THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion Number 2019-UP-023

(S.C. Court of Appeals Filed January 9, 2019)

Nikolay Gul, Claimant .... Appellant/Petitioner,

v.

Kohler Company ....Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Respondent Kohler Company (Kohler) submits this Return to Petitioner Nikolay Gul's Petition for Writ of Certiorari to the South Carolina Supreme Court. This Court should summarily reject the Petition for the following reasons.

First, the Petition does not present any circumstances to justify the exercise of this Court's discretion to review the decision of the Court of Appeals. Not even one of the factors identified in Rule 242(b), SCACR is present. The issues are not novel, the decision of the Court of Appeals was announced in an unpublished, *per curiam* opinion, there is no conflict with any decision of this Court, there are no constitutional issues presented, and there is no conflict with federal law.

Further, the preserved arguments[1] made by Petitioner are the very same arguments which were unsuccessfully made to the South Carolina Workers' Compensation Commission Appellate Panel (the Full Commission), both in the brief to the Commission and oral arguments before the Commission. Similarly, Petitioner made almost identical arguments in his brief to the Court of Appeals and again in support of the Petition for Rehearing. Furthermore, any unpreserved arguments now made in the Petition to this Court are not properly before this Court as they were not made to the Court of Appeals or Full Commission.

Finally, the legal arguments made in the Petition are erroneous. Initially, there is no finding—as stated in Issue III of the Petition—in the Court of Appeals' opinion that Petitioner's appeal and arguments were not properly preserved for review; therefore, the Court or the Commission could not have erred in "concluding as a matter of law that Petitioner's appeal and arguments were not properly preserved for review." **(Pet. 1 Issue III).** Furthermore, the Court of Appeals could not have erred or abused its discretion, or exercised "arbitrary or clearly

[1] As discussed throughout this Return, many of Petitioner's contentions and conclusory arguments in the Petition are not preserved.

unwarranted discretion" in 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" where it is undisputed that Kohler properly filed a *Final Brief* pursuant to Rule 211(b), citing to the record. *See* Rule 211(b)(1) (stating that in the final brief, "[t]he references in the initial brief shall be revised to indicate where the material appears in the Record on Appeal. These revised references may be in place of or in addition to the initial references"). **(Pet. 1 Issue IV).** Furthermore, the Single Commissioner and Full Commission could not have erred in this regard because the case was on appeal before the Court of Appeals.

QUESTIONS PRESENTED[2]

Whether the Court of Appeals properly held substantial evidence supported finding the South Carolina Workers' Compensation Commission Appellate Panel (the Full Commission) did not err in affording no weight to Dr. Gregory Feldman's opinions and finding Petitioner's asthma did not arise out of, and in the course of, his employment.

COUNTER STATEMENT OF THE CASE

This is a workers' compensation appeal by Petitioner from the Decision and Order of the Full Commission, filed on March 23, 2016, which unanimously upheld the Decision and Order of the Hearing Commissioner, Commissioner Scott Beck (Commissioner Beck). **(R. p. 86).**

On September 11, 2009, Petitioner filed a claim against Kohler, alleging he suffered from occupational asthma caused by his inhalation of acetic acid[3] at Kohler on August 20, 2009. **(R.**

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[2] Petitioner does not address in his brief the issues actually presented in his Statement of Issues; therefore, those issues are considered abandoned. *See Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) (holding an issue listed in the statement of issues on appeal but not addressed in the brief is abandoned).

