acid, itself a known lung irritant and asthma-inducer.[41] In fact, Kohler no longer uses Acetic Acid for this reason.[42] Because the evidence indicated that Gul developed asthma from his frequent use of Acetic Acid during most of the days he worked for Kohler for five (5) straight

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[33] R. pp. 1228-29.

[34] R. pp. 1229-30

[35] R. pp. 1237-40.

[36] R. pp. 1237-40.

[37] R. pp. 1237-40.

[38] R. pp. 1229-32

[39] R. p. 318.

[40] R. pp. 1229-32.

[41] R. pp. 1229-32.

[42] R. pp. 1238-41, 1247-48.

years, Gul sought Workers' Compensation benefits commensurate with his work-related medical problems.[43]

More specifically, Gul began noticing that his lung problems (shortness of breath, sputum production and tightness in his chest) increased starting in 2007-2008.[44] The evidence establishes that during this period, Gul used Acetic Acid every day approximately fifteen (15) or more times per shift.[45] He used the spray bottle to spray molds (which took between 10-15 seconds per mold) and the entire machines (which took 1½ – 2 minutes per machine).[46] Gul used about five (5) bottles per shift when using the larger spray bottles, and he used ten (10) or more bottles per shift when using the smaller spray bottles.[47]

By 2009, Gul's lung symptoms of shortness of breath, coughing and chest tightness were getting worse.[48] Dr. T. Christian Nowatka, Gul's primary care physician, thought that perhaps Gul had a heart condition, so he (Dr. Nowatka) prescribed medications therefor.[49] However, Gul's symptoms and medical problems did not improve.[50] Gul also underwent heart tests in 2009, but all of which revealed that he did not have a heart problem.[51]

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[43] R. p. 89.

[44] R. pp. 1231-32.

[45] R. p. 1174.

[46] R. p. 1174.

[47] R. p. 1175.

[48] R. p. 1176.

[49] R p. 1178.

[50] R. p. 1178.

[51] R. pp. 1237-40.

Gul subsequently saw another primary care physician, Dr. Mathew D. Cannon, who ultimately referred Gul to Dr. Gregory J. Feldman, a triple board-certified physician who specializes in pulmonary medicine and critical care.[52] Dr. Feldman first examined Gul in September of 2009 and diagnosed him with asthma, likely work-related due to his continuous exposure to Acetic Acid over time.[53] Dr. Feldman prescribed medications for Gul, which initially helped, but as is frequently the case of patients with asthma, Gul had acute asthma attacks at various times and required hospitalizations.[54] Dr. Feldman performed bronchoscopies on two of those occasions, finding that Gul's airways exhibited inflammation, constriction and mucus, thereby making it difficult for Gul to breathe.[55] Dr. Feldman has seen, evaluated and treated Gul more than fifty (50) times since 2009.[56] Dr. Feldman, a specialist in pulmonary medicine, is of the opinion to "a high degree of certainty" and "without question" that Gul has asthma directly caused by his workplace exposure to Acetic Acid while working for Kohler.[57] Dr. Feldman stated that "As his treating pulmonologist, it continues to be my opinion, based upon a reasonable degree of medical certainty, this patient's exposure to Acetic Acid at Kohler most probably resulted in him developing occupational asthma."[58]

Since filing his claim, and at Kohler's request, Gul saw Kohler's physician Dr. Charles M. Fogarty, a pulmonologist in Spartanburg and a competitor of Dr. Feldman's pulmonology

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[52] R. p. 1240.

[53] R. p. 318.

[54] R. pp. 1241-42.

[55] R. p. 443.

[56] R. p. 1242.

[57] R. p. 318.

[58] R. p. 318

practice.[59] The evidence shows that Dr. Fogarty, during the times at issue in this case, was himself in litigation against Dr. Feldman.[60] Dr. Fogarty only saw and evaluated Gul one time, and opined that Dr. Feldman's long-standing patient – Gul – did not even have asthma, despite the fact that Dr. Feldman evaluated and treated Gul many times, and performed multiple invasive lung procedures (bronchoscopies) at Spartanburg Regional Medical Center, all of which confirmed the diagnosis of asthma.[61]

Gul was also seen and evaluated by Kohler's suggested physician, Dr. Steven A. Sahn in Charleston.[62] Dr. Sahn only evaluated Gul one time.[63] Dr. Sahn opined that Gul did not have asthma, but instead thought he had a heart condition, so he referred Gul to a cardiologist to help determine Gul's cardiopulmonary problems.[64] Notably, and importantly, Dr. Sahn did not have all of Gul's medical records.[65] In fact, and most importantly, he did not have nor review the many medical records of Dr. Feldman, whose pulmonology records were extensive since he had seen Gul many times.[66]

Per Dr. Sahn's recommendation, Gul subsequently was given a complete cardiac evaluation by cardiologist Dr. Joseph E. Mobley on December 15, 2011.[67] Dr. Mobley noted

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[59] R. p. 467.

[60] R. p. 708.

[61] R. p. 467.

[62] R. p. 443.

[63] R. pp. 1242-43.

[64] R. p. 443.

[65] R. pp. 781-83.

[66] R. pp. 781-83.

[67] R. p. 434.

that Gul's EKG was unremarkable and also documented the following: "Dyspnea, questionable etiology, appears most likely pulmonary related given my history and physical examination. No current evidence of volume overload on my examination to suggest congestive heart failure as a component here."[68] Dr. Mobley further noted that "[Gul] has long-standing dyspnea at this point, which appears most likely pulmonary related," and that "his symptoms of chest pain are clearly atypical, pleuritic and are likely related to underlying pulmonary pathology, possibly asthma," leading him to conclude the following:

> ...from a cardiac perspective, I would not recommend further cardiac evaluation, but instead would concentrate more on pulmonary treatment especially as treatment with Prednisone and Ventolin inhalers seem to be improving his symptoms currently, which would go against a cardiac component.[69]

Kohler never sought or offered any cardiac evaluations that contradict those of Dr. Mobley, which are undisputed. Currently, and consistent with Dr. Mobley's findings, Gul's medical problems are pulmonary-related, due to work-induced asthma, an occupational disease.[70]

Gul has never returned to work per doctor's orders.[71] Specifically, Dr. Feldman, as his treating physician, has ordered him not to go back to work due to his work-induced asthma.[72] On August 16, 2012, Dr. Feldman completed a Form 14B providing that Claimant has "severe asthma" and assigning a 65% impairment to both lungs, stating that Claimant is unable to return to work and will need future medical care.[73] Since that time, Dr. Feldman has continuously

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[68] R. p. 434.

[69] R. p. 434.

[70] R. p. 318.

[71] R. pp. 1242-43.

[72] R. pp. 1242-43.

