

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F000657

JOHN SIKES,
EMPLOYEE

CLAIMANT

GEORGIA-PACIFIC CORPORATION,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JULY 7, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE GREGORY R. GILES, Attorney
at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE MARK A. PEOPLES,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed as
modified.

OPINION AND ORDER

The claimant appeals an Administrative Law Judge's
opinion filed August 21, 2002. The Administrative Law Judge
found that Act 1281 of 2001 made substantive law changes to
the burden of proof for occupational disease and was to be
applied prospectively. The Administrative Law Judge
therefore found, "Claimant has failed to prove by clear and
convincing evidence that he sustained an occupational
disease which arose out of and in the course of his
employment." After reviewing the entire record *de novo*, the
Full Commission finds that the Legislature meant to apply
Act 1281 retroactively, so that the "preponderance of the

evidence" standard of Ark. Code Ann. § 11-9-601(e)(1)(B) applies to the instant matter. The Full Commission finds that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease. We therefore affirm, as modified, the opinion of the Administrative Law Judge.

I. HISTORY

John Edward Sikes, age 39, testified that he became employed with Georgia-Pacific Corporation in February 1991, working in production, converting areas, and shipping. Mr. Sikes testified that his work changed to maintenance in 1996, which duties included operating heavy equipment - cranes, bulldozers, backhoes, and so on. The claimant testified that half of his work was "in the woodyard," and the other half "spread between the pulp mill, the powerhouse, and outlying areas." The claimant testified that he worked close to the "purchased chip" area where rail cars were dumping material. The claimant testified that he saw "continuous" airborne particles and dust.

The claimant testified that he began suffering "flu-like symptoms" which he attributed to being exposed to dust at work.

A physician's conclusion from an office visit on February 5, 1998 was "sinusitis, bronchitis, flu." There was no mention in the physician's notes of the claimant's work, and medication was prescribed.

The claimant testified:

Q. Take us back to August 14, 1998. What were you doing on that particular day?

A. On that particular day myself and Mark Gibbs and - I can't remember - Gary Wayne Grant were at truck wood west and we were rolling up fire hoses because we had had a major problem with what they call the clear water well. What this well was doing was sprinkling these quarter mile long stacks of hardwood timber. They would spray it with water to, I guess, see how long it would keep, and then the water ran out and they were just trying everything to get some water to this clear water well....

Q. What kind of symptoms had you been having before that day?

A. Couldn't hardly breathe, my chest was killing me....

Q. If you had to pick one, what was the absolute worst symptom that was going on?

A. I couldn't breathe....

Q. Is there anything that you are pointing to in particular that on the 14th would have caused you to get this sick?

A. Nothing other than the Aspergillus fungus that is out there in the wood chips.

Q. Okay. On that particular day, as you think back is there something, I mean, were you working

in an area where you feel like you had gotten into a dusty area or a moldy area on that particular day?

A. Yes. In traveling back and forth from truck wood west to our shop, you go right through the woodyard.

The claimant testified that he had to leave work early that day. The record indicates that he presented to Dr. George Covert on August 14, 1998:

This 33 y/o w/m onset last Sunday of URI/sinusitis, which led to cough, which was non-productive and associated with aching in his chest. Seen in LRMH clinic on the day of admission with shortness of breath and diffuse wheezing and non-stop coughing. He was admitted after Albuterol treatment for his asthmatic bronchitis.

An x-ray of the chest was taken on August 14, 1998 and compared to a previous examination dated May 24, 1991:

Heart and mediastinum are within normal limits. Once again there is perihilar interstitium on the trachea with evidence of increased bronchial wall thickening in the perihilar regions which is consistent with the patient's history of asthma with bronchitis. No focal alveolar infiltrates are present. No pleural effusions are present. Soft tissues and bones are unchanged.

IMPRESSION:

1. FINDINGS AS ABOVE CONSISTENT WITH THE PATIENT'S HISTORY OF ASTHMA WITH BRONCHITIS. NO FOCAL INFILTRATES ARE PRESENT.

Dr. Covert's impression was "severe asthmatic bronchitis."

The record indicates that the claimant was hospitalized at Little River Memorial Hospital on or about August 15, 1998. Another x-ray was taken on August 16, 1998 and compared to the examination dated August 14, 1998:

No significant change has occurred since the previous examination with mild perihilar interstitial infiltrates. No focal alveolar infiltrates are present. Lungs are normal inflated. No pleural effusions are present. Soft tissues and bones are unchanged.