[3] Acetic acid is an organic compound. Vinegar is roughly 3-9% acetic acid by volume, making acetic acid the main component of vinegar apart from water; therefore, acetic acid is essentially vinegar. **(R. pp. 39, 52, 1236, 1409).**

pp. 89-92). Kohler denied the claim was compensable. Commissioner Derrick Williams heard the matter on December 5, 2012, and found the claim was compensable as an injury by accident. **(R. p. 17).** Kohler appealed **(R. pp. 129-130)**, and after a hearing, the Full Commission vacated the Decision and Order of Commissioner Williams and remanded the matter for a *de novo* hearing. **(R pp. 27-30).** *No appeal was taken by either party from that Order.*

On remand, Commissioner Beck heard the matter and found, among other things not subject to this appeal, Petitioner did not suffer from any asthmatic condition as of the alleged date of injury.[4] **(R. pp. 67-70).** Further, Commissioner Beck found that even if Petitioner suffered from asthma on the date in question, Petitioner failed to establish by a preponderance of the evidence Petitioner's asthmatic condition was related to his employment with Kohler. **(R. p. 36).**

Despite Petitioner'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' December 2012 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

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[4] Appellant implies Commissioner Beck abused his discretion by denying benefits to Appellant because counsel for Kohler previously represented Commissioner Beck. **(Pet. 5).** Appellant's contention is flawed for several reasons. First, although Kohler contends this is unpreserved because Appellant never raised this argument to the Full Commission, the Court of Appeals considered and properly rejected Appellant's contention regarding any impropriety by Commissioner Beck or the Full Commission. Furthermore, the record demonstrates that 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 Appellant's prior counsel, even after receiving the knowledge of prior representation, and (3) specifically indicated there was "no need for recusal." **(R. pp. 37, 1459-60).** Therefore, although Petitioner repeatedly implies bias, dishonesty, and lack of integrity on the part of Commissioner Beck stemming from Kohler's counsel's prior representation of Commissioner Beck, Petitioner was fully aware of counsel for Kohler's previous representation of Commissioner Beck prior to the hearing and waived any issue with the prior representation.

whose opinion is at issue—was not taken until October 2013, which was 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 Petitioner's employment at Kohler. **(Id.).**

Petitioner filed a *pro se* Form 30 Notice of Appeal of Commissioner Beck's order. **(R. p. 131).** After filing the Form 30, Petitioner retained new counsel who provided Petitioner's brief and argued before the Full Commission on his behalf. Kohler argued the issues briefed by Petitioner's new counsel were not the issues raised in Petitioner's *pro se* Form 30 and therefore the issues were not preserved, and Commissioner Beck's findings of fact and conclusions of law were the law of the case.[5] **(R. pp. 84, 171, 182-84, 205, 1422, 1427-30).** Ultimately, the Full Commission considered the issues briefed, unanimously found Commissioner Beck's Decision and Order was supported by the greater weight of the evidence, and affirmed the Decision and Order in its entirety. **(R. p. 86).**

That same counsel for Petitioner then filed an appeal and a brief with the South Carolina Court of Appeals. On January 9, 2019, the Court of Appeals issued an opinion affirming the Full Commission's decision, which had afforded no weight to Dr. Feldman's opinions and found

[5] Contrary to Appellant's repeated allegations, as discussed more fully in Argument II of this Return, Kohler never argued before Commissioner Beck or the Full Commission that Dr. Feldman lacked credibility *because of* his Russian descent.

Petitioner failed to establish a compensable occupational disease. *See Gul v. Kohler Company*, No. 2019-UP-023 (S.C. Ct. App. January 9, 2019). Counsel for Petitioner filed a petition for rehearing on January 22, 2019, which the Court of Appeals denied. On April 15, 2019, counsel for Petitioner filed a request to this Court for an extension of time to file a Writ of Certiorari. On May 23, 2019, Petitioner filed a *pro se* Petition for Certiorari for review of the decision of the Court of Appeals by this Court. This Court dismissed the *pro se* Petition by Order dated May 29, 2019, finding it could not accept the *pro se* documents because Petitioner was still represented by counsel. Counsel for Petitioner then moved this Court to be relieved as counsel and asked this Court to reinstate Petitioner's *pro se* Petition. This Court granted counsel's motion to be relieved and reinstated the appeal.