[73] R. p. 125.

treated Gul.[74] Dr. Feldman stated in his deposition that Gul, due to his asthma, is "100% impaired...It's 100%. Because he wouldn't be able to hold a job...He's getting worse. He's not getting better."[75]

Because Gul's initial award of Workers' Compensation benefits was subsequently denied by Commissioner Beck, whose Order was adopted by the Appellate Panel, Gul hereby appeals for the reasons stated herein.

STANDARD OF REVIEW

The Court may reverse or modify the decision of the Appellate Panel of the Workers' Compensation Commission "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are…(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380 (5)(e)-(f). "An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Barnes v. Charter 1 Realty*, 411 S.C. 391, 395, 768 S.E.2d 651, 652 (2015); *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 384, 769 S.E.2d 1, 3 (2015); *Bartley v. Allendale County Sch. Dist.*, 392 S.C. 300, 306, 709 S.E.2d 619, 621-22 (2011); *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *Burnette v. City of Greenville*, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012); *Crawford v. Hutchinson Constr.*, 399 S.C. 65, 72, 731 S.E.2d 303, 306-07 (Ct. App. 2012); *Brunson v. Am. Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011).

[74] R. p. 1180.

[75] R. pp. 774-75.

ARGUMENT

Commissioner Beck and the Appellate Panel clearly erred, abused their discretion and exercised arbitrary and clearly unwarranted discretion by failing to consider and affording "no weight" to the medical opinions, medical records and evaluations of Dr. Feldman, Gul's long-time treating physician who has seen, evaluated and treated Appellant clinically and invasively for work-related asthma at least fifty (50) times more than any other physician relied upon by Commissioner Beck and the Appellate Panel. The nature and manner of Commissioner Beck's Decision and Order, which was upheld "verbatim" by the Appellate Panel, shows they clearly erred, abused their discretion and exercised arbitrary and clearly unwarranted discretion. Therefore, and for the reasons stated herein, the Appellate Panel's ultimate Decision and Order filed on March 23, 2016 should be reversed.

Gul was initially awarded benefits after Commissioner Williams appropriately considered and weighed all of evidence, particularly the medical evidence, in this matter. Gul was subsequently denied benefits only after Commissioner Beck, who was previously represented by Kohler's new attorneys, afforded "no weight" to Dr. Feldman's numerous medical opinions, medical records and evaluations.[76] By the time Commissioner Beck ruled, there was zero additional medical evidence weighing in favor of Kohler. If anything, there was more medical evidence weighing in favor of Gul in terms of determining that he had work-induced asthma. Commissioner Beck's (and, concomitantly, the Appellate Panel's) effective reversal of Commissioner Williams' Order in this regard speaks loud and clear: there was an abuse of discretion, an exercise of unwarranted discretion and a ruling made in an arbitrary manner to deny benefits to Gul, who was an honest, hard-working laborer as affirmed by Kohler's

[76] R. p. 65.

supervisors themselves.[77] Because the Appellate Panel affirmed Commissioner Beck's Decision and Order, the Appellate Panel's March 23, 2016 Decision and Order should be reversed.

When in doubt, especially when two different Single Commissioners rule in opposition to each other based on the very same medical evidence, Workers' Compensation coverage and benefits should be resolved in favor of the claimant – Gul – pursuant to South Carolina's rules of construction. "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." *Pierre* at 541, 689 S.E.2d 615, 618. "Where employer and employee are subject to the compensation act…an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." *Id.* "These words are construed broadly and should continue to be so construed." *Id.* "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." *Id.* at 542, 689 S.E.2d 615, 619.

I. Commissioner Beck and the Appellate Panel clearly erred, abused their discretion and exercised arbitrary and clearly unwarranted discretion in determining Gul does not have asthma by failing to consider, and affording "no weight" to, the medical records, evaluations and medical opinions of Dr. Feldman.

Commissioner Beck and the Appellate Panel clearly erred, abused their discretion and exercised arbitrary and clearly unwarranted discretion when they denied Workers' Compensation benefits to Gul. The evidence shows that such a determination is error, arbitrary and an abuse of discretion because Commissioner Beck ruled in favor of the attorneys who formerly represented

[77] R. pp. 983-84.

him by categorically failing to consider Dr. Feldman's medical opinions, medical records and evaluations of Gul, affording them "no weight." This ruling occurred despite no new medical evidence weighing in favor of Kohler between the time Commissioner Williams awarded benefits to Gul and the time Commissioner Beck denied benefits to Gul. If anything, more medical evidence weighed in favor of Gul receiving Workers' Compensation benefits in terms of his work-induced asthma stemming from his work at Kohler.

In order for Commissioner Beck and the Appellate Panel to deny benefits to Gul, they must necessarily find a way to fully discount and absolutely not consider Dr. Feldman's medical records, evaluations, and opinions, which is precisely what they decided to do: they gave him "no weight." Because of the arbitrary nature by which Commissioner Beck, and ostensibly, the Appellate Panel, ruled is dependent on the substance of the evidence, it is necessary to examine and explain hereinafter the medical evidence for the purpose of highlighting their error, abuse of discretion and arbitrary ruling.

A.) Dr. Feldman has actually seen, evaluated and treated Gul clinically and invasively many more times than Dr. Fogarty or Dr. Sahn.

Dr. Feldman is the only specialist in pulmonology who has seen, evaluated and treated Gul more than once. In fact, Dr. Feldman has seen, treated and evaluated Gul well over 50 times since September of 2009, and he continues to treat him today.[78] Pulmonologists Dr. Fogarty and Dr. Sahn, paid for by Kohler and its attorneys who were hired during the course of litigation, only saw Claimant one time each.[79] In addition, Dr. Feldman has performed more tests and invasive procedures than Dr. Fogarty and Dr. Sahn, including pulmonary function tests and

[78] R. pp. 1241-42.

[79] R. pp. 1242-43.

multiple bronchoscopies.[80] Bronchoscopies are procedures whereby a scope (a magnified camera) is inserted into the lungs of a patient to look for any pathology or other problems, and to treat accordingly.[81] Dr. Feldman has performed these procedures multiple times on Gul, finding irritation in the inner lining of his lungs with mucus buildup, pathologically evidencing a recurrent lung problem consistent with asthma.[82] Dr. Fogarty and Dr. Sahn have performed these procedures a total of zero times.

More specifically, Gul has been hospitalized on more than one occasion as a result of his asthma.[83] At the time of Gul's May 2010 admission to the hospital, Dr. Feldman performed a bronchoscopy and noted "copious secretions" in Gul's lungs, noting that "[l]avage was done until all visible secretions were cleared."[84] Dr. Feldman discharged Gul with a diagnosis of "asthma exacerbation."[85] During Gul's July 2011 hospitalization for lung problems, Dr. Feldman performed another bronchoscopy and noted Gul had "inflamed mucosa."[86] Dr. Feldman again noted a discharge diagnosis of "asthma exacerbation," and further noted that Gul was "feeling much better" following the bronchoscopy despite still exhibiting "residual wheezing."[87]

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[80] R. pp. 318 and 448.

