

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Appellate Case No. 2019-00647
Unpublished Opinion No. 2019-UP-023
Submitted October 1, 2018 - Filed January 9, 2019

Nikolay Gul, Claimant.....Petitioner,

v.

Kohler Company,.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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

Nikolay Gul
155 Suttles Road
Inman, South Carolina 29349
(864) 590-8347
Pro Se Petitioner

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S.C. SUPREME COURT

The Court of Appeals affirmed the judgment of Workers' Compensation Commission. Nikolay Gul v. Kohler Company, Unpublished Op. No. 2019-UP-023 (S.C. Ct. App. filed January 9, 2019). Petitioner Nikolay Gul seeks a writ of certiorari to review that decision.

STATEMENT OF ISSUES

- I. Whether the Workers' Compensation Commission's Single Commissioner, Appellate Panel and Court of Appeals 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, Appellate Panel and Court of Appeals 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?
- III. Whether the Workers' Compensation Commission's Single Commissioner, Appellate Panel and Court of Appeals clearly erred, abused their discretion or exercised arbitrary or clearly unwarranted discretion by concluding as a matter of law that Appellant's appeal and arguments were not properly preserved for review.
- IV. Whether the Workers' Compensation Commission's Single Commissioner, Appellate Panel and Court of Appeals clearly erred, abused their discretion or exercised arbitrary or clearly unwarranted discretion by concluding as a matter of law that Kohler's Initial Brief did not fail to sufficiently cite to the record and is, therefore, merely unsubstantiated argument.

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

⁶ R. pp. 15-16.

⁷ R. pp. 10-16.

⁸ R. p. 443 and R. p. 467.

⁹ R. p. 19.

¹⁰R. 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

The 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

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

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

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

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.

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 practice.⁵⁹ The evidence shows that Dr. Fogarty, during the times at issue in this case, was

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

⁵⁹ R. p. 467.

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 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

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.

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 treated Gul.⁷⁴ Dr. Feldman stated in his deposition that Gul, due to his asthma, is “100%

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.

⁷⁴ R. p. 1180.

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.

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-

⁷⁵ R. pp. 774-75.

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.

The Appellate Panel of the Workers' Compensation Commission (hereinafter "Appellate Panel") ruled on January 12, 2016, as reflected in its filed March 23, 2016 Decision and Order, that Gul's appeal to the Appellate Panel was proper, timely and appropriate.⁷⁶ While Gul's *pro se* Form 30 notice may not have been written particularly artfully, the Appellate Panel appropriately exercised its discretion by construing Gul's Form 30 appeal as an issue of credibility with respect to Dr. Feldman for which he may appeal.⁷⁷ The Appellate Panel thus did not err.

Furthermore, this Court recently ruled in *Wofford v. City of Spartanburg* that an appeal from the Workers' Compensation Commission to the South Carolina Court of Appeals is proper even though the grounds for the appeal were not specified or noncompliance with the APA appeal regulations may have occurred, particularly when potential conflicts arise between the APA and Workers' Compensation Commission rules and the South Carolina Appellate Court Rules. *Wofford v. City of Spartanburg*, 410 S.C. 102, 763 S.E.2d 53 (Ct. App. 2014). Because Gul's Form 30 was construed by the Appellate Panel to include the issues on appeal with respect

⁷⁶ R. p. 71.

⁷⁷ R. p. 71.

to the credibility of witnesses, particularly that of Dr. Feldman, and since Gul properly and timely appealed to the Court of Appeals in accordance with *Wofford*, Gul's appeal and arguments before this Court are properly preserved for review.⁷⁸

Kohler's Initial Brief is written extensively without citing or referencing the record in violation of Rule 208(b)(4) of the SCACR.⁷⁹ This leads to but one conclusion: the arguments made by Kohler mislead the Court by offering skewed facts, half-truths and unfounded assumptions. Examples of such arguments – important and salient to the central issue of this case – are delineated hereinafter below.

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

Kohler states in its Initial Brief that Gul offers “blatantly false accusations” and a “blatant allegation of xenophobia” when Gul points out that the attorneys for Kohler attempted to show that Dr. Feldman was not credible by repeatedly arguing Dr. Feldman was Russian.⁸⁰ However, Kohler's attorney did, in fact, argue this over and over not only in the hearing before Commissioner Beck on April 22, 2015, but also before the Appellate Panel on January 12, 2016.⁸¹ Moreover, Kohler *explicitly admitted* in its Initial Brief that “the fact that Appellant's expert, Dr. Feldman, is of Russian origin was raised to show potential bias.”⁸² Clearly, this

⁷⁸ R. p. 71.

⁷⁹ Respondent's Brief at 169.

⁸⁰ Respondent's Brief at 174 and 194.

