

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213354

JULIA COOPER, EMPLOYEE	CLAIMANT
TEXTRON, EMPLOYER	RESPONDENT #1
LIBERTY MUTUAL GROUP, INSURANCE CARRIER	RESPONDENT #1
FIREMAN'S FUND INSURANCE CO., CARRIER	RESPONDENT #2

OPINION FILED NOVEMBER 6, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 11, 2003, at Little Rock, Pulaski county, Arkansas.

Claimant represented by the HONORABLE J. CHRIS BRADLEY, Attorney-at-Law, North Little Rock, Arkansas.

Respondents #1 represented by the HONORABLE BETTY J. DEMORY, Attorney-at-Law, Little Rock, Arkansas.

Respondents #2 represented by the HONORABLE RICHARD SMITH, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine claimant's entitlement to workers' compensation benefits.

On April 15, 2003, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order was filed. The Pre-hearing order reflects stipulations entered by the parties, the issues to be addressed during the hearing, and the parties' respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Julia Cooper, the claimant, Peggy Sue Burell, Janice Bowland, Sandy Turner, Paul McGuire, and Mile Montgomery, coupled with the deposition testimony of Dr. Deanna N. Ruddell and Dr. Kevin Roberts, along with medical reports and other documents comprise the record in this claim.

DISCUSSION

Julia Faye Cooper, the claimant, with a date of birth of September 20, 1949, grew up in Houston, Texas. After quitting school claimant worked for several employers to include, K-Mart, Montgomery Ward, and Teletec. In 1991, claimant moved to Little Rock, Arkansas.

After moving to Little Rock, Ar., claimant secured employment with K Enterprises, collecting on bad debts on medical accounts. The afore was telephone type work. Claimant was later employed by LSI Financial Group/Nouvel for five years. Later claimant secured employment with Sun Trust as an account executive.

Claimant described her work with Sun Trust as a telephone type job/telemarketing. In this regard, claimant's testimony reflects:

We marketed what they call the purchase line, which is an unsecured credit line up to \$50,000. And, we sold that to customers, businesses. Also equipment financing. (T. 78)

At the time claimant commenced her employment with Sun Trust, the business was physically located in the Stephens Building, in Little Rock. In January 2000, Sun Trust relocated to the second floor of the old Arkansas Gazette building, now owned by the Arkansas Democrat Gazette.

The testimony in the record reflects that at the time Sun Trust relocated to the old Arkansas Gazette building renovation and construction was ongoing in the entire building, to

include work on the second floor. Claimant's work station on the second floor was on the east side of the building. On June 1, 2001, Sun Trust was acquired by Textron. The employment of the employees of Sun Trust was terminated following the acquisition. The former employees of Sun Trust submitted employment application to Textron and were hired to fill their former positions. Claimant was such an employee.

Claimant performed the same type job with Textron as she had with Sun Trust. Claimant note that her earnings were excellent with Textron and that while so employed she received performance recognitions. Because her job with respondent-employer involved telemarketing type work, she is now unable to do it:

Well, because my voice kind of comes and goes. I have this cough and sometimes I'll keep it for a month and I'm taking antibiotics right now and it will go away and then it will come back. (T. 79-80).

Claimant added that her present antibiotics are for wheezing and for chest pains.

Claimant's testimony reflects that in 1991, she underwent a gastric bypass or segmentation. Claimant added in the last five (5) years she developed some problems with iron mal-absorption. In 2000, claimant became anemic and underwent treatment under the care of Dr. Baltz for three to four months during which time she went twice weekly for IV treatments with multi-vitamins and iron. The treatment ended in March/April 2001. Claimant also under a hysterectomy in November 2000. Claimant returned to work in either February or March 2001.

Claimant denied that she had ever been diagnosed with pneumonia, asthma, chronic bronchitis, or any kind of pulmonary disease before going to work at the old Arkansas Gazette building. Claimant acknowledged that for eight to nine years prior to her November 2000

hysterectomy she was a cigarette smoker. However, claimant maintains that during her smoking history she ever had to see a doctor for chronic bronchitis or that she had a smoker's cough. Claimant denies experiencing any severe coughing episodes, other than a cold, prior to going to work at the Arkansas Gazette building. Finally, claimant denies that she was a regular at her family doctor for sinus conditions or that she had to take Allegra, Advair or Combivent before she went to work at the Arkansas Gazette building.

Ms. Peggy Sue Burell, who held the position of collection supervisor in her employment with respondent-employer from June 1, 2001, through January 6, 2003, commenced her employment with the predecessor in interest of respondent-employer, Stephens Diversified Leasing, on February 9, 1989. Ms. Burell explained that Stephens Diversified Leasing was subsequently sold to Sun Trust Credit, a portion of Sun Trust Banks, and that the same was later sold to Respondent-employer, Textron.

Ms. Burell's work area was on the west side of the building on the second floor once Sun Trust relocated from the Stephens Building to the old Arkansas Gazette building in January 2000. Ms. Burell noted that while her normal hours were 8:00 a.m. to 5:00 p.m., Monday through Friday, as a supervisor the hours varied anywhere from 7:00 a.m. to 7:00 or 8:00 p.m. and on weekends.

Ms. Burell's testimony reflects, with respect to the condition of the building at the time of the January 2000 relocation:

On the west side of the building when we moved in there it was really cramped but it was dusty and, you know, we had just moved in. They had been doing a lot of renovations prior to our moving in. (T. 16)

Ms. Burell added that there were times that there was no heat on the second floor or the heat was not sufficient for the space, which lasted periodically until spring. Ms. Burell observed that there was ongoing little fixes throughout the year of 2000, with respect to work and renovation.

The testimony in the record reflects that in late summer/early fall 2001 major construction activity took place on the second floor of the building. Respondent-employer Textron acquired the business of Sun Trust on or about June 1, 2001. Major renovation/construction took place in the building, to include the second floor, beginning August 2001.

The testimony of the witnesses is consistent regarding the condition of the work environment during the major renovation/construction which took place between August 2001 and November/December 2001:

I remember that we came into work and there was ceiling tiles that had been removed. Air ducts were flowing pretty freely with, you know, the air conditioning and there were things – you know, it was dusty and dirty and the renovation of whatever they were doing in the ceiling with those air vents.(T. 19).

There was a – I don't even know if I'd call it dust because it's not normal household dust. It was like dust that you would see from drywall or whatever, it was real gritty, white-ish gray and it covered everything.(T. 22)

Ms. Burell testified that periodically a odor that smelled like raw sewage would be noticed the entire time that she worked in space on the second floor of the old Arkansas Gazette building:

You would smell the odor when you walked in on the first floor and it was very, very strong in the elevators going up and it would emanate through the second floor. And, I was never on the third floor to know that, you know, after the initial moving in. (T. 26).