[81] R. p. 448.

[82] R. p. 448.

[83] R. p. 448.

[84] R. p. 448.

[85] R. p. 448.

[86] R. p. 448.

[87] R. p. 448.

Interestingly, and as corroboration of Dr. Feldman's diagnosis of "asthma exacerbation" during Gul's hospitalizations for which he (Dr. Feldman) attended, Gul was seen in the emergency room on August 22, 2010 at which time physician Dr. Justin Davis diagnosed Gul with "acute asthma exacerbation" – the same diagnosis made by Dr. Feldman.[88] This corroborating evidence only highlights the appropriate and correct care, evaluation, diagnosis and treatment provided to Gul by Dr. Feldman.

B.) Dr. Feldman is imminently qualified as an expert in pulmonology and in the area of asthma as reflected in his training, experience and professional accomplishments.

Aside from the fact that he has – by far – treated Gul more than any other pulmonologist and has performed more multiple tests and invasive procedures compared to any other pulmonologist, Dr. Feldman is imminently qualified to offer medical testimony to a reasonable degree of medical certainty by virtue of his qualifications and background. It is clear from his CV and testimony that Dr. Feldman, after earning his medical degree under the control of communist Soviet power in 1979, immigrated to the United States in 1981 to escape the communist regime and seek a better life for his family.[89] He subsequently spent four (4) years performing research in the Methodist Hospital Cardiology Department in Houston, Texas until 1985, after which he completed three (3) years of an Internal Medicine residency at Seton Hall University, followed by three (3) years of a residency in Pulmonology and Critical Care at Dartmouth Medical Center in Hanover, New Hampshire.[90] He is triple board-certified in Internal

[88] R. p. 448.

[89] R. p. 809.

[90] R. p. 809.

Medicine, Pulmonary Medicine and Critical Care Medicine, all by the standard, respected American Boards.[91]

Dr. Feldman is a consulting pulmonologist with privileges at multiple hospitals and clinics in the Upstate of South Carolina, including Spartanburg Regional Medical Center, Upstate Carolina Medical Center, Wallace Thompson Hospital and Restorative Care. He is also the past President of the Carolina Thoracic Society.[92]

Dr. Feldman is either a Principal Investigator or Sub-Investigator of multiple pharmaceutical research companies as well, including South Carolina Pharmaceutical Research, Greenville Pharmaceutical Research, Gaffney Pharmaceutical Research and Union Pharmaceutical Research.[93] Dr. Feldman helps investigate, *inter alia*, new drugs researched by national and international pharmaceutical companies, including the following: RW Johnson, Parke Davis, Bristol Myers Squibb, Dey Labs, Aventis Pharmaceuticals, GlaxoSmithKline, Merck, AstraZeneca, MGI Pharma, Oscient Pharmaceuticals, Epix Pharmaceuticals, Boehringer Ingelheim, UnitedBioSource Corp., Altana Pharma, Novartis Pharmaceuticals, Replydine Inc., Genetech, Inc., Pfizer, Inc., Cephalon, Inc., Mpex Pharmaceuticals, Forest Research Institute, and Schering Plough.[94] These Pharmaceutical companies seek Dr. Feldman's assistance in providing research with respect to drugs for which these companies hope to gain approval by the United States Food and Drug Administration.

Not only does he practice clinical medicine through his practice, Upstate Lung and Critical Care Specialists, P.C. and in various hospitals throughout the Upstate, and investigate

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[91] R. p. 809.

[92] R. p. 809.

[93] R. p. 809.

[94] R. p. 809.

new drugs with national and international pharmaceutical companies, Dr. Feldman has specifically published articles in peer-reviewed publications.[95] For example, he has published on the subject of Asthma, *inter alia*, in the *Annals of Internal Medicine*, the *COPD Journal*, the *Journal of Bronchoscopy*, *BMC Pulmonary Medicine*, the *Clinical Respirations Research Journal*, *Chest*, the *International Journal of COPD*, the *Journal of Thoracic Disease*, and others.[96]

Dr. Feldman has also made presentations on lung and pulmonary problems to other physicians nationally and internationally, including in the following locations: Barcelona, Spain; Budapest, Hungary; Vienna, Austria; Amsterdam, Netherlands; Las Vegas, Nevada; Ponte-Vedra Beach, Florida; San Francisco, California; Greenville, South Carolina; and others.[97]

Specifically, and most importantly to this case, Dr. Feldman served as an invited speaker and Chair of the National Toxicology Meeting on Occupational Asthma.[98] He has published original research on this topic, including his published article on RADS (asthma) due to inhalation of an occupational chemical hazard, which was presented at the 2nd International Summit on Toxicology in October of 2013.[99] The title of the article is listed as *Reactive Airway Dysfunction Syndrome after Inhalation of the Acrylonitrile: Perspective of the Pulmonologist*, Feldman, Gregory J., J. Clinic Toxicol. 2013, Vol. 3, Issue 5.[100] The biographical section of this

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[95] R. p. 809.

[96] R. p. 809.

[97] R. p. 809.

[98] R. pp. 142-43.

[99] R. pp. 142-43.

[100] R. pp. 142-43.

published article states that "Feldman is also a practicing pulmonologist with a busy clinical practice that is treating many patients with asthma and occupational asthma."[101]

Dr. Feldman is certainly qualified in his specialty field of pulmonology and in occupational asthma, and it would be clear error to afford his medical records, evaluations and medical opinions "no weight" and arbitrarily decide not to consider his evaluations, opinions and extensive participation with respect to Gul's treatment and care.

C.) Dr. Feldman did his research to support and provide a basis for his clinical knowledge, opinions and experience in this matter.

Even though Dr. Feldman is clinically qualified to offer pulmonology opinions in this matter, he also performed research and provided articles supporting his opinions, as he so testified during his deposition and as he later provided as exhibits thereto.[102] For example, Dr. Feldman provided a 2004 article by Thomas H. Milby, M.D. titled *Reactive Airways Dysfunction Syndrome (RADS): Diagnostic Criteria and Forensic Issues*, Milby, Thomas H., The Forensic Examiner, Summer 2004, which provides the criteria and basis for the diagnosis of Gul's RADS and irritant-induced asthma ("IIA").[103] Dr. Milby stated in his article that "Reactive Airways Dysfunction Syndrome (RADS) and Irritant-Induced Asthma (IIA) are clinical pathological entities caused by exposure to a toxic or irritant agent and characterized by a negative history of asthma symptoms for at least 2 years prior to exposure, persistence of asthma symptoms for at least 3 months, objective evidence of obstructive airway disease and/or nonspecific bronchial hyper-responsiveness."[104] Based on the evidence in this case, Gul meets these characteristics.