COUNTER STATEMENT OF FACTS

The "Statement of the Facts" section of the Petition is incorrect and incomplete in many instances. The Petition also omits material uncontested facts that are relevant to the issues raised in the Petition. Petitioner began working at Kohler in 2004. **(R. pp. 38, 1227-28).** His last full shift was on July 20, 2009, though he worked for four hours on August 20, 2009. **(R. pp. 61, 67).** Petitioner testified he first noticed the symptoms which led to this claim in or around late 2007 or early 2008 and his symptoms "definitely worsened" in 2008. **(R. pp. 39, 61, 1231-32).**

While working for Kohler, Petitioner worked on several pieces of equipment, including the "kitchen sink," "cover 2," "cover 5," and "small machines." **(R. pp. 36, 61, 1228-29).** Initially, Petitioner worked on the cover 2, cover 5, and small machines, each of which required minimal use of some acetic acid. **(R. pp. 39, 1234-35, 1359).** The exposures were brief as acetic acid was used in very small quantities and for a very specific purpose. **(*Id.*).** Kohler employees testified the machines had various "run times" during which Petitioner would not have used or been

exposed to acetic acid, and any acetic acid sprayed on the machine was "baked off" during the process. **(R. pp. 48, 1367-68, 1393-95).** The run times on the machines were approximately thirty minutes; therefore, out of every hour, Petitioner used acetic acid for less than two or three minutes and in minimal amounts. ***(Id.).***

In at least the four months preceding Petitioner's departure from Kohler in 2009, Petitioner worked on the kitchen sink machine. **(R. pp. 6, 9, 38, 1228-29).** Petitioner admitted his job on the kitchen sink machine did not require the use of any acetic acid; however, he alleged that during his time on the machine, he would assist other employees on the cover 2 machine, and while doing so, he was occasionally exposed to acetic acid. ***(Id.).*** Yet, Petitioner admitted that when substituting on the cover 2 machine, the employee he assisted would be the person who regularly sprayed acetic acid during this four-month period. **(R. pp. 1228-29).**

As to the machines requiring acetic acid, Petitioner's testimony directly contradicted other Kohler employees' testimony describing acetic acid use on the machines. Contrary to the testimony of his supervisors, Petitioner testified he essentially saturated the machines with acetic acid between runs. **(R. pp. 39, 48, 50-51, 1097-101, 1234-35, 1367-69, 1393-94, 1400-01).** Kohler conducted an industrial hygiene assessment to recreate Petitioner's version of acetic acid use. **(R. pp. 696-701).** During the assessment, Kohler "soaked" the machines in acetic acid, though Petitioner was not trained to apply the acetic acid in this manner. **(R. pp. 49, 696-701, 1002-03, 1097-101, 1151-52, 1379-80, 1382-83).** Despite saturating the machine with acetic acid for the assessment, the assessment results showed the levels of acetic acid were between one-tenth and one-hundredth the levels allowed by the Occupational Safety and Health Administration (OSHA). **(R. pp. 66, 698, 701).**

Even though Petitioner alleged he knew at the time that the acetic acid was causing him health problems, Petitioner did not report any complaints about eye, nose, throat, or lung irritation. **(R. pp. 46, 1323-25).** Further, the record does not include medical records or other documents showing Petitioner ever complained of or suffered from any pulmonary issues during the time he worked on the machines which required minimal use of some acetic acid. **(R. pp. 41-43, 46, 61-63, 1255, 1257-85).** Petitioner asserted he asked Kohler for a respirator to wear while he used acetic acid but he was denied one. **(R. pp. 39, 1232-35).** By contrast, Kohler's employees testified Petitioner never requested a respirator, Kohler had a respirator program, and had Petitioner requested a respirator, he would have immediately been referred to the respirator program for fitting and given a respirator. **(R. pp. 47-8, 51, 977, 985, 1006, 1030-31, 1147-48,1401-06).**