Ms. Burell testified that once she moved into the old Arkansas Gazette building she begin

to have respiratory problems. Specifically, Ms. Burell testified that when she was three years old she had pneumonia, however she never had another bout with it until August 2001. Ms. Burell added that while she continued to work in the building after August 2001, she was plagued with periodic respiratory infections. Ms. Burell's employment with respondent-employer Textron ceased on January 6, 2003, due to a reduction in force.

Mr. Paul McGuire, an account executive, who commenced his employment with respondent-employer Textron on September 10, 2001, testified regarding the work environment on the second floor of the old Arkansas Gazette building during renovation/construction. Mr. McGuire provided testimony regarding the dust found on uncovered surfaces each morning, and confirmed the accuracy of the photographs taken by the claimant in May 2002, as the same depicted the work environment. (Claimant Exhibit #3-Claimant Exhibit #6).

Mr. McGuire performed similar job duties as the claimant during his employment with respondent-employer Textron. Additionally, Mr. McGuire worked in close proximity to the claimant, separated by two cubes. Mr. McGuire provided testimony about when he began to hear the claimant coughing and the corresponding impact on her work attendance:

As far as remembering exactly when it started, no, I can't tell you when exactly it started but I know that there was like a string of several people coughing and it going on around there but I did notice that, I'm thinking it may have been about November of 2001 when I first started - - that is when Judy kind of started missing, started missing some work. She went from being there all the time to not knowing if she was going to be there or not.(T. 42)

Mr. McGuire's testimony reflects that after December 2001, there continued to be dust and grit in the air in the workplace. Mr. McGuire added that during the time of his employment

for respondent-employer Textron he developed an acute bronchitis condition for which he sought medical treatment. Mr. McGuire noted that during his employment with respondent-employer Textron he used an inhaler, and that his cough did not get any better until he the employment. Finally, Mr. McGuire testified that there were several other employees using inhalers while he was employed by respondent-employer Textron.

Ms. Janice Bowland testified that she was employed by Sun Trust in June 1996, as a telemarketer and later went over to booking and bills. Ms. Bowland was a part of the move by Sun Trust from the Stephens Building to the old Arkansas Gazette building in January 2000. Also, after Sun Trust was acquired by Textron in June 2001, Ms. Bowland became an employee of same. In June 2001, Ms. Bowland's job with respondent-employer Textron was that of commercial leasing. Ms. Bowland explained, "we get leads from the telemarketers for any kind of equipment leasing for businesses". (T. 53).

Ms. Bowland worked on the second floor of respondent-employer Textron, across from the claimant's cubicle. Ms. Bowland left the employment of Textron in May 2002. With respect to the condition of the old Arkansas Gazette building at the time Sun Trust relocated there from the Stephens Building in January 2000, Ms. Bowland's testimony reflects:

Honestly I don't remember. I know at some point there was a lot of construction. The tiles were down. At some point there was a big air, whatever, the hose or whatever that blew down on us. We held up umbrellas and put blankets around us, had to hold our papers down with different things to keep them from blowing away.(T. 54)

Ms. Bowland also confirmed the accuracy of the photos of the claimant as being representative of the work environment during renovation/construction. (Claimant Exhibit #3-Claimant Exhibit

#6).

Ms. Bowland testified that during her employment with respondent-employer Textron she experienced problems with her tonsils and headaches:

I had problems with my tonsils. They were wanting to take them out but since I have left there I have no problems with them at all. (T. 56).

Ms. Bowland's testimony reflects that her headaches begin when the relocation was had to the old Arkansas Gazette building. Ms. Bowland also testified regarding the odor of sewage in the building, primarily in the elevators.

Ms. Sandy Turner testified that she had been employed by Sun Trust for approximately two (2) years before the business was acquired by Textron. Ms. Turner begin her employment history as an account executive with Sun Trust while the business was located in the Stephens Building. Ms. Turner's testimony reflects regarding the condition of the old Arkansas Gazette building at the time of the relocation:

They were in the process of renovating the building even as we moved in. We were on the second floor and at that time it was where we could move into the second floor. The first floor had not, you know, it was - - stuff was everywhere. It had not been renovated to the degree of the second floor and it's still not. But, we stepped over things to get in there and everything but the second floor, it was conducive where we could work.(T. 63).

Ms. Turner noted that the following year, 2001, major construction/renovation took place. Ms. Turner remains in the employment of respondent-employer Textron. She noted that major construction ongoing in the work area:

Now, when you say floating down, I can't say that I've actually stood there - - sat there and saw things just, not just

coming down on the desk but we've seen dust or grainy material that looks like that stuff that you just showed me on the picture on the desk, yeah. But, I'm not talking about stuff raining down from the ceiling, no, no.(T. 67)

Ms. Turner testified regarding physical problems that she attributed to the work environment:

I started having problems with my - - well, in the very beginning I started having headaches after we had been in the building for several months, just headaches, okay? And, I don't normally have headaches. And, so the first thing I noticed was I was having headaches and I didn't relate it to anything, okay, other than just a headache. But, as it stayed and persisted over months and months then, you know, after a while, you know, everybody was taking sinus medication, you know, sinus pressure. So, I started taking that and it did help some. But, after it with me, I finally, you know, decided, okay, this is not normal. I don't normally have headaches, you know, like some people take something all the time. I don't. So, I end up going to the doctor and taking, you know, something just for pain.(T. 67-68).

Regarding the progression of her complaints in her work environment, Ms. Turner testified:

I still had the problem on and off periodically. The last time was - - the last bad time I had, I would lose my voice because my larynx would just swell up and I couldn't talk. And so, I couldn't talk.....(T. 69).

Claimant's testimony reflects that her family doctor was Dr. Kevin Roberts. Claimant acknowledged that in May 2001, she was seen by Dr. Roberts for a sinus problem. While uncertain if she was placed on medication during the May 2001, visit to Dr. Roberts, claimant testified that she was sure that she was put on antibiotics at the time. Claimant maintains that her condition worsened after the May 2001 visit. Claimant noted that in August 2001, she was extremely sick, having developed walking pneumonia. Claimant obtained medical treatment at

the emergency room. Claimant's testimony reflects:

I had developed walking pneumonia. I went to the emergency room. They didn't tell me that I had the pneumonia but the next day I had a followup with my family doctor and he diagnosed it the next day. I was really, really sick. I couldn't breathe.(T. 89-90).

Claimant's testimony reflects, with respect to her work environment during the August 2001, time period:

Well, there was a lot of stuff that was on the desk which, I don't know, a substance to me, I don't know what it was. It was just grainy and I know in the evening I'd go home home and I would take my clothes off at the front door because my body, my hair was just full of it. I don't know what it was but I know it was all over - - it felt like I had been at Galveston Beach, like a sandy type grit.(T. 90).