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[101] R. pp. 142-43.

[102] R. pp. 222-316.

[103] R. p. 242.

[104] R. p. 242.

Dr. Milby further stated in his article that "If more than 24 symptom-free hours pass after exposure to the causal irritant, the resulting asthma is referred to as IIA."[105] He wrote, "Characteristically, the irritant exposures of the not-so-sudden asthma cases [in the study] were neither massive nor single, and ensuing asthma took longer to develop."[106] Additionally, Dr. Milby wrote that "it is rarely possible to ascertain the airborne concentration of the causative chemical agent through standard industrial hygiene procedures."[107] As the record reflects, the circumstances surrounding Gul's asthma diagnosis is almost identical to what Dr. Milby describes. Specifically, Gul was exposed to Acetic Acid for many months and even years and developed respiratory/cardiopulmonary symptoms eventually over time, all of which turned out to be pulmonary-related and not cardiac-related, according to cardiologist Dr. Mobley.[108] Additionally, it was and is impossible to replicate and measure the concentration of the airborne Acetic Acid during the times Gul worked at Kohler, as testified to by Kohler foreman Charles Clayton.[109] Therefore, the concentration of Acetic Acid value after a planned industrial hygiene test performed by Kohler after litigation began has no bearing on the diagnosis of asthma, according to medical research as described by Dr. Milby.[110]

Dr. Milby further cited a study from 1989 by Tarlo and Broder and "described RADS patients whose exposure to workplace irritants was not limited to a single incident or accident. These included 3 subjects with irritant-induced asthma who had been exposed at work for over 6

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[105] R. p. 242.

[106] R. p. 242.

[107] R. p. 242.

[108] R. p. 434.

[109] R. pp. 1000-02.

[110] R. p. 242.

months before the onset of their symptoms. They were still working when diagnosed, but were unable to link the initial onset of their respiratory symptoms to any given accident or unusual workplace event. These cases added the notion of non-dramatic, tolerable concentrations of workplace irritants as a potential cause of RADS."[111] Again, this study supports the facts and circumstances in this matter: Gul was directly exposed to Acetic Acid for a long period of time, gradually developed symptoms in 2007-2008 and eventually suffered a crescendo of symptoms in 2009 to the extent that it made him medically unable to work.

In the article's conclusion, Dr. Milby stated that "There is no 'gold standard' for the diagnosis of RADS. An unambiguous exposure history and demonstration of persistent nonspecific bronchial hyper-responsiveness are required elements of the diagnosis."[112] This clinical diagnosis is exactly what Dr. Feldman describes in his numerous medical records and during his testimony under oath. The medical community supports Dr. Feldman's opinions, and Dr. Feldman offers a wide-standing basis and pool of knowledge as reflected in this article. In fact, Dr. Milby stated towards the end of his article that "Current scientific evidence appears to support the conclusion that RADS is a distinct clinical entity. This view is held by the American Thoracic Society, the Canadian Thoracic Society, the American College of Chest Physicians and the legal community."[113] If Commissioner Beck and the Appellate Panel afforded "no weight" to Dr. Feldman, they must necessarily afford "no weight" to the research backing up his opinions, which is arbitrary and clearly erroneous since such research – and this article in

[111] R. p. 242.

[112] R. p. 242.

[113] R. p. 242.

particular – is highly relevant to this case. Kohler and its attorneys offered no literature rebutting this in any way.

Not only has he seen, evaluated and performed pulmonary tests and procedures on Gul many more times than any other physician, Dr. Feldman backs up his diagnosis by providing research supporting the basis therefor. It was clearly erroneous and arbitrary to afford Dr. Feldman "no weight."

D.) Dr. Feldman adequately explained how Gul's June 2009 pulmonary function testing at Kohler could be normal and yet his September 2009 pulmonary function testing by Dr. Feldman could show a drop in lung capacity of 25-30%.

Commissioner Beck and the Appellate Panel erred when they ruled that Dr. Feldman failed to adequately explain the differences in Gul's pulmonary function testing (i.e. – "spirometry") at Kohler in June of 2009 compared to similar testing performed by Dr. Feldman in September of 2009.[114] The explanation rests with one qualified to provide an explanation; namely, a medical specialist who has expertise in the field of pulmonology. In this case, Dr. Feldman offered that explanation. Dr. Feldman testified first about the utility of spirometry in diagnosing asthma during his deposition as follows:

Q. In looking at your spirometry that was done on the 25th –

A. Right.

Q. – how is that interpreted to determine whether or not he was suffering from asthma or RADS? What are you looking for on the spirometry to make that determination?

A. I don't. The spirometry has very little role in diagnosis of asthma, unless it's entirely normal. Then we may proceed with a test called methacholine bronchoprovocation test. But most common is normal. The second most common is obstructive. The third most common is restrictive. But the part, the pulmonary function test and spirometry play very little role. Because in people with asthma, it can be normal, which is most common,

[114] R. p. 65.

obstructive, which is second most common, and restrictive, which is just as common. So pulmonary function test play very little role.[115]

Dr. Feldman further explained as follows:

Q. So most people who suffer from asthma, if you give them a spirometry test, in most cases, it'll show up being normal?

A. Yes. Majority of cases with people with asthma – it depends. Asthma is a cyclical disease. It's up and down, okay? So it's impossible to catch somebody on – on one day they're one way, the other day they're the other way, okay? It is not – it's not like COPD, which is pretty much diagnosis by spirometry. Asthma is not a spirometric diagnosis.

Q. Okay. What criteria do you use, or did you use in his case, to diagnose him with asthma?

A. Of course. It's number one, physical examination. Number two, differential diagnosis, okay? Number three is symptoms, cough, wheezing, shortness of breath, okay? Exclusion of other causes, for example, not everybody who's wheezing has asthma. It could be heart failure, it could be aspiration. It could be many other things, vocal cord dysfunction. Once you exclude those, then you make a diagnosis of asthma. Spirometry could be helpful in a clinical context. For example, he has obstructive spirometry, which is considered as asthma. But say he has a normal spirometry. That is not excluding the diagnosis, okay? We also frequently give methacholine bronchoprovocation test in people who have normal spirometry. But never somebody who has abnormal spirometry.

Q. So you would not give the second test to someone who had abnormal spirometry?

A. Methacholine, which is challenge test.

Q. Methacholine.

A. No, I would not.

Q. Okay. You would only do that if it was a normal test?

A. I would only do that if there's a question whether somebody has asthma or not. In this case, there is no question.

Q. So in his case, has he ever undergone a methacholine challenge test?

A. No. It would be very dangerous for him. He is a very, very compromised man. Methacholine bronchoprovocation challenge test can put him in the emergency room. By the way, you know what the methacholine challenge test? You want an explanation?