Petitioner's medical records revealed a multiple-year history of problems *unrelated* to his lungs and do not mention acetic acid in any way. Kohler conducted two routine lung function tests on Petitioner prior to Petitioner's September 23, 2009 visit with Dr. Feldman when Dr. Feldman diagnosed Petitioner with asthma. **(R. pp. 56, 58, 889-91).** Kohler conducted the tests on May 9, 2006, and June 11, 2009. ***(Id.).*** By the time of Petitioner's first test, Petitioner had worked around acetic acid for approximately two years. Both tests produced completely normal results. **(R. pp. 889-91).**

On July 22, 2009, Petitioner saw Dr. Chris Nowatka, his family physician, and complained that he was unable to work because he was suffering from an irregular heartbeat. **(R. pp. 53, 571).** At this visit, Petitioner made no complaints related to shortness of breath or any other pulmonary issues. ***(Id.).*** Medical records from the visit show his lungs were clear. ***(Id.).*** The records do not mention burning eyes, nose, or throat, which other physicians testified would be expected in someone who had a multi-year history of exposure to a chemical that purportedly caused

occupational asthma. **(R. pp. 53-4, 559, 571).** Dr. Nowatka diagnosed him with bradycardia tachycardia, abnormal liver enzymes, and elevated blood sugars. **(R. pp. 54, 571).**

On July 27, 2009, Petitioner saw Dr. Yogi J. Hiremath for a cardiac evaluation. **(R. pp. 54, 580-81).** Medical records from the visit show his lungs were clear on exam. **(R. pp. 54, 581).** Dr. Hiremath placed Petitioner on a treadmill for seven minutes and Petitioner completed this task without any complaints related to asthma or his lungs.[6] ***(Id.).***

On July 29, 2009, Petitioner returned for a follow-up visit with Dr. Nowatka. **(R. pp. 54, 570).** Dr. Nowatka noted Petitioner had problems with his heart and had developed some right flank pain that came on mostly at night or when he worked. ***(Id.).*** A physical exam again revealed Petitioner's lungs were clear. ***(Id.).*** On August 11, 2009, Dr. Nowatka saw Petitioner again for upper right quadrant and right flank pain. **(R. pp. 54, 569).** A physical exam revealed that his lungs were clear. ***(Id.).***

On August 25, 2009, Petitioner returned to Dr. Nowatka again complaining of pain. **(R. pp. 54, 567).** Petitioner stated he was unable to work for more than four hours because of his right upper quadrant pain. ***(Id.).*** The record does not include evidence showing this quadrant pain was related to any pulmonary issues or acetic acid exposure. **(R. p. 54).** In fact, Dr. Nowatka noted the pain was *not* worsened by deep breathing. **(R. pp. 54, 567).** Petitioner's lungs were clear on examination. **(R. pp. 54-5, 567).** Petitioner specifically requested a pulmonary consult referral from Dr. Nowatka despite having no prior pulmonary complaints. **(R. pp. 55, 567).** In response to this request, Dr. Nowatka stated, "They are asking for [a] referral to the pulmonologist and I don't think that there is anything wrong with his lungs so we certainly could consider that but I

[6] Appellant's seven minutes exceeded the American Thoracic Society's recommended six-minute walk test when trying to produce symptoms of asthma. **(R. 555, 581).**

think [they are] unlikely to find anything wrong." ***(Id.)***. Dr. Nowatka felt Petitioner's symptoms were related to anxiety and stress rather than any pulmonary pathology. ***(Id.)***. Chest films, which included the lungs, were unremarkable. ***(Id.)***.

On August 31, 2009, Petitioner was still complaining of pain, but Dr. Nowatka noted that he was having episodes of tachycardia, lightheadedness, and dizziness, all of which were cardiac in nature. **(R. pp. 55, 566).** Dr. Nowatka thought his abdominal pain was brought on by anxiety. ***(Id.)***. Petitioner did not provide any pulmonary complaints during this visit. ***(Id.)***.