Claimant noted that there was a time in 2001, when she got to feeling better, but later got to feeling worse:

. . . . It would just kind of come and go. I might go two months and feel real energetic and real good where I didn't have the cough and then I would pick the cough up, two months later the cough would come back and the wheezing. I'm not sure exactly when I developed that. I was thinking that was more of 02, 2002, the wheezing started coming on with the cough.(T. 90-91).

While acknowledging that there was a time when some of the construction came to an end, claimant noted that the tiles were out of the ceiling on several occasions:

I know it was the fall of 2001 and I'm thinking it was maybe a little bit later in 2002, March or April of 2002, some of the tiles, yeah, they came out again.(T. 91).

Claimant testified that her condition started getting worse in February/March 2002:

I got to where I was having some bad choking spasms and my chest was hurting quite a bit most of the time. I carried

this dry cough and I cannot get rid of it yet.(T. 91).

Claimant acknowledged that she had a choking problem in July 2000, in her sleep, however maintains that problem experienced later was different:

That was a lot different. I woke up one night and I was hitting on my husband because I couldn't get my breath and he went ahead and got up and he kind of bent me over and then he got me water and I did okay.(T. 91-92).

Claimant noted that while she did see Dr. Roberts following the July 2000, incident, she was not referred to a pulmonologist or asthma doctor at that time. Claimant was provided medication by Dr. Roberts for acid reflux. Claimant maintains that thereafter she did not have any other choking episode for over a year and a half until she started getting the regular choking kind of spasms.

In the meanwhile claimant asserts she started having respiratory problems which manifested itself in shortness of breath and breathing problems. Claimant asserts in 2002, her condition so bad that she had to depend on her husband to do a lot of things she normally did. In describing the effect physically, claimant testified:

. . . I put weight on. I gained weight. I had started taking steroid shots because I got pretty weak and I was taking B12 shots, vitamin B12 shots.

I could walk a little bit but I'd get real tired and sometimes I'd have to stop and, you know, just kind of catch my breath a little bit and I would walk a little bit further and I experienced that quite a bit.(T. 93).

Claimant noted that she found it more and more difficult to perform her job, which entailed talking on the telephone:

I would hang in there and talk on the phone as much as I

could and if I felt like - - there was a few times when I had to just excuse myself with a customer. I would start coughing and I would start losing my breath and I'd just say, I'll call you back and I would do that a couple of times a week.(T. 93)

Claimant's testimony reflects that her job with respondent-employer Textron was the best paying job she had ever had. In November 2002, claimant stopped going to work because of her inability to function. Claimant begin treating with Dr. Giglia at the time. While claimant has looked for work since November 2002, she has been unable to find same:

I haven't found a full-time position yet. I've applied at a couple of places and I've applied for sit-down type jobs. There was one that I did apply for as being a cashier but I have - - I could sit quite a bit on that job as cashier and it's for a check advance company where they give loans and I have loan experience and the lady told me, you know, I could contact her at a later date so, I haven't really followed up on that yet.(T. 94).

Claimant did file for unemployment benefits in May 2003, and received \$345.00. per week.

With respect to her current activities, claimant testimony reflects:

I mean, most of the time I have good days where I can get up and make my bed and if I need to go shopping I can go to the store and get my groceries. There are some days that I can't do a whole lot and I can't do the vacuuming like I used to be able to do. And, the major cleaning I depend on my husband to do that.(T. 95).

Claimant acknowledge that she was having shortness of breath and headaches in April 2000, prior to becoming an employee of respondent-employer Textron on June 1, 2001. Further, the testimony of the claimant reflects that on July 20, 2001, she was married in the building. (T. 97-98). Claimant concedes that while she may have smoked more than two packs of cigarettes per week, she denies that she ever smoked two (2) packs per day.

Claimant does not disputed the accuracy of a November 12, 1996, office note of Dr. Kevin Roberts, relative her visit of said date in which she complained of congestion and a sore throat. The office note reflects an entry of smoking seven (7) packs of cigarettes per week. (RX. 1, p. 1). Claimant noted that while she smoked cigarettes from the age of 34 to age of 51, the habit was not consistent, in that she quit smoking several times within that period.(T. 119).

Claimant begin taking Zoloft for anxiety in 1996/97 due to panic attacks. In describing her panic attacks, claimant testified:

Well, I'm told you have chest palpitations. In my case I really didn't have the chest pain as much as I did the sweats. I would start sweating and it's like you'd be standing in Kroger and you would see people in front of you. I remember one day - - one day really stands out because I remember I was at the check out and the girl was waiting on the person in front of me and I was watching them and they were talking but I couldn't hear them and I thought, my God, what's going on, and I looked and my hands were real sweaty and I just left my basket and ran outside and I was fine. And, I'm thinking it was the month of January but I don't know what year. That was one panic attack I remember and I had been treated with the Zoloft. (T. 103-104)

Claimant acknowledge going to see Dr. Roberts on July 31, 2000, with complaints of shortness of breath. Claimant was seen in the emergency room for complaint of dizziness and near blackout spell on November 1, 2000.

Claimant's testimony reflects that she missed some time from work after her August 14, 2001, emergency room visit to St. Vincent Doctor's Hospital, for her shortness of breath complaint, which was later diagnosed as walking pneumonia by Dr. Roberts. Claimant is not aware of the diagnosis rendered by the emergency room physician relative to the August 14, 2001, visit.

With respect to her present physical restriction of her employment activity which claimant attributed to residuals of injurious exposure in the employment of respondent-employer Textron, claimant's testimony reflects:

I know I can't be on the phone a lot. Other than that probably I could, I mean, it depends on what, like sometimes I feel really good, like a million dollars and then there are some days I don't feel real good so it really depends. I'm trying to find something that's got a little flexibility, like a job that has a little flexibility and not to where I would have to be on the phone consistently for seven or eight hours a day.

* * *

Well, maybe I did say that. I'm not sure but I just know like this week I know that I couldn't clean my bathroom, my husband had to clean it. Probably a month or two ago I was cleaning it. There are some things that I can't do and there are sometimes I can do those things and I don't really try to do them and then there's other times I get into an asthma attack and I can't do a lot. (T. 114-115).

Claimant acknowledge taking an allergy test pursuant to the direction of Dr. Deanna Ruddell, and being informed of her allergy to cat and dog dander as well as pollen and mold. Further, claimant testified that she was seen by Dr. Giglia and underwent a bronchoscopy. Claimant added that while she was experiencing respiratory problems, Dr. Giglia was unable to determine what was causing it. (T. 125-126).