Q. Sure.

A. Methacholine is a derivative of acetylcholine. Acetylcholine is a natural transmitter, which is, everybody has, okay? It's all over the human airway, okay? It directly constricts the airway. So giving methacholine is giving somebody a direct constrictor, all right? An increase in dose can

[115] R. pp. 723-24.

produce significant bronchospasm. Usually in people with normal spirometry, we can tolerate that because reduction is apparent, but mild. In people with obvious asthma, they can end up in emergency room.

Q. So in the spirometry test, how would you have relied on this at all in diagnosing Mr. Gul? Or would you have?

A. I would not. But in his case, it's obstructive. If it would be normal, I would give him a test, possibly, okay? But this is a man with obstructive spirometry who is wheezing, who is coughing, and so that's enough, okay?[116]

As noted above, Dr. Feldman explained that with a patient who has clinical signs and symptoms of asthma per clinical exam, spirometry plays an insignificant role in the diagnosis. He also explained that the bronchodilator test may have some utility if there is a question of asthma (i.e. – if physical exam and spirometry were normal, but the patient's complaints indicate possible asthma), but not in the clinical context of a patient who exhibits signs and symptoms of asthma. Such a test would, therefore, be dangerous. Dr. Fogarty opined that the methacholine bronchoprovocation challenge test should have been done, but Dr. Feldman explains its use and [lack of] utility in Gul's particular situation above.

So, after explaining how he arrived at Gul's asthma diagnosis, Dr. Feldman testified that a patient who has asthma cannot fake efforts in spirometry testing when the different lungs (left v. right) reflect different FEV1 values, which occurred with Gul's testing. Such evidence shows that Claimant did, indeed, have obstructive asthma. Dr. Feldman explained in his deposition as follows:

Q. Right. Are you of the opinion that someone can give submaximal effort and as a result, affect the spirometry results?

A. You cannot fake obstruction. If you're going to give submaximal effort, everything will be reduced. Not FEV1 will be reduced disproportionately. Okay, you cannot do that. It is impossible. Okay? So you cannot, for

[116] R. pp. 724-27.

example, increase your heart rate from 90 to 100, or from 100 to 200. Same with spirometry. It will affect all the volumes, not just one.[117]

Dr. Feldman further explained the spirometry results here:

Q. Right.
A. First one, and second one. You can have both decreased or both normal, but you cannot fake one being normal and the other one being abnormal. It is impossible to do, okay?
Q. Okay.
A. So you can't have 90 percent and 68 percent. This is impossible.
Q. It would either be – they would be closer together?
A. They will be all reduced, right, if it's a poor effort.[118]

Dr. Feldman fully explained his diagnosis and the relative utility of pulmonary function tests/spirometry and bronchodilator tests for determining asthma. He explained that variances in spirometry testing cannot be faked when the left and right lung fields provide different results, all of which leads to one conclusion in this matter: Gul clearly has asthma, as diagnosed and thoroughly explained by the one lung specialist (Dr. Feldman) who has seen this patient many times. For Commissioner Beck and the Appellate Panel to find that Dr. Feldman failed to adequately explain the differences in Gul's pulmonary function testing (i.e. – "spirometry") at Kohler in June of 2009 compared to such testing performed by Dr. Feldman in September of 2009 is simply in error. Dr. Feldman performed those tests, explained them, and testified under oath about how those differences are to be evaluated. The evidence is clear in this regard.

E.) Dr. Feldman's diagnosis of Gul's severe wheezing was not undermined by the medical records of Dr. Chandler dated September 25, 2009.

Commissioner Beck and the Appellate Panel erred when he found that Dr. Chandler's medical records undermined Dr. Feldman's diagnosis of Gul's severe wheezing on September

[117] R. pp. 733-34.

[118] R. p. 734.

25, 2009.[119] Quite simply, Dr. Chandler is a cardiologist who focuses on a patient's heart and the etiologies of any such heart problems. Dr. Feldman, as explained above, is a pulmonologist who focuses on diseases and problems of the lungs. It would be no surprise, therefore, when Gul's pulmonologist focuses on and evaluates Gul's lungs and when his cardiologist focuses on and evaluates Gul's heart.

F.) Dr. Feldman's opinions should carry more weight due to the frequency with and extent to which he has treated Gul compared to Dr. Fogarty and Dr. Sahn.

The frequency and extent to which Dr. Feldman has treated Gul should be enough to afford some weight to his opinions, as Commissioner Williams did. However, Commissioner Beck and the Appellate Panel afforded "no weight" to his opinions, which is clearly erroneous and arbitrary when objectively considering the facts and evidence. Dr. Feldman has treated Gul for over six (6) years now (since September of 2009) during which he has seen, evaluated and treated him well over fifty (50) times. During the course of his care, Dr. Feldman has consistently diagnosed Gul with, and treated him for, asthma. In fact, Dr. Feldman stated that Gul's asthma "is progressing even today...His asthma is getting worse."[120] Dr. Feldman has prescribed and provided medications specifically to treat Gul's asthma, and these treatments have been effective.[121] Dr. Feldman has performed multiple invasive procedures, such as bronchoscopies, wherein he actually visualized (and treated) severely inflamed airways, bronchial constriction and mucus buildup to "wash out the lungs."[122] In this regard, Dr. Feldman

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[119] R. p. 64.

[120] R. p. 802.

[121] R. p. 318.

[122] R. pp. 772-73.

has a very intimate knowledge base with respect to Gul's lungs over this extended period of time, and such information should reasonably afford not only some weight, but much weight.

The circumstances in this matter are very similar to those in another claim involving the very same Kohler facility in Spartanburg where Gul worked. In *Corbin v. Kohler Co.*, 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002), the claimant was found to have a compensable injury from exposure to silica dust. Dr. Applebaum, the claimant's treating pulmonologist, saw and treated the claimant for almost a year. The claimant saw Dr. Applebaum more than any other physician, similar to this case. Significantly, the Court of Appeals stated that Dr. Applebaum "is a pulmonologist who specializes in the very type of condition [the claimant] sustained in his workplace," further noting that the various other physicians offering opinions either were not specialists *or had only seen the claimant on one occasion. Id.* at 623-24 (emphasis added). The Court of Appeals ultimately found that "The evidence provided by Dr. Applebaum was entitled to greater weight than that of the other expert medical testimony, as she saw [the claimant] more and was a specialist in pulmonology." *Id.* at 624.

