

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Appellate Case No. 2016-000853  
WCC #0912295

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Nikolay Gul .....Claimant, Appellant,

v.

Kohler Company .....Respondent.

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JAN 22 2019  
SC Court of Appeals

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**APPELLANT'S PETITION FOR REHEARING**

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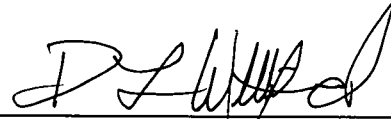
The Appellant Nikolay Gul petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Gul v. Kohler Company*, Op. No. 2019-UP-023 (S.C. Ct. App. filed January 9, 2019).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting Memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Gul v. Kohler Company*, Op. No. 2019-UP-023 (S.C. Ct. App. filed January 9, 2019), the supporting Memorandum filed herewith, the briefs and Record on Appeal, Rule 221(a), SCACR, and other rules of court.

Respectfully submitted,

DAVIS, SNYDER, WILLIFORD & LEHN, P.A.



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David L. Williford, Esq. (SC Bar # 73129)  
DAVIS, SNYDER, WILLIFORD & LEHN, P.A.  
5 Hawthorne Park Court  
Greenville, SC 296515  
(864) 335-3500 (office)  
(864) 335-3505 (fax)  
[dwilliford@davissnyder.com](mailto:dwilliford@davissnyder.com)

*Attorney for Appellant Nikolay Gul*

January 22, 2019  
Greenville, South Carolina

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**MEMORANDUM IN SUPPORT OF  
APPELLANT'S PETITION FOR REHEARING**

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Appellant Nikolay Gul (hereinafter "Gul") has petitioned this Court for a rehearing of its recent unpublished decision in *Gul v. Kohler Company*, Op. No. 2019-UP-023 (S.C. Ct. App. filed January 9, 2019). The Appellant respectfully submits that the following points were overlooked or misapprehended by the Court:

In affirming the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (hereinafter "Appellate Panel") denying Gul benefits from Respondent Kohler Company (hereinafter "Kohler"), this Court misapprehended the gravamen of Gul's appeal, which is that Commissioner Beck exercised *arbitrary* discretion and therefore, *abused his discretion* by essentially changing Commissioner Williams' initial order granting Workers' Compensation benefits to Gul.

The Appellate Panel affirmed Commissioner Beck's arbitrary decision to deny benefits to Gul, and this Appeal followed.

Gul does not argue that Commissioner Beck and the Appellate Panel did not *have* discretion to weigh and consider the evidence in the record. To the contrary, Commissioner Beck and the Appellate Panel should have exercised sound discretion to decide this matter. However, they abused their discretion by inexplicably taking away the award of Workers' Compensation benefits *without any new medical evidence* being discovered or presented.<sup>1</sup> The primary difference-maker between Commissioner Williams' award of benefits to Gul and Commissioner Beck's denial of benefits to Gul is the fact that Commissioner Beck was a former client of Kohler's newer attorneys who handled this matter after Kohler lost their case to Gul under Commissioner Williams, after Kohler fired their initial attorney, and after Kohler hired new attorneys and asked for a re-do (or *de novo*) hearing in front of Commissioner Beck.<sup>2</sup> And, as might have been expected, Commissioner Beck, in effect, took away Gul's Workers' Compensation benefits award *without considering any new or different medical evidence than what was considered by Commissioner Williams*.

It would be more palatable and perhaps more believable if Commissioner Beck merely reduced Gul's initial award, but he (Commissioner Beck) essentially did an "about-face" and completely denied benefits to Gul (after Gul was initially awarded it) by opining that Dr. Feldman - the main *treating* physician of Gul - carried "no weight" with respect to his medical opinions, but affording all the weight to Kohler's hired gun experts who only saw Gul once each over the years. The decision-making by Commissioner Beck - affirmed by the Appellate Panel - is a facade of justice couched in the legal and judicial power of discretion, and allows workers and patients like Gul (who

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<sup>1</sup> Brief of Appellant, p. 5.

<sup>2</sup> Brief of Appellant, p. 5.

clearly contracted his occupational disease while at Kohler, as stated by Commissioner Williams: “The greater weight of the evidence supports that [Gul] 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.”<sup>3</sup> to suffer without just compensation.