Mr. Mike Montgomery, vice-president of operations for Textron Financial since June 1, 2001, testified that he was employed by Sun Trust in 1997, and continued to work for sam until it was purchased by respondent-employer. Regarding the transfer or purchase of Sun Trust by Textron Financial, Mr. Montgomery testified:

It was an asset sale so Textron pretty much had their pick and choosing of what assets they wanted to purchase from Sun Trust. They purchased pretty much all of the physical tangible assets,

computer systems, what have you and then from the employee standpoint, they went through the employee files to look and see which employees they would be interested in hiring. There were some duplicate positions so not everyone was given an opportunity to apply. But, at that point in time Sun Trust physically terminated everyone from their employee system and all those employees had to fill out a new application with Textron and go through the hiring process. (T. 139-140).

Mr. Montgomery's testimony reflects that when Sun Trust signed the lease with the Arkansas Democrat Gazette, the building was renovated for occupancy. The afore process started in May 1999, and was completed in December 1999. Mr. Montgomery noted that while the building is owned by the Arkansas Democrat Gazette it is managed by Moses Tucker Real Estate. Sun Trust and Textron have both occupied the second floor of the building.

Mr. Montgomery testified regarding the second floor:

Well, the second floor consist of approximately 22,000 square feet and if you can vision the shape - - it's a 'U' shape, it's an entirely open air environment from one side of the building to the next. On the east side of the building is where our sole department is located, where all the account executives work. We have approximately 42 account executives that occupy that side of the building. Then on the west side of the building - - on the south side of the building you have customer service, which is right in the middle of the sales group and on the west side we have our collections department, accounting, administrative offices and also the MIS Information Technology area. (T. 141).

Mr. Montgomery noted that while there were some offices along the south and west walls on the second floor, of the 96 employees all but about six were in the open environment. Mr. Montgomery testified that at the time Sun Trust moved into the building during the second week of January 2000, the second floor was totally ready occupancy.

Regarding the construction going on in the building relative to the other floors in January

2002, Mr. Montgomery testified:

Yes. There was construction, more like demolition on the first floor in some of the unoccupied areas. The Democrat Gazette wanted to open the area up to attract other retailers to come in and lease other office spaces, as well as the third floor. At the point in time that we moved in, there was some of that demolition still going on on the third floor space above us as well as some of the unoccupied areas on the first.(T. 143).

Mr. Montgomery denies that any dust, pollen or debris fell from the third floor onto the second floor during the ongoing construction in 2000.

Mr. Montgomery testified that the next major renovation took place on the second floor of the building beginning August 21, 2001, and that the same was the HVAC air renovation. Mr. Montgomery acknowledged that during the early part of 2000, there were time when parts of the second floor were colder or warmer than other while the building maintenance people were calibrating the system trying to get the air system balanced out.

Mr. Montgomery asserts that the August 21, 2001, major renovation was completed on November 9, 2001. Mr. Montgomery testified regarding what was entailed in the HVAC renovation:

. . . What this renovation was for was to replace both the air units with larger area units to move a higher volume amount of air for the second floor and the duct work that was on the second floor was some of the existing duct work whenever we moved in but it wasn't large enough to carry some of the volume of air that the Democrat Gazette felt that needed to be moved in in that area. So, what they did was come in, whenever the project began, they would come in in the evenings, approximately 9:00 at night and start and go into the area such as this, remove the ceiling grid and then go in and move the existing duct work, replace the duct work and then replace the ceiling grid and move on to the next area. The first area they started with was our accounting area on the northwest side of the building and then methodically moved around to finally

finishing up on the east side of the building.(T. 145).

Mr. Montgomery testified that the construction workers would normally come in at 9:00 in the evening and complete whatever demolition and rebuild the air duct by 3:00 a.m. Thereafter, Mr. Montgomery maintains they would cleanup, dust, vacuum and empty the trash cans, as best construction people could. East Harding Construction was the company used on the renovation job. Mr. Montgomery denies that additional construction was going on after November 9, 2001, where ceiling tiles were being removed or that anything was falling from the ceiling:

Once that renovation was complete and everything was put back up, the floor remained relatively static other than general maintenance where Moses Tucker Real Estate would come in and change light bulbs, what have you. Everything remained relatively static until the first part of this year whenever they did some more renovations on our floor. (T. 146).

Mr. Montgomery noted that all of the new renovation begin on January 2, 2003, and was completed by March 7, 2003, a point in time after claimant had ceased working for respondent-employer Textron. Mr. Montgomery testified the he first learned that the claimant was asserting that she had problems associated with the work environment in the fall of 2002, shortly before she ceased working for respondent-employer.

During the first renovation, August through Nov. 2001, Mr. Montgomery acknowledged that there were complaints from employees regarding the work environment:

During the first renovation back in 2001 and on an occasion we'd come in to work and the construction company would be a little bit lax and maybe dusting on some of the desks and what have you and in that case we would notify Moses Tucker Real Estate and they would send someone over to come up and maybe do a little bit more dusting, empty trash, such as that. And, there were a few occasions of that that had occurred. (T. 147).

Mr. Montgomery testified that as of May 2002, the ceiling tiles were in place on the second floor at Textron. Mr. Montgomery noted that part of his job was working with information technology and that the same took him all areas of the floor at various points in time of the day. Mr. Montgomery denies that he ever saw anything floating in the air during the construction period although the ceiling would be exposed.

Mr. Montgomery testified that he reviewed the OSHA report based on a November 2001 evaluation. Mr. Montgomery noted that respondent-employer was not issued a citation or fine as a result of the evaluation. Regarding the SOMA group report, Mr. Montgomery testified:

The SOMA group was actually an independent study that we as part of Textron requested whenever we became aware in the fall of some of Ms. Cooper's concerns at that point in time and having known what we had gone through with the first OSHA research, even though there were no findings, Textron engaged SOMA Medical Group to come in and do an independent study, do air monitoring and quality study of the area just to rule out and make sure that everything was okay.(T. 150-151).

Regarding the duct work reflected in the photographs in the record, Claimant exhibits #3-#6, Mr. Montgomery testified:

This type of work was done on the entire floor, including all the individual offices, other than the training room there was no space on the floor that did not go through the same renovation. (T. 152).

Mr. Montgomery concedes that there one occasion when there was one air duct that was hitting a few employees and the construction folk were directed to come over and relocate it. However, Mr. Montgomery had no recollection of seeing employees wearing coats and using umbrellas to keep the air from duct from hitting them.

Mr. Montgomery testified that he was unaware of any e-mail being sent by management

to employees regarding covering telephones and computer keyboards during the major renovation period, August through November 2001. After being furnished a copy of the e-mail, Mr. Montgomery responded:

I don't remember, have no knowledge of how it was the day that the e-mail was written, no, sir.(T. 155).