Amazingly, the facts from the *Corbin* opinion are strikingly similar to this case. Like Dr. Applebaum, Dr. Feldman is a specialist in pulmonology – the specific specialty for diagnosing and treating asthma. Dr. Feldman, again, has seen Gul so many more times than Dr. Fogarty or Dr. Sahn that it appears to reveal a state of antipathy by Commissioner Beck and the Appellate Panel to afford "no weight" to these facts, i.e. – Dr. Feldman's treatment and opinions, backed up by literature. Dr. Fogarty and Dr. Sahn saw Gul only one time each, and as they should know, asthma is a medical problem that manifests differently depending on the day, time of day, medications taken and proximity of airborne irritants. Sometimes asthma can be diagnosed

immediately, but other times it takes multiple visits by a patient for a physician to diagnose it.[123] If a patient happens to present with symptoms during a visit to a physician, it likely can be diagnosed. However, the absence of transient but persistent symptoms does not exclude the diagnosis of asthma only based on that one visit.[124] In this regard, Dr. Fogarty and Dr. Sahn may have missed the diagnosis of asthma, but their one-time exams did not afford them the proper opportunity to fully assess and evaluate Gul like Dr. Feldman. Thus, as supported by the Court of Appeals' opinion in *Corbin*, Dr. Feldman's opinions should carry more weight than those of Dr. Fogarty and Dr. Sahn. It was error, however, for Commissioner Beck and the Appellate Panel to afford "no weight" to Dr. Feldman's opinions in this particular case.

G.) Dr. Fogarty and Dr. Sahn lacked most of the medical information available to form their opinions.

Dr. Fogarty saw Gul only one time – on December 22, 2009.[125] Despite Gul's continued treatment from Dr. Feldman these past six (6) years, Dr. Fogarty (and Kohler's new attorneys) have not made any attempts to seek an updated exam or opinion from Dr. Fogarty, nor provide him with the many years of Gul's medical records showing he has been continuously treated for asthma, including Gul's hospitalizations and bronchoscopy procedures. These facts simply show that Dr. Fogarty's opinion – and the basis for such opinions – are quite limited. There is no dispute about that. As previously pointed out, if it were to be acceptable to afford all weight to Dr. Fogarty's opinions and "no weight" to Dr. Feldman's opinions under these factual circumstances, one would need to assume Dr. Feldman has committed long-term medical malpractice and healthcare fraud for his years of treatment to Gul, including actual

[123] R. pp. 724-25.

[124] R. pp. 724-25.

[125] R. p. 467.

hospitalizations and invasive procedures. Why would Commissioner Beck and the Appellate Panel afford "no weight" to his opinions? Because such a decision is simply arbitrary.

Further, Dr. Feldman actually had the opportunity to review Dr. Fogarty's report, and in a letter dated June 17, 2010, wrote: "I disagree with nearly everything that Dr. Fogarty has written in his report."[126] Dr. Feldman further explained as follows:

> Work Related Asthma (WRA) refers to asthma that can be attributed to or made worse by exposure in the workplace. WRA is characterized by episodic symptoms of airflow obstruction which is at least partially reversible and temporal pattern of symptoms associated with exposure at workplace. [Gul] undoubtedly clearly has both classic symptoms and temporal exposure history.
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> As for Spirometry, even at Dr. Fogarty's office where he reportedly had no wheezing, his FEV1 was 3.37L as compared to 3.69L, at Kohler earlier which is significant drop of 332 mL. When he was more symptomatic in my office his FEV1 was 2.71L, nearly 1000cc less or 68%. Oftentimes no Spirometry was possible due to sever wheezing and symptoms.
>
> [Gul] has also clearly demonstrated Obstructive defect, which cannot be faked by any effort.[127]

Dr. Fogarty has never offered an explanation for Dr. Feldman's above analysis. Likewise, and as discussed herein below, Dr. Sahn was not provided with much in the form of medical records to help form the basis of his own opinions.[128]

The record is bare of any evidence that Dr. Sahn reviewed any records from Dr. Feldman's long-standing care and treatment of Gul.[129] Much of the care – including hospitalizations – to treat Gul's asthma occurred before Dr. Sahn's sole evaluation of Gul. As an

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[126] R. p. 412.

[127] R. p. 412.

[128] R. pp. 781-83.

[129] R. pp. 781-83.

expert in pulmonology, Dr. Feldman testified to the deficiencies of the medical evaluations of Dr. Fogarty and Dr. Sahn as follows:

> Q. All right.
> 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.[130]

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.[131]

Clearly, Dr. Feldman, factually, has much more of a basis to offer opinions on Gul's condition than the limited evaluations done by Dr. Fogarty and Dr. Sahn at the request of Kohler. This is just utterly and factually true.

H.) The bases of the opinions offered by Dr. Fogarty and Dr. Sahn are suspect and actually have been proven to be incorrect.

[130] R. pp. 782-83.

[131] R. pp. 784-85.

The bases of the opinions rendered by Dr. Fogarty and Dr. Sahn are suspect for multiple reasons. First, and significantly, Gul was already receiving treatment for his asthma at the time he was evaluated by both Dr. Fogarty and Dr. Sahn, and he was taking medications for his asthma during that time.[132] Because Gul's undisputed testimony shows that his asthma medications given by Dr. Feldman helped him, it makes perfect sense that Gul's manifestation of asthma on only one visit to each of them (Dr. Fogarty and Dr. Sahn) certainly may have been mitigated or reasonably benign. However, upon learning of Dr. Sahn's conclusions, Dr. Feldman noted the following in his medical records on November 8, 2011:

> THIS MAN IS WHEEZING TODAY!!
> HE IS ON/WAS ON A LOT OF MEDS WHEN SEEN [at] MUSC [by Dr. Sahn]
> NEEDS TO GO TO MUSC ON A BAD...NOT GOOD DAY[133]

Interestingly, and quite revealing, is Dr. Sahn's conclusion that Gul likely had symptoms of a cardiac problem.[134] Even Dr. Fogarty recognized the fact that Gul's prior cardiac evaluations were normal.[135] In conclusion of his exam, Dr. Sahn recommended that Gul seek a cardiac evaluation because that is what Dr. Sahn thought was the cause of his symptoms of shortness of breath and chest tightness.[136]

So, Gul was referred to Dr. Mobley, who performed a thorough cardiac evaluation and administered various tests, only to conclude that Gul's symptoms were not, in fact, cardiac-

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[132] R. pp.1242-43.

[133] R. p. 318.

[134] R. p. 443.

[135] R. p. 467.