⁸¹ R. pp. 1217-1418 and R. pp. 1419-54.

⁸² Respondent's Brief at 194.

attempt to show bias was aimed at Dr. Feldman's credibility because of his Russian origin. Common sense dictates that this was Kohler's purpose.

What is more troubling, however, is that Kohler's attorneys knew that Dr. Feldman and Gul originated from different countries, yet proceeded (and continues to proceed) with the argument that Dr. Feldman is not credible because they are both Russian. Nothing could be further from the truth, however. As Kohler's attorneys know, Dr. Feldman originates from Russia, having left there, legally, in the early 1980's from communist rule.⁸³ Gul, on the other hand, originates from the Ukraine, a completely separate and distinct country essentially at war with Russia.⁸⁴ In fact, even as of October of this year, Russian and Ukrainian relations have been extremely poor to the extent that even Wikipedia cites Reuters and other world news outlets in regards to the following:

On 5 October 2016, the Ministry of Foreign Affairs of Ukraine officially recommended that its citizens should avoid travel to Russia claiming Russian law enforcers' growing number of groundless arrests of Ukrainian citizens and that they often "rudely treat Ukrainians, use illegal methods of physical and psychological pressure, torture and other acts that violate human dignity."⁸⁵

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

⁸³ R. p. 702.

⁸⁴ R. p. 1227.

⁸⁵ https://en.m.wikipedia.org/wiki/Russia%E2%80%93Ukraine_relations

Such arguments are also inaccurate for the purpose of helping Kohler's cause. If Kohler's attorneys are attempting to show bias and lack of credibility with respect to Dr. Feldman, attempting to show they are "in cahoots" by their racial heritage misunderstands the fact that people from these respective nationalities do not like each other and would not be inclined to help one another.⁸⁶

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

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

In their Initial Brief, Kohler's attorneys keep arguing that Gul did not have asthma because "his lungs were clear on exam."⁸⁷ Kohler makes this reference at least six (6) times on two pages alone in their Initial Brief.⁸⁸ However, defined as follows, asthma is:

A disease caused by increased responsiveness of the *tracheobronchial tree* to various stimuli, which results in episodic *narrowing and inflammation of the airways*. Clinically, most patients present with wheezing and shortness of breath. Cough is also a common symptom. *Between attacks the patient may have normal respiratory function*. Although most asthmatics have mild disease, in some cases the attacks become continuous. This condition, called *status asthmaticus*, may be fatal.⁸⁹

⁸⁶ https://en.m.wikipedia.org/wiki/Russia%E2%80%93Ukraine_relations

⁸⁷ Respondent's Brief at 177-78.

⁸⁸ Respondent's Brief at 177-78.

⁸⁹ Taber's Cyclopedic Medical Dictionary 187-188 (20th ed. 2005).

As such, asthma is *not* a medical problem because the lungs might have congestion, mucous or other fluid in the lungs (as Kohler’s attorneys would have everyone believe), but, rather, is a medical problem of the bronchial tracts *constricting and narrowing*, therefore reducing the amount of air inspired into the lungs.⁹⁰ It is quite normal, actually, to have severe asthma *and* lungs clear on exam.⁹¹

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

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

Kohler’s attorneys are misleading the Court and misconstruing the evidence by continually arguing the point that Dr. Feldman essentially “jumped the gun” by allegedly diagnosing Gul with occupational asthma on his first visit on September 23, 2009.⁹² Kohler states the following on page 11 of its Initial Brief:

Though Dr. Feldman’s note reflected a question about Appellant’s asthma being occupational, he testified there was no doubt that on this day – the first day of his visit – Appellant had occupational asthma.⁹³

Further, Kohler states on pages 19-20 in its Initial Brief the following, in relevant part: Importantly, evidence in the record reveals Dr. Feldman diagnosed Appellant with asthma on the first visit, September 23, 2009, without performing any actual medical examinations during the

⁹⁰ Taber’s Cyclopedic Medical Dictionary 187-188 (20th ed. 2005).

⁹¹ <http://www.lakesidepress.com/pulmonary/10errors-asthma.htm>

⁹² Respondent’s Brief at 179; 187-92.

⁹³ Respondent’s Brief at 179.

visit...Rather, the record simply includes a wholly unsupported conclusion reached by Dr. Feldman that Appellant suffered from occupational asthma...He did not wait until a more comprehensive examination was conducted that included lung function studies.⁹⁴

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

What *is* true is the fact that Dr. Feldman, as an expert in pulmonology medicine, diagnosed Gul with asthma on September 23, 2009, but *not occupational* asthma because he needed more time and information to do so.⁹⁵ Dr. Feldman waited patiently for Gul to fulfill the criteria for such a diagnosis.⁹⁶ Dr. Feldman stated in his deposition on October 24, 2013 – over four (4) years *after* Gul's September 23, 2009 visit – that, retrospectively, Claimant definitely had occupational asthma on September 23, 2009.⁹⁷ And, at the time, Dr. Feldman needed to wait a few months – three (3) months – before making the diagnosis. He testified as follows:

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

Q. Okay.

⁹⁴ Respondent's Brief at 187-92.