Mr. Montgomery testified that he had no memory of a memo sent by Chris Morris to Sherman Mason concerning the dust cough. Mr. Montgomery acknowledged that as operation manger the contents of the memo or concerns would be something he would want to be aware.

The record includes several e-mails from employees of respondent-employer Textron regarding construction going on in the building and the effect of same on the equipment. A October 4, 2001, e-mail from Mr. Sherman Mason to SBD-Sales Team, with copies to other supervisory personnel, to include Mr. Mike Montgomery, reflects, in pertinent part:

Due to construction in our area, we've had a few phones to stop working properly. Everyone should either unplug their phone and headset each evening and put them in a drawer or cover them when you leave for the day. If at all possible, cover your keyboards as well.(CX. 2, p. 1)

In a October 17, 2001, e-mail to Mr. Sherman Mason, Mr. Christopher Morris, an account executive with respondent-employer Textron, relayed his concerns regarding his own health, his observation regarding the health of co-workers, and the possible harmful impact of the work environment:

I think of myself as a team player and as such I would like to take this opportunity to express a concern which has been plaguing me for some time now. I have a very oppressive cough that I cannot seem to shake. It interrupts my conversations, and my phone calls. As an AE with Textron Financial, it is very important that I have a clear and resonant speaking voice. Many times, I am forced to log

off Mosaix in order to clear my throat and allow my head to stop pounding from coughing too hard. I have had this cough every since I came to work for Textron Financial in August.

I have recently noticed that I am not the only one who is sick. Judy Cooper, who sits across from me, is complaining of having a hard time breathing. She will be leaving early today so that she can try and get well. Only 2 months ago, she was diagnosed with pneumonia. She missed a lot of work because of it. Kyle Nicholas, who is never sick, left early yesterday and is out all day today due to illness. These are not the only ones who are having symptoms. If it was only me, I would simply be concerned for my own health. However, having noted that so many of my co-workers are also experiencing these difficulties, I am forced to discount that it is simply that time of the year, and instead attribute it to something that we are all breathing.

I understand that this building is under construction and that can cause disturbances in the air, but I am afraid that this is something else. I have experienced a “dust” cough before. This is nothing like it. This cough follows me home and fades almost to nothingness until I return to work. There have been mornings when I felt fine until I arrived here. Upon entering the building, my cough returns within a few hours. By the end of the day, I am coughing so hard that my head hurts, I get dizzy, and I can barely talk on the phone. These symptoms become progressively worse as the week goes on until the weekend, when they fade, only to return on Monday morning. Yesterday, I felt weak and the cough was accompanied by uncontrollable sneezing. These are not symptoms of a “dust” cough. This is something much worse.

My concern is not only for myself, but it lies with everyone who works in this building. I would hate for this to go unnoticed simply because nobody said anything. I would like to request that the air in this building be tested. I believe that this is a reasonable request because there are over 100 people who work here. The safety and health of the people in this company are paramount and should be a top priority. . . .(CX2, p. 2).

A October 30, 2001, e-mail from Ms. Lora Brown to the SBD Sales Team, with a copy to Mr. Sherman Mason, noted:

Our air quality was tested and it is safe...dusty...but safe. HEPA type air filters (hospital operating room grade) were put in place to help with the dust. Our building is within all current building

codes. The old duct work is no longer emitting any air at all. Everyone is on the new heat/air system.

I have been told that the entire project should be complete by the end of next week.(CX2, p. 3)

Claimant last discharged employment duties for respondent-employer Textron on or about November 11, 2002. The credible testimony in the record reflects that while there were definite periods of major construction/renovation, there ongoing minor construction/renovation in the building and on the second floor. A December 17, 2002, e-mail from Mr. Mike Montgomery to SBD-LR Office reflects, in pertinent part:

You may have noticed some additional construction activities going on in the building recently. The building owner, Arkansas Democrat-Gazette, has contracted with East-Harding to do some building renovations over the next several months. The majority of all construction will take place un unoccupied areas downstairs on the first floor, in the basement, and on the exterior of the building.

The only planned renovations to our floor will be limited to our training room, break room, and the restrooms. During the time that any work will done on our floor, East-Harding will temporarily restrict access to those areas for safety reasons. We have also requested that any work requiring drilling or other potential causes of loud noise to be done at night after 9 PM.

At this time, East-Harding is scheduled to be on our floor working in the restrooms to install floor drains the nights of January 2nd and 3rd. Again, this work will be done after hours and the specific areas will be restricted until they are finished. As they progress forward with their work here in the building, I will continue to keep everyone informed with what to expect.(CX2, p. 4).

Claimant's family doctor is Dr. Kevin D. Roberts. The record contains detailed medical reports relative to claimant's extensive medical history. Further the parties have obtained the deposition testimony of Dr. Roberts and Dr. Deanna N. Ruddell.

Dr. Kevin D. Roberts is a family practice physician who has provided medical treatment to the claimant since 1996. In describing the specialty of family practice, Dr. Robert testified:

So I do family practice medicine. The way I look at that is anything that walks through the door, we either take care of it, or triage it, or send them to a specialist, or you know, so. (RX3, p. 7).

Dr. Roberts noted the extent of his contact with the claimant over the years for various medical complaints.

A review of the medical records of Dr. Roberts reflects that the claimant was seen by him on August 15, 2001, following her August 14, 2001, visit to the emergency room of St. Vincent Doctor's Hospital. The August 15, 2001, office note of Dr. Roberts reflects that claimant was seen in the emergency room for complaints of shortness of breath, cough, congestion, and pleuritic type chest pain. The assessment of the claimant's complaint by Dr. Roberts during the August 15, 2001, visit was, "bronchitis versus URI versus pneumonia".

While the claimant was provided medication by Dr. Roberts during the August 15, 2001, visit and directed to return if her condition did not improve in the next couple of days, there is no evidence in the record to reflect that claimant was again seen by Dr. Roberts prior to October 17, 2001. During an October 17, 2001, visit, to Dr. Roberts claimant presented with atypical chest pain, shortness of breath, and cough. Claimant also relayed the ventilation was being replaced where she worked, and that there was usually dust and particles on her desk every morning. Claimant questioned whether she was getting exposed to some allergens in her building. (CX. 1, p. 15). Claimant relayed similar complaints during a November 2, 2001, visit to Dr. Roberts. During subsequent visits to Dr. Roberts claimant consistently relayed respiratory complaints

which she related to exposure to work environment. As a consequence of the afore, during a November 6, 2002, claimant was referred to a pulmonologist by Dr. Roberts.(CX. 1, p.22).