IMPRESSION:

1. NO SIGNIFICANT CHANGE.

The impression of Dr. Kevin Kleinschmidt on August 16, 1998 was "1. Status asthmaticus with bronchitis, exacerbation due to allergic reaction to Xanax, stable at this time. 2. Allergy to Xanax, Benzodiazepines, Valium, and Phenobarbital."

Dr. Covert reported on August 19, 1998:

John has Aspergillosis that has grown out of his sputum. It is very prominent. His wheezing continues, it is perhaps a little better today. His chest x-rays continue to show no infiltrate per se....I spoke with Dr. Lyon at the CDC yesterday, authority on Aspergillosis. He agrees with the current therapy with probably an allergic reaction to this yeast. It is of some concern that there was such a fulminate growth on the plates if the patient does not improve, certainly consideration will be needed for bronchoscopy and see if this is localized in a part of the lung. Right now he is being treated with corticosteroids which is an appropriate treatment for Aspergillosis bronchopulmonary reaction....

The claimant was discharged from Little River on August 20, 1998. Dr. Covert's discharge diagnosis was "Aspergillus bronchopulmonary allergic asthmatic reaction." Dr. Covert transferred the claimant to St. Michael Health Care Center for treatment with Dr. Lowell E. Vereen. Dr. Vereen, a physician at a pulmonary disease/medicine clinic, reported on August 20, 1998:

Mr. John Sikes is a man who was admitted to Doctor Covert's service on August 14th, he had been feeling puny and sick for about a week....He had aspergillus grow out of one of his sputum specimens and was referred over here....The patient subsequently denies ever having any asthma before. He had been exposed to lyme he says, over there at the plant, but he has been working there for a year and has been at the paper plant for several years....

IMPRESSION: 1). APPARENTLY SOME UNDERLYING BRONCHOSPASM; INITIALLY HIS O2 SATURATION WAS 91% ON 3 LITERS UP THERE WITH RESPIRATORY FAILURE AND HE SUBSEQUENTLY HAS RESPONDED TO STEROIDS AND APPARENTLY INHALED BRONCHODILATORS AND I AM NOT SURE WHICH ANTIBIOTICS.
2). ASPERGILLUS
3). HYPERTENSION.

Dr. Vereen recommended, "At this time the patient will be admitted and given some breathing treatments and he will undergo bronchoscopy after CT scan."

Dr. Vereen discharged the claimant on August 24, 1998:

The patient was admitted her (sic) and continued on his steroids. He underwent bronchoscopy. At that time bronchoscopy had thick tenacious

secretions primarily in the left lower lobe and some in the right lower lobe. His computed axial tomography scan was consistent with a pneumonia and the bronchoscopy was consistent with allergic bronchopulmonary aspergillus. His IGE and his aspergillus precipitins are pending....

He was then discharged in stable condition and will be followed up by Doctor Covert in one week to see if he can return to work.

Dr. Vereen gave the following final diagnosis:

1. ALLERGIC BRONCHOPULMONARY ASPERGILLUS WITH SUPERIMPOSED INFECTION WITH PNEUMONITIS IN THE LEFT LOWER LOBE.
2. HYPERTENSION.

The claimant began seeing Dr. Bill Vorhease on August 26, 1998. The claimant testified that he returned to work on September 7, 1998, performing the same maintenance duties "in and around the airborne particles and dust." The claimant was apparently re-admitted to Little River on October 27, 1998. The impression from an x-ray report dated October 27, 1998 was "Normal Chest." The claimant was discharged on October 30, 1998, with the final diagnosis, "Allergic bronchitis secondary to Asperigellosis."

Dr. Malcolm Smith, a pulmonologist, examined the claimant and gave the impression on December 11, 1998, "Probable allergic bronchopulmonary aspergillois. His history and available data is suggestive although I don't have results of any eosinophilia aspergillus precipitant

testing, previous IgE levels, sputum cultures, bronchoalveolar lavage, eosinophil count or test for protozoal....I suspect he will have asthma in the future....I agree with current therapy including systemic corticosteroids in tapering doses and periodic measurement of IgE levels and chest x-ray."

The claimant said he returned to work on or about December 15, 1998, but he was off work again beginning January 11, 1999.

The record includes an x-ray report dated January 12, 1999:

2 views of the chest demonstrate incomplete inspiration. Throughout there is some mild bibasilar volume loss. No definite infiltrates or effusions. Heart and mediastinum are within normal limits.