⁹⁵ R. pp. 721-23.

⁹⁶ R. pp. 721-23.

⁹⁷ R. pp. 721-23.

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

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

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

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

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

A. Yes.

Q. - exposure -

A. Yes.

Q. - or RADS?

A. Yes.

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

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

Kohler's argument that Dr. Feldman testified he had no doubt that Gul had occupational asthma on September 23, 2009 insinuates that Dr. Feldman that very day – September 23, 2009 – diagnosed him with occupational asthma. What is true, however, is that over four (4) years and many, many evaluations later, Dr. Feldman was deposed in this matter. By the time he was deposed, he had the benefit of years of experience, treatment and knowledge of Gul in particular

to the extent that he could prudently and more accurately testify that Gul, no doubt, had occupational asthma on September 23, 2009. But he could *not* make the diagnosis that day because he needed more time, evaluations, tests and knowledge about his circumstances before doing so. In this regard, Dr. Feldman patiently and responsibly made the diagnosis.

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

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

Kohler's attorneys state on page 32 in their Initial Brief that "The record includes sufficient evidence to conclude Dr. Fogarty and Dr. Sahn had a better understanding of Appellant's medical history and work history to reach a conclusion as to whether Appellant suffered from asthma..."⁹⁸ Kohler's attorneys, in their Initial Brief, also discuss "common sense."⁹⁹ They quote the Supreme Court of South Carolina on page 29 in their Initial Brief by stating that "the facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced therefrom as common sense dictates." *Gastineau v. Murphy*, 331 S.C. 565, 570, 503 S.E.2d 712, 714 (1998) (citing *Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204-205, 52 S.E.2d 744, 749 (1949)).¹⁰⁰

Well, "common sense" dictates that Dr. Feldman – not Dr. Fogarty or Dr. Sahn – has had a greater understanding of Gul's medical condition over the years and has been in a better position to diagnose him with occupational asthma. Without reciting the details of Gul's Initial Brief, but by way of summary, the record is clear that Dr. Feldman has evaluated and treated Gul

⁹⁸ Respondent's Brief at 200.

⁹⁹ Respondent's Brief at 200.

¹⁰⁰ Respondent's Brief at 200.

more than 50 times, some of which have been invasive procedures within Gul's lungs, but Dr. Fogarty and Dr. Sahn merely saw Gul one time, for pay and during litigation.¹⁰¹

Notably, Kohler's attorneys state on page 33 of their Initial Brief that "Appellant alleges Dr. Sahn never received his medical records, but Appellant has never offered any proof Dr. Sahn did not receive those records."¹⁰² Amazingly, Kohler's attorneys assert this argument despite the fact that they provided the very evidence supporting Gul's claim in this regard.¹⁰³ Specifically, the attorneys for Kohler took the deposition of Dr. Feldman on October 24, 2013 which revealed the following exchange with regard to the deficiencies of the incomplete medical evaluations of Dr. Sahn and Dr. Fogarty:

Q. All right.

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?

¹⁰¹ R. pp. 1241-43.

¹⁰² Respondent's Brief at 201.

¹⁰³ R. p. 782-85.

Q. I don't know.

A. He never see my reports, never comment on my report?

Mr. Dantin: He did not.

A. Oh, okay. I believe Dr. Sahn did not have enough sufficient information -

Q. Okay.

A. - to opine.

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

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

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

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

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

CONCLUSION

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

For the reasons stated, Petitioner Nikolay Gul asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



Nikolay Gul
155 Suttles Road
Inman, South Carolina 29349
(864) 590-8347
Pro Se Petitioner

May 23, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Appellate Case No. 2019-00647
Unpublished Opinion No. 2019-UP-023
Submitted October 1, 2018 - Filed January 9, 2019

Nikolay Gul, Claimant..... Petitioner,

v.

Kohler Company,.....Respondent.

PROOF OF SERVICE

I certify that I have served one copy of the Petition for Writ of Certiorari on the Respondent's counsel via US Mail, first class postage prepaid, at the below address on May 23, 2019:

Grady L. Beard
Nicolas L. Haigler
Jasmine D. Smith
Robinson Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211

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S.C. SUPREME COURT

May 23, 2019



Nikolay Gul
155 Suttles Road
Inman, South Carolina 29349
(864) 590-8347
Pro Se Petitioner

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