In September 2009, Petitioner reported to the South Carolina Department of Employment and Workforce that he was ready, willing, and able to work from September 2009 until September 2011, over two years after his termination from Kohler. **(R. pp. 44, 609-27, 1300).** He did not disclose any illnesses or disabilities with respect to his alleged occupational asthma. **(R. pp. 45, 634, 1302, 1304).** Further, he did not disclose that he was unable to work due to his alleged asthmatic condition. **(R. pp. 45, 634, 1302-03).** Because of these representations by Petitioner, he received unemployment benefits during this entire time. **(R. p. 1300).**

On September 23, 2009, twelve days after retaining legal counsel, Petitioner saw Dr. Feldman, the pulmonologist whose credibility is at issue in this case. **(R. pp. 55, 432-33, 717, 1455-57).** Dr. Feldman generated the following two documents from that visit: (1) an examination sheet which contained Petitioner's basic information and stated "occupational asthma?", **(R. p. 432)** and (2) a document stating Petitioner had asthma and it was possibly occupational. **(R. p. 433).** Though Dr. Feldman's note reflected a question about Petitioner's asthma being occupational, he testified there was no doubt that on this day—the first day of his visit—Petitioner had occupational asthma. **(R. pp. 720, 726, 760).** The record does not include evidence showing

Dr. Feldman conducted a physical exam or pulmonary function testing (PFT)[7] during this visit. **(R. pp. 432-33, 717-19).** In fact, Dr. Feldman could not produce an actual medical report from that date and had no basis for his failure to do so. **(R. pp. 55, 717-18, 759-60).**

Two days later, on September 25, 2009, Dr. Feldman performed a physical exam and lung function testing. **(R. pp. 55, 428-31, 719).** He performed three PFT trials on Petitioner and determined his lung capacity was at 80% and his FEV1 was at 68% of its predicted value.[8] **(R. pp. 55, 531).** The three PFT trials produced wildly different results. **(R. pp. 557, 562, 762).** Dr. Feldman's records did not mention any prior pulmonary function testing Petitioner had undergone at Kohler. **(R. p. 55, 729).** Further, Dr. Feldman's report stated, "*Caution: Only one acceptable maneuver was present*" and indicated that the report had to be interpreted "*with care.*"[9] (emphases added). **(R. pp. 55, 431, 762).** He did not conduct any post-bronchodilator testing—the administration of a bronchodilator to determine improvement in lung function following a bronchodilator. **(R. pp. 55, 567).** He noted Petitioner had wheezing and shortness of breath with walking. **(R. pp. 56, 430).** Dr. Feldman testified that the inaccurate and inconsistent PFTs were of no concern to him in diagnosing Petitioner because Petitioner's wheezing was so bad that Dr. Feldman could make his diagnosis on that basis alone. **(R. p. 56, 720, 724, 727, 732).** Dr. Feldman could not testify to Petitioner's work or medical history or explain why he accepted Petitioner's invalid PFTs. **(R. pp. 722, 729, 731, 743, 758).**

Unbeknownst to Dr. Feldman, also on September 25, 2009, Dr. Archie Chandler, a cardiologist, performed a physical exam on Petitioner. **(R. pp. 56, 515-17).** As part of the physical

[7] The terms "pulmonary function testing," "PFT," "lung function testing," and spirometry are used interchangeably throughout the record.
[8] FEV1 is the volume of air that can forcibly be blown out in one second, after full inspiration.
[9] The American Thoracic Society requires reproducible results or multiple tests resulting in similar outcomes. **(R. pp. 55, 58, 559-60).**

exam, Dr. Chandler performed auscultation of Petitioner's lungs and evaluated any respiratory distress Petitioner may have had. **(R. pp. 56-7, 516).** Dr. Chandler recorded Petitioner's lungs were clear and noted Petitioner was *not* in any respiratory distress. **(R. pp. 57, 516).** The record does not include evidence of any wheezing on this examination despite the fact that Dr. Feldman reported wheezing and respiratory distress so severe that he could render a diagnosis of asthma on this basis alone. **(R. pp. 57, 515).** Moreover, the record does not include evidence of Petitioner telling Dr. Chandler that he had an appointment with a pulmonologist, had already seen a pulmonologist, and had been diagnosed with asthma that very day. **(R. pp. 515-17).**