On November 20, 2002, claimant was evaluated by Dr. Anthony R. Giglia, pulmonologist, pursuant to the referral of Dr. Roberts. The reason for the referral of the claimant by Dr. Roberts to Dr. Giglia, as reflected in the November 20, 2002, report was shortness of breath, recurrent bronchitis, undiagnosed. The November 20, 2002, report reflects, in pertinent part:

.The patient is a 53-year-old white female who states she began to be shortness of breath and have problems about one and a half years ago. She relates this to a building she is working in, and at the time began to be sick when they started to remodel some of the ducting in the building, in which they took down ceiling tiles, and it was dusty. The were down for about three months over the area where she worked. She states several people have been sick in that area. . . . She states she has worked there three years, but this began one and a half years ago. She states she has had fever on and off during that time. She has had several bouts of bronchitis. She had pneumonia in August of 2001, and again in February of 2002. She had not been sick prior to that, and had no known prior pulmonary problems. No history of asthma. No known tuberculosis exposure. She had a remote negative PPD skin test. No environmental pathogen exposure that I can elicit. She states she has a cough, which is mostly dry and nonproductive. It occurs mainly at work. She states when she is home on the weekends she coughs very little. She has been off work several times, and when she is off work for a week at a time, she hardly coughs. This is somewhat suspicious. Several people at work have been ill, but not all have to do with pulmonary problems. Some have to do with sinuses and throat. . . . She has had intermittent wheezing. . . . She has been on multiple medications for this, mainly bronchodilators, inhaled steroids, and antibiotic to try to correct this. She was a smoker from age 34 to age 51, only at two packs per week, never a heavy smoker. She has no significant gastroesophageal reflux, though she has been evaluated and treated for such, thinking this may be the cause of her substernal chest discomfort and tightness. Proton pump inhibitors have been of no help, and she has had endoscopy by Dr. Greenway, and was cleared of esophageal reflux suspicion. . .(CX.1,p.24)

The November 20, 2002, report of Dr. Giglia reflects that a physical examination of the claimant was had during the evaluation. Dr. Giglia also directed additional diagnostic studies to include PPD skin test, fungal serologies, and CT scan of the thorax. The November 20, 2002, report of Dr. Giglia noted that claimant requested and was cleared to return to work with directions to return for medical treatment if she got ill.

Claimant returned to Dr. Roberts for further medical treatment following the initial evaluation by Dr. Giglia. While Dr. Roberts issued an off work slip on November 26, 2002, directing the claimant to be off work due to illness until further notice, the December 11, 2002, office note reflects that the claimant had been off work since November 11, 2002. Also Dr. Roberts indicated in the December 11, 2002, office note that he did not think that the claimant would be able to go back to work in the building. (CX. 1, p. 32-33).

Claimant was again seen by Dr. Roberts on January 7, 2003, at which time she continued to have problems of cough, congestion, and drainage. The clinic note further reflects:

. . . She brings literature with her today with several different fungal species that apparently have been tested for positively in her building where she worked. Aspergillus is one, and the other two are Alternaria and Cladosporium, which she reports is probably what has been making her sick. She has an appointment with Dr. Giglia, a pulmonologist, on January 20th. (CX 1. p. 37).

A January 3, 2003, Mold Analysis Report, contain in the record reflects the results of samples collected from the second floor ceiling tiles of the old Arkansas Gazette building, claimant's workplace during her employment with respondent-employer Textron. The report disclosed the presence of Alternaria, Aspergillus, and Cladosporium along with a description of their most common impact to human health.(CX. 2, p. 5).

Claimant was again seen by Dr. Giglia on January 20, 2003. The January 20, 2003, report relative to the visit reflects, in pertinent part:

Since being seen here, patient's PPD skin test was negative. Her fungal serologies were negative. CT scan of the thorax showed no pulmonary parenchymal disease and only a moderate hiatal hernia, and she has been started on Aciphex for this. However, when patient went back to work, she became more sick and quit her job. . . . Today she brings me a mold analysis report taken from the second floor ceiling tiles where she worked. This was growing *Alternaria*, *Aspergillus*, and *Cladosporium*, all of which are fungus, and as usual, can cause allergic fungal reactions or hypersensitivity reactions without evasive pulmonary disease. . . . She states she has had fever on and off at 102 degrees. She complains of severe paroxysms of cough. It is usually dry and nonproductive. Sometimes it is productive of a very small amount of mucus, sometimes clear, sometimes pale yellow. Sometimes she coughs until she is nauseated and vomits. She has dyspnea with talking, activities of daily living, and walking, mostly from coughing. She sometimes confuses fatigue with dyspnea.(CX 1, p. 38).

Dr. Giglia's assessment of the claimant's complaint following his examination and test results during the January 20, 2003, visit was possible allergic reaction to mold at the workplace.

Claimant underwent a bronchoscopy with bronchial washing to check for lower respiratory tract fungal infection on January 27, 2003, pursuant to the directions of Dr. Giglia. (CX.1, p. 41).

Claimant was seen in follow-up by Dr. Giglia on March 10, 2003. The report relative to the March 10, 2003, visit, reflects, in pertinent part:

Chest: Mild end-expiratory wheezes bilaterally, slightly greater left than right. This is the first time I have heard any wheeze in this lady. She did have some costochondral tenderness.(CX 1, p. 42).

Dr. Giglia assessed the claimant with an asthmatic type condition.

On March 14, 2003, claimant was seen by Dr. Deanna N. Ruddell, who is board certified

in the field of allergy as well as pediatrics, pursuant to a referral for an allergy work-up as well as an asthma work-up.(RX 2). Dr. Ruddell, following allergy testing, determined that the claimant was sensitive to a number of things including cat and dog dander, weed pollen, molds and tree pollen. In an April 17, 2003, correspondence Dr. Ruddell addressed an inquiry from claimant's attorney:

I will try to go through the specific questions that you have concerning Mrs. Cooper's case. Mrs. Cooper stated that her allergy symptoms started after this presumed exposure at her workplace. Certainly with allergic diseases, the current thinking is that people are born with the predisposition to become allergic and with the right exposure, symptoms may develop including hay fever, asthma and eczema.

Mrs. Cooper showed positive allergy tests to cat, dog, weed pollen, as well as molds. This test was done on March 25, 2003. It is conceivable that Mrs. Cooper may not have been bothered by her allergies until this exposure at the workplace occurred. Mrs. Cooper also came in reporting significant respiratory problems.