[136] R. p. 443.

related but were, rather, likely pulmonary-related.[137] Dr. Mobley noted in his records as follows: "Dyspnea, questionable etiology, appears most likely pulmonary related given my history and physical examination. No current evidence of volume overload on my examination to suggest congestive heart failure as a component here."[138] Dr. Mobley further noted that "[Gul] has long-standing dyspnea at this point, which appears most likely pulmonary related," and that "his symptoms of chest pain are clearly atypical, pleuritic and are likely related to underlying pulmonary pathology, possibly asthma," leading him to conclude that

> ...from a cardiac perspective, I would not recommend further cardiac evaluation, but instead would concentrate more on pulmonary treatment especially as treatment with Prednisone and Ventolin inhalers seem to be improving his symptoms currently, which would go against a cardiac component.[139]

Dr. Mobley's opinions are undisputed, all of which supports Dr. Feldman's long-standing diagnosis. Interestingly, and quite importantly, Dr. Sahn's opinions are not even supported by conclusions of the physician (Dr. Mobley) to whom he referred Gul.

In sum, and as noted above, there are a multitude of problems with the opinions and bases thereof with respect to Dr. Fogarty's and Dr. Sahn's one-time evaluations. What is clear, however, is the factual evidence showing that Dr. Feldman's opinions should carry more weight and that his opinions are bearing out to be truer the more Gul gets evaluated, as even shown by Dr. Mobley.

Overall, the weight of the medical evidence in this case favors, from a very factual standpoint, that of Dr. Feldman's. Clearly, then, it was erroneous, arbitrary and an abuse of discretion for Commissioner Beck and the Appellate Panel to find that Gul does not suffer from

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[137] R. p. 434.

[138] R. p. 434.

[139] R. p. 434.

any asthmatic condition by completely discounting, and finding "no weight" to, the extensive, thorough and accurate assessments by Dr. Feldman determined over time. Commissioner Beck and the Appellate Panel were arbitrary and clearly in error by giving "no weight" to Dr. Feldman without any new medical evidence to consider and by [Commissioner Beck] having a former attorney-client relationship with the new attorneys hired by Kohler after Commissioner Williams awarded Gul benefits. Gul was an honest, hard-working man who should expect the same honesty and integrity from State Commissioners who hear his plea.[140] "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." *Pierre* at 541, 689 S.E.2d 615, 618.

II. Commissioner Beck and the Appellate Panel clearly erred, abused their discretion and concluded arbitrarily that Gul failed to establish his asthma arose out of, and in the course of employment of, his employment with Kohler.

Commissioner Beck and the Appellate Panel erred and abused their discretion by concluding that Gul's asthma did not arise out of, and in the course of employment of, his employment with Kohler. The substantial evidence as a whole shows Gul suffered asthma and its symptoms during the course of his employment with Kohler. Therefore, Commissioner Beck and the Appellate Panel erred in concluding Gul failed to establish this fact.

Quite simply, the evidence shows that for almost the entirety of his time working at Kohler from 2004 to August 25, 2009, Gul directly used Acetic Acid as required by Kohler.[141]

Unquestionably, Gul was exposed to Acetic Acid for years during his work at Kohler.[142] Indisputably, Gul developed continuous difficulty breathing, dizziness, chest tightness and

[140] R. pp. 983-84.

[141] R. pp. 1031-33.

weakness during his time working at Kohler.[143] The fact that Gul's diagnosis of asthma did not come until September of 2009 in no way negates the fact that Gul developed his lung problems during the scope of his employment with Kohler. The record reflects that there is no other cause for Gul's asthma other than his use of Acetic Acid while working at Kohler.

In *Mohasco Corp., Dixiana Mill Div. v. Rising*, 289 S.C. 130, 345 S.E.2d 249 (Ct. App. 1986), *rev'd on other grounds*, 292 S.C. 489, 357 S.E.2d 456 (1987), this Court set forth the following six (6) elements that must be proven in order for a claimant to receive Workers' Compensation benefits for having contracted an occupational disease:

1. A disease;
2. The disease must arise out of and in the course of the claimant's employment;
3. The disease must be due to hazards in excess of those hazards that are ordinarily incident to employment;
4. The disease must be peculiar to the occupation in which the claimant was engaged;
5. The hazard causing the disease must be one recognized as peculiar to a particular trade, process, occupation, or employment; and
6. The disease must directly result from the claimant's continuous exposure to the normal working conditions of the particular trade, process, occupation, or employment.

Fox v. Newberry County Memorial Hosp., 319 S.C. 278, 280-81, 461 S.E.2d 392, 394 (1995).

Commissioner Beck and the Appellate Panel erred by concluding that Gul's symptoms were not causally related to his employment with Kohler primarily because the facts show Gul

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[142] R. pp. 1031-33.

[143] R. pp. 1178-79.

developed his respiratory problems while working at Kohler with no other explanatory cause. Plus, Dr. Feldman's differential diagnosis excludes other possibilities.[144]

Specifically, the evidence shows that Gul worked at Kohler from 2004 through August 25, 2009 as a machine operator.[145] Much of his time working at Kohler involved his direct use of, and exposure to, Acetic Acid in the workplace.[146] Specifically, Gul worked on the Kitchen Sink machine during the last four (4) months he worked at Kohler.[147] He did not use Acetic Acid on this machine, but he directly used it on other machines with which he was helping during this period.[148] For one and a half (1½) years prior to the Kitchen Sink job, Gul worked on Cover Machine #5, and he directly used Acetic Acid on this job.[149] For one and a half (1½) years prior to the Cover Machine #5 job, Gul worked on Small Machines, and he directly used Acetic Acid during that job.[150] For one and a half (1½) years prior to the Small Machines job, Gul worked on Cover Machine #2, on which he directly used Acetic Acid.[151] For almost the entirety of his time working at Kohler from 2004 to 2009, Gul directly used Acetic Acid as required by Kohler.[152]

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[144] R. pp. 783-85.

[145] R. pp. 1227-28.

[146] R. pp. 1031-33.

[147] R. pp. 1228-29.

[148] R. pp. 1228-29.

[149] R. p. 1167.

[150] R. p. 1167.

[151] R. pp. 1167-69.

[152] R. pp. 1031-33.

Gul stopped working at Kohler because he started developing some medical problems.[153] All of his lung problems started once he worked for Kohler.[154] According to the evidence, Gul has been diagnosed with severe asthma.[155] Gul did not have asthma before working at Kohler.[156] He began having symptoms while working for Kohler, and the only exogenous (or external) agent causing lung problems in his life was Acetic Acid, itself a known lung irritant and asthma-inducer.[157] In fact, Kohler no longer uses Acetic Acid for this reason.[158] The evidence shows Gul has asthma resulting from his frequent use of Acetic Acid during most of the days he worked for Kohler during those five (5) years.