Kohler then scheduled Petitioner for an independent medical exam with Dr. Charles Fogarty, a pulmonary expert, on December 29, 2009. **(R. pp. 57, 552-65).** Dr. Fogarty noted Petitioner's allegations and reviewed Petitioner's complete past medical history, including the records of Dr. Feldman. **(R. pp. 57, 552-57).** Dr. Fogarty also physically examined Petitioner—an exam which was completely normal. **(R. pp. 57, 557-58).** Dr. Fogarty attempted to perform his own spirometry tests on Petitioner but noted Petitioner had difficulty taking a deep breath despite repeated coaxing. **(R. pp. 57, 557).** He noted Petitioner appeared to stop short and refused to fully inflate his lungs. **(*Id.*).** He observed this by watching Petitioner's purported attempts to breathe in air as Petitioner's chest was not expanding. **(R. pp. 57-8, 557).** Even on the one instance in which Petitioner did appear to give some effort, Dr. Fogarty noted Petitioner refused to give a forceful exhalation effort. **(R. pp. 58, 557).**

To get accurate results despite Petitioner's repeated poor effort, Dr. Fogarty administered albuterol to Petitioner for post-bronchodilator measurements. **(*Id.*).** Even after that medication, Petitioner exhibited an "inconsistent effort" in performing the tests. **(*Id.*).** Dr. Fogarty noted Petitioner's best effort was still significantly below the efforts given prior to the administration of

the albuterol—something wholly contrary to a diagnosis of asthma, as the administration of the albuterol should have improved his tests results. **(R. pp. 58, 557-58, 560).** Dr. Fogarty concluded Petitioner did not suffer from asthma as of December 2009. **(R. pp. 58, 560).** Moreover, he concluded that the diagnosis made by Dr. Feldman was flawed and did not meet the American Thoracic Society's criteria for diagnosing asthma. **(*Id.*).** Finally, Dr. Fogarty concluded Petitioner's history and alleged symptoms were inconsistent with that of occupational asthma. **(*Id.*).**

Thereafter, by Consent Order, the parties sought a third opinion. **(R. pp. 1-2, 60).** Dr. Steven Sahn, a pulmonary expert at the Medical University of South Carolina (MUSC), provided the third opinion after he evaluated Petitioner in October 2011. **(R. pp. 60, 501-06).** Aside from being obese, Dr. Sahn did not report any unusual findings on Petitioner's physical exam. **(R. pp. 60, 505).** Dr. Sahn attempted to obtain pulmonary function testing from Petitioner, but the results revealed Petitioner either exerted submaximal effort or suffered from respiratory muscle weakness—not asthma. **(R. pp. 60, 506).** Dr. Sahn noted Petitioner was unable to produce acceptable and reproducible spirometry. **(*Id.*).** Despite being administered albuterol, Petitioner was still only able to produce one test that met the accepted protocols after four attempts. **(*Id.*).** After additional testing, Dr. Sahn ultimately concluded, as did Dr. Fogarty, Petitioner did not suffer from *any* lung disease as of October 2011, and there was no evidence Petitioner suffered from any work-related respiratory illness. **(*Id.*).**

Subsequently, Commissioner Beck denied Petitioner's claim **(R. p. 69)** and the Full Commission unanimously found Commissioner Beck's Order was supported by the greater weight of the evidence, and therefore affirmed the Order in its entirety. **(R. p. 86).** The Court of Appeals affirmed the Full Commission's decision, holding the decision was supported by substantial

evidence in the record. This Petition followed.

ARGUMENT

I. Petitioner fails to offer a special or important reason for this Court to exercise its discretion and issue a Petition for Certiorari.