* * *

Mrs. Cooper will be seen in our clinic for follow up in approximately two to three months. My impression at this time is that she does have allergic rhinitis as well as asthma. Certainly this condition is treatable and controllable with the proper follow up medical care.(CX 1, p. 52)

A May 2, 2003, clarification report of Dr. Ruddell reflects:

In follow-up to your clarification on Mrs. Cooper, it does appear that it is more probable than not that Mrs. Cooper's workplace exposure precipitated her allergy symptoms as well as her reactive airway disease. I do feel, as I have stated earlier, that she has a very good chance of having a good quality of life with follow-up medical care as well as the proper medications. . . .(CX 1, p. 55).

In a responsive report of April 30, 2003, to claimant's attorney, Dr. Giglia noted of the claimant and her condition:

She did have an asthmatic condition, and this asthmatic condition is diagnosed by objective findings. However, even though I suspicion that her disease may have been produced by allergic reactive airway disease, with possible etiology of mold from her workplace, I cannot, with any degree of certainty, opine this because of the length of her problem prior to when I saw her, plus any factors that work to possibly cause this. It is noted that the patient was a smoker for 17 years until the time of this problem. This may come into play. However, as far as stating with a reasonable degree of medical that her reactive airway disease was caused by injurious agents at her workplace, I cannot say this, just that in talking with the patient herself by history in time course, this quite possibly is the case. (CX. 1, p. 54).

In addition to his August 4, 2003, deposition testimony, Dr. Kevin D. Roberts authored two (2) reports of June 20, 2003, addressing the casual nexus of the claimant's workplace to her diagnosed reactive airway disease. The first June 20, 2003, report of Dr. Roberts reflects, in pertinent part:

Julia Cooper has been a patient in our clinic since November 1996. Until April 2001 she never presented to me for treatment of shortness of breath and a bad cough. Continuing treatment was required as well as subsequent intervention by a pulmonary specialist and asthma specialist. Based upon her history of exposure to construction activity at her work place and my treatment of other persons from Textron for similar presenting complaints and similar histories of work place construction activity I believe that Julia's asthma was bought about by her work place exposure. . . .(CX 1, p. 56).

During his August 4, 2003, deposition Dr. Roberts stated that he authored a second report of June 20, 2003, as a post script to the initial report, at claimant's request to address any impact of the claimant's weight on her reactive airway disease. The second June 20, 2003, report reflects:

Ms. Julia Cooper has been a patient in our clinic since November 12, 1996. She had no respiratory problems until she presented on May 22, 2001 with a mild respiratory syndrome. She has had recurring problems since. It is my medical opinion that this has nothing to do with her weight. (RX. 3, ex. #1).

During the course of her June 13, 2003, deposition, Dr. Deanna N. Ruddell, provided testimony regarding her contact with the claimant, results of her evaluation of the claimant, assessment of the claimant's complaint, treatment recommendation, and permanent physical impairment. Dr. Ruddell had access to claimant's medical records relative to the claimant's medical treatment under the care of her family physician, Dr. Kevin D. Roberts, to include diagnostic test results.(RX. 2).

As an overview of asthma, Dr. Ruddell's testimony reflects:

Asthma is a chronic respiratory problem that is based on obstruction of the lungs. Lungs are reactive to different stimuli, whether that be allergens, exercise, weather changes, pollutants, cigarette smoke, GE reflux. Things like that can exacerbate a case of asthma.

* * *

The latest thinking is that allergies and asthma are genetically predisposed in certain individuals. And, as you go through life and you're exposed to different things, the disease can develop. (RX. 2, p. 12).

During her deposition Dr. Ruddell reaffirmed her opinions and conclusions as reflected in the reports generated on April 17, 2003, April 25, 2003, and May 2,2003, regarding the claimant.

Dr. Ruddell's testimony reflects, regarding the nexus of the claimant's allergies to her work environment:

I think her exposure to work, first of all, stands out in her history. Also, the timing of her illness, dating back to again the records that came in from primary care physician, 8 of '01 up until this date. I felt that it was accurate to say it is conceivable.(RX. 2, p. 14).

In addition to having access to and reviewing claimant's medical records relative to medical treatment received by the claimant under the care of her family doctor, Dr. Roberts, and

a pulmonary specialist, Dr. Anthony R. Giglia, subsequent to August 2001, Dr. Ruddell also reviewed a July 31, 2000, office note of Dr. Roberts relative to the claimant. Dr. Ruddell observed that the July 2000, report did not suggest that the claimant had asthma. Further, Dr. Ruddell testified that the report would not suggest that testing for asthma should be done:

Not based on this, because it looks like you're really leaning more toward the GE reflux question, the question of this post-gastric bypass problem. It said she had some shortness of breath and has been told in the past that she had esophageal spasm. Sometimes those - - that can be in the differential of working up a patient with shortness of breath. (RX. 2, p. 30-31).

In terms of medical certainty, Dr. Ruddell's testimony reflects that one would need to be taking the spirometry readings or peak flow while in the workplace. (RX. 2, p. 38-39). The afore is impractical in a typical occupational asthma worker's compensation claim. The distinction is between a reasonable degree of medical certainty and absolute medical certainty. Dr. Ruddell's testimony reflects, respect the to May 2, 2003, report:

In going back through everything, I think it's conceivable and I think that's accurate. The medical certainty, if it's defined by objective findings only, then you cannot with medical certainty say that this was workplace exposure. If you can factor in subjective, if you can look at previous doctor visits notes, and put all that together, then I think it's possible.

Dr. Ruddell testified regarding the difference between a sensitizer and an irritant relative to occupational asthma:

It's hard to differentiate, I guess. But if you think of a - - a sensitizer as something that can cause occupational asthma - - - and an irritant - - can be a cause of occupational asthma. So I guess the only way you could differentiate would be to put it in some type of category.

In response to the question of whether a sensitizer is something that takes a period of time to create an asthmatic response, Dr. Ruddell testified:

It can. I think it's variable. There are certain things that may cause a more immediate reaction, and some things may take longer for it to really develop. (RX. 2, p. 41).

Dr. Ruddell also testified that latency periods in asthma would be variable depending upon the type of irritant and the person.

During the course of his August 4, 2003, deposition Dr. Kevin D. Roberts reaffirmed the opinions expressed in his June 20, 2003, letters, to include the medical certainty question. Dr. Roberts noted that prior to May 22, 2001, the claimant had not received medical treatment from for respiratory or lung problems. Additionally, the testimony of Dr. Roberts reflects that the claimant was not treated by him for bronchitis prior to May 2001.(RX. 3, p.29).

Commencing March 31, 2002, respondent-carrier #1 provided workers' compensation insurance coverage for respondent-employer Textron. Prior to March 31, 2002, respondent-carrier #2 provided workers' compensation insurance coverage for respondent-employer Textron. The claimant's earning records during her employment with respondent-employer Textron reflects her base weekly pay at the time of hire and the increase as of April 1, 2002. Further the wage records reflects that claimant earned commissions ranging from \$659.00 to \$2569.00.(CX. 2, p.6-7).