More specifically, Gul began noticing that his lung problems (shortness of breath, sputum production and tightness in his chest) increased in 2007-2008.[159] The evidence establishes that, during this period, Gul used Acetic Acid every day approximately fifteen (15) or more times per shift.[160] He used the spray bottle to spray molds (which took between 10-15 seconds per mold) and the entire machines (which took 1½-2 minutes per machine).[161] Gul used about five (5) bottles per shift when using the larger spray bottles and used ten (10) or more bottles per shift when using the smaller spray bottles.[162]

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[153] R. pp. 1229-30.

[154] R. pp. 1229-32.

[155] R. p. 318.

[156] R. pp. 1229-32.

[157] R. pp. 1229-32.

[158] R. pp. 1130-34, 1140-41.

[159] R. pp. 1231-32.

[160] R. p. 1174.

[161] R. p. 1174.

[162] R. p. 1175.

By 2009, Gul's lung symptoms of shortness of breath, coughing and chest tightness were getting worse.[163] Gul ultimately saw Dr. Feldman, who diagnosed Gul with asthma directly related to and caused by his occupation at Kohler.[164] As noted above, Dr. Feldman has seen, evaluated and treated Claimant more than 50 times since 2009.[165] As an expert in pulmonary medicine, Dr. Feldman is of the opinion to "a high degree of certainty" and "without question" that Gul has asthma directly caused by his workplace exposure to Acetic Acid while working for Kohler.[166] Dr. Feldman has stated that "As his treating pulmonologist, it continues to be my opinion, based upon a reasonable degree of medical certainty, this patient's exposure to Acetic Acid at Kohler most probably resulted in him developing occupational asthma."[167]

Dr. Feldman also testified in his deposition connecting Gul's asthma to his work at Kohler as follows:

> Q. Now, in determining – is it your opinion that it was his job at Kohler that caused his occupational asthma?
> A. Yes.
> Q. And what substance is it that you understand he was exposed to at Kohler that caused it?
> A. Acetic acid.[168]

Dr. Feldman explained that essentially a later diagnosis of asthma due to years of prior exposure frequently happens all the time, just as in Gul's case. Dr. Feldman testified as follows:

> Q. Now, how long could he be exposed to the acetic acid and not develop symptoms of asthma?

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[163] R. p. 1176.

[164] R. p. 318.

[165] R. p. 1242.

[166] R. p. 318.

[167] R. p. 318.

[168] R. p. 743.

A. It is impossible question to answer. Because it depends on the individual susceptibility, different circumstances and so forth. Some people can expose to acetic acid for years, and never develop asthma. Some people can be exposed to acetic acid just one day and develop RADS.

Q. So the fact that he went four and a half years or five years without developing any symptoms is not relevant to your opinions?

A. Well, he has occupational asthma, yes. The longer your been exposed, the greater the chance that your lungs have damage. This man maybe not recognize that he is sick, okay? Many people don't, until he really became sick. So the question is it relevant to me that he's exposed four or five years or one day? No. But I know occupational asthma, four or five years is very common. In fact, that probably would be average.[169]

Dr. Feldman reiterated the clear connection of Gul's asthma to his work at Kohler as follows:

Q. Well, what day did he develop occupational asthma, then?

A. Well, 2009, okay? He did develop occupational asthma while working with acetic acid. That is what the question. Yes, he did, okay? So his asthma is acetic acid induced asthma. All right? He didn't quit and develop asthma. All right? He continued to work. He didn't move to Las Vegas, okay? He developed asthma while at work. That's a temporal relation and that's occupational asthma.[170]

Based on the foregoing, the evidence as a whole shows Gul developed his respiratory problems while working at Kohler with no other explanatory cause and with a clear medical diagnosis linking the two.

The evidence shows that: (1) Gul had a disease (asthma) as diagnosed and treated for years by Dr. Feldman; (2) his disease arose out of and in the course of his employment (lung problems and symptoms from asthma occurring at least during the years 2007-2008 but officially diagnosed in 2009); (3) his disease was due to the hazard of a pulmonary irritant which is a hazard above those hazards ordinarily incident to employment (the Acetic Acid, which label includes a hazard warning for being a respiratory irritant, especially since no other factor was the

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[169] R. pp. 746-47.

[170] R. p. 757.

catalyst for his developed respiratory symptoms/asthma); (4) his disease (asthma) is peculiar to the occupation in which Claimant was engaged (asthma can be expected or result from the use of Acetic Acid with respect to the specific jobs Gul worked while at Kohler); (5) the hazard (Acetic Acid) causing the asthma is recognized as unique to the specific jobs Gul worked at Kohler; and (6) the disease (asthma) directly resulted from Gul's continuous exposure to the normal working conditions of his employment working with Acetic Acid on the cover machines job, small machines job and kitchen sink job, all the while helping coworkers with Acetic Acid along the way.

The evidence simply and clearly meets the elements necessary to sustain a compensable claim for a compensable occupational disease under *Fox*. With no other evidence to the contrary, Commissioner Beck and the Appellate Panel clearly erred by not finding in favor of Gul when the substantial evidence meets these required elements of the law.

CONCLUSION

Commissioner Beck and the Appellate Panel clearly erred, abused their discretion and exercised arbitrary and clearly unwarranted discretion by failing to consider and affording "no weight" to the medical opinions, medical records and evaluations of Dr. Feldman, Gul's long-time treating physician who has seen, evaluated and treated Appellant clinically and invasively for work-related asthma at least fifty (50) times more than any other physician relied upon by Commissioner Beck and the Appellate Panel. The nature and manner of Commissioner Beck's Decision and Order, which was upheld "verbatim" by the Appellate Panel, shows they clearly erred, abused their discretion and exercised arbitrary and clearly unwarranted discretion. Therefore, and for the reasons stated hereinabove, the Appellate Panel's ultimate Decision and Order filed on March 23, 2016 should be reversed.

Gul was initially awarded benefits after Commissioner Williams appropriately considered and weighed all of evidence, particularly the medical evidence, in this matter. Gul was subsequently denied benefits only after Commissioner Beck, who was previously represented by Kohler's new attorneys, afforded "no weight" to Dr. Feldman's numerous medical opinions, medical records and evaluations. By the time Commissioner Beck ruled, there was zero additional medical evidence weighing in favor of Kohler. If anything, there was more medical evidence weighing in favor of Gul in terms of solidifying the determination that he had work-induced asthma. Commissioner Beck's (and, concomitantly, the Appellate Panel's) effective reversal of Commissioner Williams' Order in this regard speaks loud and clear: there was an abuse of discretion, an exercise of unwarranted discretion and a ruling made in an arbitrary manner to deny benefits to Gul, who was an honest, hard-working laborer as affirmed by Kohler's supervisors themselves. Because the Appellate Panel affirmed Commissioner Beck's Decision and Order, the Appellate Panel's March 23, 2016 Decision and Order should be reversed.

Respectfully submitted,

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February 2, 2017

CERTIFICATE OF COMPLIANCE

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

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