The Supreme Court, or any two of its justices, may in its discretion issue a writ of certiorari to review a final decision of the Court of Appeals. Rule 226(a), SCACR. A writ of certiorari is not a matter of right, "but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 226(b), SCACR. In exercising its discretion, this Court considers several factors, including the following:

> (1) Where there are novel questions of law;
> (2) Where there is a dissent in the decision of the Court of Appeals;
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
> (4) Where substantial constitutional issues are directly involved;
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Perhaps a different set of facts would lend itself to review by this Court; however, the Court of Appeals simply applied ordinary, well-established principles of workers' compensation law and appellate standard of review to the uncontroverted facts of this case and correctly affirmed the Full Commission's order.

Although this Court is not bound by any of the factors in Rule 226, *see* Rule 242(b), notably Petitioner does not even attempt to argue this case falls under one of the categories outlined in the rules. In fact, the Petition fails as it does not assert *any* error by the Court of Appeals in reaching its decision. Instead, Petitioner merely repeatedly argues this Court should reverse the Court of Appeals because "the arguments made by Kohler mislead (sic) the Court [of Appeals] by offering skewed facts, half-truths and unfounded assumptions" and simply lists what he contends to be

"[e]xamples of such arguments." **Pet. 14-23.** Yet, Petitioner had a full and fair opportunity to assert any arguments or statement of the facts to the Court of Appeals. *See* Rule 208(b), SCACR (outlining the contents of the brief of an appellant, stating that as part of the argument section of a brief "[a] party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions"). Moreover, the Court of Appeals had before it over 1000 pages of the record, including multiple briefs, depositions, medical records, and hearing transcripts.

Even if this Court were to exercise its discretion and grant Petitioner's Petition for Certiorari, the Court would find, as did the Court of Appeals, that the uncontested evidence establishes substantial evidence that supports finding the Full Commission did not err in affording no weight to Dr. Feldman's records, evaluations, and opinions. It would further find the Court of Appeals correctly determined the Full Commission did not err in finding Petitioner failed to establish a compensable occupational disease. Petitioner cites to no novel or special principle of law that the Court of Appeals overlooked which would alter the result in this case. All that was required was application of the well-established principles of workers' compensation law to the facts of this case, which the Court of Appeals correctly did.

Petitioner apparently is uninformed concerning workers' compensation law when making his contentions to this Court. It is well-established that the Full Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted. *Pack v. S.C. Dep't of Transp.*, 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009). Furthermore, the possibility of drawing inconsistent conclusions from the evidence does not prevent the Appellate Panel from being supported by substantial evidence. *Fishburne v.*

ATI Sys. Intl, 384 S.C. 76, 85-86, 681 S.E.2d 595, 600 (Ct. App. 2009).

II. Kohler did not argue Dr. Feldman was not credible because of his racial or cultural background and any arguments in this regard did not present an error by the Court of Appeals.

As fully discussed in Kohler's brief and Return to Petition for Rehearing before the Court of Appeals and contrary to Petitioner's blatantly false accusations, Kohler never argued before Commissioner Beck or the Full Commission that Dr. Feldman lacked credibility *because of* his Russian descent.

Initially, Petitioner's unnecessary explanations, arguments, and citations to untrustworthy sources such as Wikipedia regarding the racial relations between Russia and the Ukraine are not preserved as they were never presented to the Full Commission nor the Court of Appeals. **(Pet. 15-16).** *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010) (holding that in order for an issue to be properly preserved for review, it must have been both raised to and ruled upon by the trial court).

Furthermore, as Kohler noted to the Full Commission and Court of Appeals, the mere fact that a witness originates from a country other than the United States is clearly not a ground for impeachment because it in no way suggests untruthfulness. Here, the fact that Petitioner's expert, Dr. Feldman, is of Russian origin was raised to show potential bias under the South Carolina Rules of Evidence, as both Petitioner and Dr. Feldman originate from the former Soviet Union, relocated to South Carolina, and speak Russian. **(R. pp. 759, 765, 805).** *See* Rule 608(c), SCRE ("Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by

examination of the witness or by evidence otherwise adduced."). In the hearing before Commissioner Beck, Dr. Feldman's nationality, along with other potential bias, was raised during cross-examination of Petitioner after it was revealed that Petitioner received free medications from and treated with Dr. Feldman approximately fifty times over six years without ever paying for treatment. **(R. pp. 27, 862-63, 1356-57).** At no time did Appellant's counsel object to any inquiry which would be required to raise such issue now. At the Full Commission hearing on January 12, 2016, Kohler argued it is relevant in weighing credibility and bias that Petitioner's current counsel or law firm represented Dr. Feldman, and that after Commissioner Beck found Dr. Feldman's opinions and testimony were not credible, Petitioner somehow came to be represented by counsel who represented him before the Full Commission and Court of Appeals. **(R. p. 1442).** It is apparent based upon the record viewed as a whole, substantial evidence supports finding the Full Commission properly determined Dr. Feldman was not a credible witness.

III. The Court of Appeals correctly held the Full Commission did not err in finding Petitioner's asthma did not arise out of and in the court of his employment with Kohler.

Initially, Petitioner's argument that Kohler misunderstood medicine and asthma and his citations to various medical sources was never advanced by Petitioner to the Single Commissioner, Full Commission, or Court of Appeals and therefore, is not preserved. **(Pet. 16-17).** *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."). Petitioner is now improperly citing to alleged medical references which were never presented to the Full Commission nor the Court of Appeals. Kohler was never given the opportunity to address this alleged medical science or have it reviewed by a medical professional. Moreover, these statements are conclusory and whatever proposition Petitioner is attempting to

assert is not supported by law. *See State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

Furthermore, whether "Kohler's attorneys misunderstand medicine and asthma" makes no difference in whether the Court of Appeals erred in its decision. **Pet. 16-17.** The Court of Appeals had before it thousands of pages of medical records and deposition testimony from various doctors addressing Petitioner's alleged condition. A review of the evidence demonstrated substantial evidence supported the Full Commission's ruling that Petitioner did not have a compensable occupational disease.

IV. The Court of Appeals properly held substantial evidence supported finding the Full Commission did not err in affording no weight to Dr. Feldman's records, evaluations, and opinions.[10]

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 Petitioner's work at Kohler, medical history, and exposure history to form a credible opinion. Additionally, Dr. Feldman's

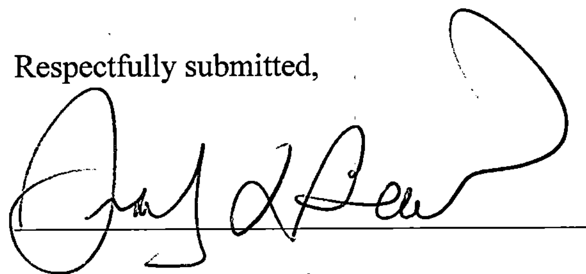
[10] It is unclear why Petitioner repeatedly refers to Kohler's "Initial" Brief where Kohler clearly filed a Final Brief with the Court of Appeals. **(Pet. 17-22).**

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. Instead of acknowledging this, Petitioner continues to focus on Kohler's presentation of the facts and legal issues, and counsel for Kohler's prior relationship with Commissioner Beck, which as fully addressed in this Return, Respondent's brief to the Court of Appeals, and Respondent's Return to the Petition for Rehearing, had no impact on the decision.

CONCLUSION

This Court should deny the petition for writ of certiorari. The Court of Appeals correctly decided this case. Because the Court of Appeals' decision was correct under established law, the Petition for Writ of Certiorari is manifestly without merit and should be denied.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2019-00647
Unpublished Opinion No. 2019-UP-023

Nikolay Gul, Employee, ... Appellant,

v.

Kohler Company, Self-Insured Employer, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Return to Petition for a Writ of Certiorari on Nikolay Gul by depositing a copy in the United States Mail, postage prepaid, on September 6, 2019, addressed to the claimant certified mail restricted delivery, 155 Suttles Road, Inman, SC 29349.

By: [signature]

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