After a thorough consideration of all the evidence in this record, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim
2. At all times pertinent the employment relationship existed between the claimant and

respondent-employer. From June 1, 2001, through March 30, 2002, Respondent-carrier #2 provided workers' compensation insurance coverage for respondent-employer. Commencing March 31, 2002, respondent-carrier #1 provided workers's compensation insurance coverage for respondent-employer.

3. At all times pertinent the claimant earned wages sufficient to entitle her workers compensation benefits at the maximum applicable rate.

4. The claimant has sustained her burden of proof by a preponderance of the evidence that as a result of continuing exposure to injurious airborne materials present in her workplace from August 2001 through November 2002, she sustained occupational asthma, which rendered her temporarily totally disabled for the period November 11, 2002, through November 26, 2002, and continuing thereafter until such time as she reached the end of her healing period.

5. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of and relative to the claimant's occupational asthma.

6. Respondents #1 have controverted this claim in its entirety.

CONCLUSIONS

The claimant was employed by the predecessor in interest to respondent-employer, Sun Trust, until the same was acquired by respondent-employer. In December 1999/January 2000, Sun Trust relocated its offices from the Stephens Building to the second floor of the old Arkansas Gazette building. On June 1, 2001, respondent-employer acquired the assets of Sun Trust. The former employees of Sun Trust submitted applications to the new employer and a number of them were hired. Respondent-employer Textron had access to the personnel files of the former employees of Sun Trust and in fact retained those employees desired.

In August 2001, major renovation/construction took place on the second floor of the Democrat-Gazette building. The evidence in the record reflects that prior to the August 2001 renovation, construction and renovation on a lesser scale was ongoing in the building. In May 2001, claimant experience her initial respiratory complaint for which she sought medical treatment. Claimant later developed other respiratory complaints to which she attributed to her continuous exposure to harmful elements in her workplace. Claimant asserts entitlement to workers' compensation benefits as a result of the afore.

Workers's compensation insurance coverage for respondent-employer Textron was provided by Respondent-carrier #2 for the period prior to March 31, 2002. Workers' compensation insurance coverage for respondent-employer Textron was provided by Respondent-carrier #1 commencing March 31, 2002. Respondents deny the compensability of this claim and have controverted it in its entirety.

The present claim is governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an a compensable injury having been sustained subsequent to the effective date of same.

While the evidence in the record reflects that the claimant was a cigarette smoker from age 34 to age 51, there is no medical evidence to reflect that she sought or required medical treatment associated with same. Indeed, the credible testimony of the claimant reflects that she was not a continuous smoker during the entire 17 year span, but that she quite several times.

Dr. Kevin D. Robert, a board certified family practice physician, has been the claimant's family doctor since 1996. While the claimant had other health problems, the evidence in the record reflects that claimant first received medical treatment relative to respiratory complaint on

May 22, 2001. In August 2001, claimant sought medical treatment at the emergency room of St. Vincent Doctor's Hospital due to severe respiratory complaint, and was seen in follow up by Dr. Roberts on August 15, 2001. Claimant was diagnosed with pneumonia by Dr. Roberts in August 2001.

Claimant continues to see Dr. Roberts for respiratory or breathing complaints thereafter. In October 2001, claimant relayed her concern to Dr. Roberts regarding the impact of the installation of a new ventilation system at work on her health. The credible evidence in the record reflects that at the time of the August 2001, renovation work, ceiling tiles were removed, duct vents were exposed and dust and debris was present throughout the work area on the second floor.

The claimant was referred by Dr. Roberts to Dr. Anthony R. Gilgia, a pulmonary specialist, and to Dr. Deanna N. Ruddell, an allergy and asthma specialist. Claimant has been diagnosed with asthma. Claimant attempted to return to her employment with respondent, however was unable to remain and discharge duties due to her allergy, coughing and an inability to communicate with potential client on the telephone.

An "occupational disease" is any disease resulting in disability or death that arises out of or in the course of an occupation or employment of the employee. Ark. Code Ann. § 11-9-601 (e) (1) (A) (Repl. 2002). Subsequent to the enactment of Act 1281 of 2001, in order for the claimant to prove she has a compensable occupational injury, the burden of proof is by a preponderance of the evidence. Ark. Code Ann. § 11-9-601 (e) (1) (B) (Repl. 2002).

The occupational disease must be "due to the nature of the employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade,

occupation, process, or employment and is actually incurred in his employment”. Ark. Code Ann. § 11-9-601 (g) (1) (A) (Repl. 2002). A disease may be considered compensable although the general public may contract the disease if the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employment. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W. 2d 875 (1992); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W. 2d. 841 (1984).

Ark. Code Ann. § 11-9-601 (f) (1) provides that where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease and the carrier on the risk when the employee was last injuriously exposed under the employer shall be liable. In the instant claim, Respondent #2 left the coverage on the risk of respondent-employer Textron on or before March 31, 2002. Claimant last discharged employment duties for respondent-employer Textron in November 2002, while Respondent #1 was on the risk.

The credible evidence in the record reflects that the claimant and other employees of respondent-employer Textron experienced health problems and difficulties once the renovation work commenced in August 2001. The evidence in record reflects that dust and debris was common place in the work environment during the renovation. Photographs and e-mail document the presence and concern of the afore. Laboratory analysis of ceiling tile from the second floor confirm the presence of injurious elements in the work environment. The medical in the record reflects the diagnosis of the claimant’s complaint and the causal nexus of same to the workplace.

The claimant has sustained her burden of proof by a preponderance of the evidence that

she sustained an occupational injury in the form of occupational asthma, arising out of her employment with respondent due to injurious exposure to elements in her work environment from August 2001 through November 2002. Further, the evidence preponderates that the claimant required medical treatment which was reasonable, necessary and related to the occupational asthma. Claimant remained within her healing period and totally incapacitated from engaging in gainful employment commencing November 11, 2002, through November 26, 2002, and continuing thereafter, until she reached the end of her healing period. Respondents have controverted this claim in its entirety.

AWARD

Respondents #1 are hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$425.00, for the period beginning November 11, 2002, through November 26, 2002, and continuing through the end of the claimant's healing period, as a result of her compensable occupational asthma growing out of her employment. Said sums accrued shall be paid in lump without discount.

Respondents #1 are further ordered and directed to pay all reasonable related medical, hospital and other apparatus expenses, to include medical related milage, growing out of her compensable occupational asthma sustained in the employment of same.

Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable J. Chris Bradley, on the controverted portion of this award, pursuant to Ark. Code Ann. § 11-9-715.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. § 11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge