

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0912295
Court of Appeals Case No. 2016-000853

RECEIVED
FEB 12 2019
SC Court of Appeals

Nikolay Gul, Claimant.....Appellant,

v.

Kohler CompanyRespondent.

RETURN TO APPELLANT'S PETITION FOR REHEARING

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Attorneys for Respondent

INTRODUCTION

On January 9, 2019, this Court affirmed the South Carolina Workers' Compensation Commission Appellate Panel's (the Full Commission) decision, which had afforded no weight to Appellant's doctor's opinions and declined to find Appellant's asthma arose out of, and in the course of, his employment. *Gul v. Kohler Company*, No. 2019-UP-023 (S.C. Ct. App. January 9, 2019). This Court's decision was entirely dispositive of all of the arguments Appellant set forth before the Appellate Panel.

Appellant now seeks to have this Court revisit its decision based on the specious premise that this Court "misapprehended the gravamen of [Appellant]'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 Appellant." (**App. 1-2**). However, it appears on the face of this Court's decision that this Court did not "overlook or misapprehend" any point Appellant raised in his brief. Rule 221, SCACR. Accordingly, this Court should deny Appellant's Petition for Rehearing.

ARGUMENT

I. Neither Commissioner Scott Beck's nor the Full Commission's decisions were arbitrary or capricious or characterized by abuse of discretion.

As a brief review of the facts, Appellant filed a claim against Kohler, alleging he suffered from occupational asthma caused by his inhalation of acetic acid at Kohler. Kohler denied the claim was compensable. Following a hearing, Commissioner Derrick Williams heard the matter and found the claim was compensable as an injury by accident. Kohler appealed, and after a hearing before the Full Commission, the Full Commission vacated the Decision and Order of Commissioner Williams and remanded the matter for a *de novo* hearing. *Neither party appealed that Order*. Thus, Commissioner Williams' original decision had no legal bearing whatsoever, yet

Appellant argues as if it did. The Full Commission vacated Commission Williams' decision, and Appellant has never argued the Full Commission's decision in that regard was arbitrary or capricious, and did not even appeal that decision. Commissioner Beck heard the matter on remand.

Appellant's Petition for Rehearing lodges an unwarranted and unfounded personal attack on Commissioner Beck. Appellant suggests, without actually arguing, Commissioner Beck abused his discretion by denying benefits to Appellant *because* counsel for Kohler previously represented Commissioner Beck. Appellant states,

The primary difference-maker between Commissioner Williams' award of benefits to [Appellant] and Commissioner Beck's denial of benefits to [Appellant] 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 [Appellant] 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.

(App. Pet. for Rehearing 2, 5-6). Appellant's arguments and reasoning are flawed for several reasons. First, although Kohler contends this is unpreserved because Appellant never raised this argument to the Full Commission, this Court considered and properly rejected Appellant's contention regarding any impropriety by Commissioner Beck or the Full Commission. Appellant did not fully argue this point in his final brief to this Court. Instead, he stated in a conclusory fashion in the statement of the case that Kohler's counsel previously represented Commissioner Beck without any argument as to how this previous representation affected the ruling. **(App. Br. 5).** *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304, 433 S.E.2d 871, 873 (Ct. App. 1993) ("This one-sentence argument is too conclusory to present any issue on appeal. Moreover, the appellant did not make this argument to the trial judge; he did not rule on it; and the appellant did not make a post-trial motion requesting a ruling. Thus, this issue is not preserved for appeal."); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Mere allegations of

error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling.”).

Furthermore, as fully discussed in Kohler’s Final Brief, prior to proceeding before Commissioner Beck, counsel for Appellant (1) knew of the prior representation, (2) consented in writing to Commissioner Beck adjudicating this claim through his prior counsel, even after receiving the knowledge of prior representation, and (3) specifically indicated there was “no need for recusal.” (**Resp. Br. 26-27**). Moreover, and perhaps more importantly, Appellant never raised anything remotely close to this issue in his appellant brief to the Full Commission or during the hearing before the Full Commission. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. at 304, 433 S.E.2d at 873.

Appellant erroneously claims Kohler requested Commissioner Beck to hear the claim. (**App. Pet. 2**). Yet, as Appellant is well aware, the South Carolina Workers’ Compensation Commission determined the assigned Commissioner to proceed over the *de novo* hearing. (**R. 1459-60**). As soon as counsel for Respondent Kohler received notification that the Commission assigned Commissioner Beck to proceed over the hearing, counsel for Respondent contacted counsel for Appellant and notified him of the prior representation. (*Id.*). Appellant never (1) appealed the order granting a *de novo* hearing, (2) appealed or disputed the notice of hearing assigning Commissioner Beck, or (3) filed a motion for recusal. Moreover, Appellant’s counsel consented to Commissioner Beck hearing the case. Appellant never raised any issues regarding counsel for Kohler’s prior representation of Commissioner Beck until now.

Notwithstanding, the record shows and substantial evidence supports finding Commissioner Beck and the Full Commission did not abuse their discretion in finding Appellant did not suffer from any asthmatic condition as of the alleged date of injury and even if Appellant

suffered from asthma on the date in question, Appellant failed to establish by a preponderance of the evidence Appellant's asthmatic condition was related to his employment with Kohler. In his Petition for Rehearing, Appellant misstates law regarding this Court's authority to reverse or modify the Full Commission's decision. Section 1-23-380(5)(f) of the South Carolina Code Ann. (Supp. 2018) provides this Court "may reverse or modify the decision [of the administrative agency] 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.*" (emphasis added). Accordingly, to support reversal, the *Commission's inferences, conclusions, or decisions* must be arbitrary or capricious. Appellant argues this Court can "infer" Commissioner Beck's decision was arbitrary pursuant to this statute, which is an incorrect statement of the law. (**App. Pet. 3-5**). Here, this Court properly affirmed the decision because Commissioner Beck nor the Full Commission's findings, inferences, conclusions, or decisions were arbitrary or capricious as they were clearly supported by substantial evidence in the record.

II. This Court correctly held the Full Commission is the ultimate fact-finder in workers' compensation cases.

Appellant continues to ignore well-settled South Carolina law that the Full Commission is the ultimate finder of facts and ultimately determines the weight to give to witnesses and evidence. (**App. Pet. 4** (listing arguments regarding facts which Appellant believes demonstrate Commissioner Beck's decision was arbitrary)). Substantial evidence supports both Commissioner Beck and the Full Commission affording no weight to Dr. Feldman's opinions, and the Commission did not abuse its discretion; therefore, this Court must affirm. *See Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("In a workers' compensation case, the Commission alone is the ultimate factfinder."); *Mullinax v. Winn-Dixie*

Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) (holding this Court may not substitute its judgment for that of the agency concerning the weight of the evidence on questions of fact).

The record shows Dr. Feldman's opinions and records lacked credibility because he reached his diagnosis and conclusions without sufficient knowledge of Appellant's work at Kohler, medical history, and exposure history to form a credible opinion. (**Resp. Br. 20-26, 28-33.**) Additionally, Dr. Feldman's lack of credibility is shown by the scarcity of pertinent information recorded in his medical records and by his deposition testimony, where his answers to questions were either evasive, based upon a misunderstanding of the facts, or revealed a lack of knowledge of the facts in this case. (*Id.*) Instead of acknowledging this, Appellant focuses on counsel for Kohler's prior relationship with Commissioner Beck, which as fully addressed in this Return and Respondent's brief, had no impact on the decision.

III. The record before Commissioner Beck included new and additional evidence.

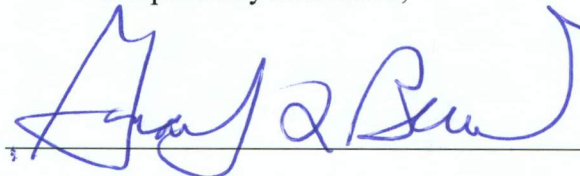
Despite Appellant's contention otherwise, the record before Commissioner Beck included several forms of additional evidence, including medical records and depositions of medical providers not available at Commissioner Williams' Hearing. A comparison of Commissioner Williams' and Commissioner Beck's orders demonstrates the additional evidence presented to Commissioner Beck. (**R. 3-5, 32-36.**) Namely, Dr. Feldman's deposition—the doctor whose opinion is at issue—was not taken until after the hearing before Commissioner Williams and therefore was not available as evidence until the hearing before Commissioner Beck. (*Id.*) Further, the parties submitted the following additional evidence to Commissioner Beck: additional medical records of Dr. Feldman; medical articles relied upon by Dr. Feldman; the deposition of and medical records from Dr. Fogarty; the depositions of several Kohler employees; medical

records from ReGenesis Healthcare, Carolina Cardiology Consultants, PA, Family Physicians of Boiling Springs, Spartanburg Cardiology, Mary Black HealthCare, Upstate Lung & Critical Care; and various exhibits regarding Appellant's employment at Kohler. Appellant's attempt to mislead this Court by stating Commissioner Beck had no additional evidence before him than was presented to Commissioner Williams is frankly contemptable.

CONCLUSION

This Court properly affirmed the Full Commission's decision, which afforded no weight to Dr. Feldman's opinions and declined to find Appellant's asthma arose out of, and in the course of, his employment. Appellant has not cited any evidence this Court overlooked or misapprehended. For the reasons set forth in this Return and in the Final Brief of Respondent, Kohler respectfully requests that this Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Grady L. Beard", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, the undersigned, Legal Assistant of Robinson Gray Stepp & Laffitte, L.L.C., attorneys for Defendants, do hereby certify that I have served the following parties with the foregoing document(s) by mailing a copy of the same via United States Mail, postage prepaid, and/or hand delivering, or otherwise indicated, to the following address(es):

Pleading(s):

Return to Appellant's Petition for Rehearing

Parties served:

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street (29201)
Post Office Box 11629
Columbia SC 29211

VIA U.S. MAIL AND E-MAIL

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Cindy Lamb

Columbia, South Carolina

February 12, 2019

February 12, 2019

VIA HAND DELIVERY

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

RE: Nikolay Gul v. Kohler Company
Court of Appeals Case No. 2016-000853
Trial Court Case No. 0912295
WCC File No.: 0912295
Date of Accident: 08/20/09
Claim No.: 2313030606
Our File No.: 6457/8002

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SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed herewith the original and seven (7) copies of the Return to Appellant's Petition for Rehearing in the above-referenced matter. We would appreciate your filing the original Return to Appellant's Petition for Rehearing and six (6) copies and returning a clocked-in copy of the same to us via our courier.

By copy of this letter and aforementioned documents to the claimant's attorney, we are serving him with a copy of the Return to Appellant's Petition for Rehearing.

Very truly yours,


Grady L. Beard

GLB:odl
Enclosures

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