This 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...(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code Ann. § 1-23-380 (5)(f). Gul’s “substantial right” of being awarded compensation has been prejudiced at least by the “inferences” (if not the “findings...conclusions or decisions” themselves) of an arbitrary determination by Commissioner Beck later upheld by the Appellate Panel. Commissioner Beck’s decision infers an arbitrary decision not to award compensation benefits to Gul, since there was no new medical basis to essentially change Gul’s compensation award to no award at all. If anything, the medical evidence showed that Gul continued to get worse in terms of his work-related asthma.<sup>4</sup>

Additionally, and as noted above, Commissioner Beck afforded “no weight” to Dr. Feldman’s opinions, while Commissioner Williams afforded each physician some weight, but weighed Dr. Feldman’s opinion as more credible based on his long-term treatment of Gul and based on the fact that Dr. Feldman was a *treating* physician and not a hired gun expert for litigation purposes. But why would Commissioner Beck afford Dr. Feldman “no weight” in his decision? May it be suggested that affording Dr. Feldman “no weight” was the way to keep credible evidence out of the picture. And if so, why? Because Commissioner Beck’s decision was arbitrary, not based on the medical evidence,

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<sup>3</sup> R. p. 16.

<sup>4</sup> R. pp. 774-75.

and was outcome-determinative to decide in favor of the lawyers who represented him in the past. The manner in which his decision was made was clearly arbitrary, and precisely the reason and basis, pursuant to S.C. Code Ann. § 1-23-380 (5)(f), for this Court to reverse the Appellate Panel's order that affirmed Commissioner Beck's decision.

To underscore the arbitrary nature of Commissioner Beck's decision not to award benefits to Gul, the following headings in Gul's Final Brief (which were explained and supported in detail therein) to this Court elucidate why affording "no weight" to Dr. Feldman does not make sense, unless Beck's decision was arbitrary, by inference at least, which is what is only required for this Court to reverse:

- A.) Dr. Feldman has actually seen, evaluated and treated Gul clinically and invasively many more times than Dr. Fogarty or Dr. Sahn.<sup>5</sup>
- 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.<sup>6</sup>
- C.) Dr. Feldman did his research to support and provide a basis for his clinical knowledge, opinions and experience in this matter.<sup>7</sup>
- 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%.<sup>8</sup>

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<sup>5</sup> Brief of Appellant, p. 15.

<sup>6</sup> Brief of Appellant, p. 17.

<sup>7</sup> Brief of Appellant, p. 20.

<sup>8</sup> Brief of Appellant, p. 23.

- E.) Dr. Feldman's diagnosis of Gul's severe wheezing was not undermined by the medical records of Dr. Chandler dated September 25, 2009.<sup>9</sup>
- 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.<sup>10</sup>
- G.) Dr. Fogarty and Dr. Sahn lacked most of the medical information available to form their opinions.<sup>11</sup>
- H.) The bases of the opinions offered by Dr. Fogarty and Dr. Sahn are suspect and actually have been proven to be incorrect.<sup>12</sup>

The above points, explained in detail within the Brief of Appellant, show why Commissioner Beck's decision was arbitrary - *by inference at least* - which is *all that is required* for this Court to reverse.

Gul and his undersigned counsel acknowledge and are fully aware that a Workers' Compensation Commissioner and the Appellate Panel have full discretion to afford the weight they determine in deciding upon the evidence before them. However, what is *not* appropriate is abusing that discretion by being arbitrary. This is exactly what they did to decide against Gul (after Gul was initially awarded benefits under Commissioner Williams), a worker who was an "honest, hard-working laborer as affirmed by Kohler's supervisors themselves."<sup>13</sup> There was no change in medical evidence between Commissioner Williams' decision and Commissioner Beck's decision: the only

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<sup>9</sup> Brief of Appellant, p. 26.

<sup>10</sup> Brief of Appellant, p. 27.

<sup>11</sup> Brief of Appellant, p. 29.

<sup>12</sup> Brief of Appellant, p. 31.

<sup>13</sup> R. pp. 983-84.

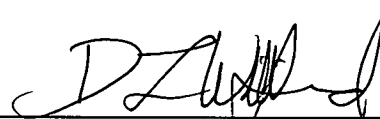
difference was the fact that Kohler hired new attorneys who formerly represented Commissioner Beck. If this fact - being the only primary change - is not at least an *inference* of an arbitrary decision (culminating in an abuse of discretion), especially since Commissioner Beck took the extreme measure to inexplicably afford Dr. Feldman “no weight” when the evidence clearly is to the contrary, then affirming Commissioner Beck and the Appellate Panel renders useless and impotent the law - S.C. Code Ann. § 1-23-380 (5)(f) - enacted to serve and protect our workers.

### CONCLUSION

Based on the foregoing discussion, the Appellant respectfully requests that the Court rehear and reconsider its unpublished decision in this matter and reverse the South Carolina Workers’ Compensation Appellate Panel’s decision and order, accordingly.

Respectfully submitted,

DAVIS, SNYDER, WILLIFORD & LEHN, P.A.



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David L. Williford, Esq. (SC Bar # 73129)  
DAVIS, SNYDER, WILLIFORD & LEHN, P.A.  
5 Hawthorne Park Court  
Greenville, SC 296515  
(864) 335-3500 (office)  
(864) 335-3505 (fax)  
[dwilliford@davissnyder.com](mailto:dwilliford@davissnyder.com)

*Attorney for Appellant Nikolay Gul*

January 22, 2019  
Greenville, South Carolina

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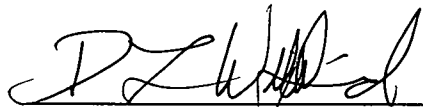
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**PROOF OF SERVICE**

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I certify that I served the **Appellant's Petition for Rehearing and Memorandum in Support of Appellant's Petition for Rehearing** on Kohler Company and the Workers' Compensation Commission by depositing a copies of same in the United States Mail, postage prepaid, on January 22, 2019, 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.

Greenville, South Carolina  
January 22, 2019



David L. Williford (SC Bar #73129)  
Davis, Snyder, Williford & Lehn, P.A.  
5 Hawthorne Park Court  
Greenville, SC 29615  
[dwilliford@davissnyder.com](mailto:dwilliford@davissnyder.com)  
(864) 335-3500  
Attorney for Appellant

**DAVIS, SNYDER, WILLIFORD & LEHN, P.A.**

ATTORNEYS AT LAW  
5 HAWTHORNE PARK COURT  
GREENVILLE, SC 29615

ASHBY W. DAVIS\*  
STEVEN A. SNYDER  
DAVID L. WILLIFORD  
COLLIE W. "TRIP" LEHN, JR.  
KEITH D. KNOWLTON

\*ALSO ADMITTED IN GEORGIA

TELEPHONE  
(864) 335-3500

FAX  
(864) 335-3505

www.davissnyderlaw.com

January 22, 2019

***Via Hand Delivery***

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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JAN 22 2019

SC Court of Appeals

Re: Nikolay Gul, Claimant, Appellant v. Kohler Company, Respondent  
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Dear Ms. Kitchings:

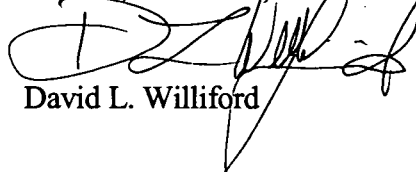
Please find enclosed for filing the original and seven (7) copies each of **Appellant's Petition for Rehearing and Memorandum in Support of Appellant's Petition for Rehearing** and Proof of Service in the above-referenced matter. Please file the original and return a clocked copy of each document to me by way of my courier. I have also enclosed my firm's \$25.00 check for the required filing fee.

By copy of this letter and its enclosures, I am serving copies on all counsel of record as well as the Judicial Director of the South Carolina Workers' Compensation Commission.

Thank you so much for your assistance.

Sincerely,

DAVIS, SNYDER, WILLIFORD & LEHN, P.A.



David L. Williford

DLW/jpk

Enclosures as stated

cc: Grady L. Beard, Esq. (w/encl.)  
Nicolas L. Haigler, Esq. (w/encl.)  
Jasmine D. Smith, Esq. (w/encl.)  
Sowell Gray Stepp & Laffitte, LLC  
P.O. Box 11449  
Columbia, SC 29211  
Attorneys for Respondent

Ms. Amy A. Bracy (w/encl.)  
Judicial Director  
South Carolina Workers' Compensation Commission  
P.O. Box 1715  
Columbia, SC 29202-1715