IMPRESSION:

1. PROBABLY NORMAL EXPIRATORY CHEST.

On January 22, 1999, a doctor noted, "Back to work 1/25/99."

The claimant returned to the Little River emergency room on January 24, 1999, complaining of diarrhea and "pain L side of chest on expiration." An x-ray of the chest was taken on January 24, 1999 and compared to the examination dated January 12, 1999:

Heart and mediastinum are unchanged in appearance since the earlier examination. Lungs are free of focal infiltrates. No pleural effusions are

present. Calcified healed granulomatous disease is present as before. Soft tissues and bones are unchanged. No significant change. No evidence of acute cardiopulmonary disease.

IMPRESSION:

1. NO EVIDENCE OF ACUTE CARDIOPULMONARY DISEASE.

The claimant again returned to the emergency room on January 26, 1999, complaining of headache, fingers tingling, diaphoretic shortness of breath, "took a Beta blocker by mistake this a.m." The claimant returned to work after January 29, 1999, but he continued to frequently present for medical treatment. The claimant missed work from March 15, 1999 through March 19, 1999.

The claimant returned to the Little River Memorial emergency room on July 4, 1999, and was off work beginning that date. An x-ray of the chest on July 4, 1999 was normal. On July 19, 1999, the claimant signed a Release From Responsibility For Discharge. The claimant certified that he was being released from Little River Memorial Hospital against the advice of his physician.

The claimant said he returned to work on August 15, 1999. However, the claimant was off work from August 20, 1999 until August 23, 1999. The claimant worked one-half day on August 24, 1999, and he was then off work from Aug. 25, 1999 until October 15, 1999.

A chest x-ray was taken at Little Rock Diagnostic Clinic on September 8, 1999, with the following impression:

1. Mild interstitial prominence in the left lung field.
2. Otherwise, no acute process visualized.

Dr. Timothy R. Cook provided a pulmonary consultation and assessment on September 8, 1999:

Mr. Sikes's history is consistent with the diagnosis of allergic bronchopulmonary aspergillosis. With no records, I must go by history alone. I discussed the nature of allergic bronchopulmonary aspergillosis extensively with Mr. Sikes and his wife. Often this is a recurrent disease. Flare-ups frequently occur when the steroid dosing is decreased. The disease can be relentless and result in scarring or fibrosis. My impression is that Mr. Sikes has been treated well, however, he is frustrated more by the disease process. This is very understandable.

The claimant testified that he did not work after November 30, 1999. The claimant testified that he was unable to walk or breathe. The claimant testified, "The back pain came from me walking funny trying to favor a bad leg."

The claimant testified that he presented to Dr. Don H. Burt on December 9, 1999. "Early aseptic necrosis lt hip" was noted on December 9, 1999. The impression from a lumbar MR scan taken on March 2, 2000 was "Herniated disc with extruded fragment at L5-S1 on the left." On March 2, 2000,

Dr. Burt performed a "Decompression, laminotomy and medial facetectomy at L4-5 and L5-S1 on the left. Diskectomy at L5-S1 on the left."

Dr. Vereen wrote to an attorney on May 1, 2000:

Greetings! This letter is in reference to Mr. John Sikes. As you know, Mr. John Sikes had allegedly had exposure to aspergillus, where he works. The patient had some clinical symptoms consistent with allergic broncho pulmonary aspergillosis. A lot of his tests have been at the hospital and aren't available at time of dictation. Never the less, the patient seems to have reasonably kept his pulmonary functions tests normal. Recently, his IgE level, which is what we use to follow these patients, has been in stable range. In fact, the last time I had contact with him, I suggested that he be weaned from his prednisone. I'm not sure if he is still taking it or not. Usually, this disease does not lead to irreversible damage and by studying his pulmonary functions test, appears to be stable at this time.

Dr. Burt stated in June 2000:

In my opinion, the sequence of events outlining Mr. Sikes difficulties are as follows:

- 1) Aspergillus lung infection, contracted while working in the woodyard at Georgia Pacific, as suggested by his Pulmonologist.
- 2) Early aseptic necrosis of the left hip, as a result of Steroid therapy.
- 3) Disc herniation in the low back due to altered gait, due to the aseptic necrosis.
- 4) The strong possibility that total hip replacement on the left will be needed at some point in the future.
- 5) The possibility that aseptic necrosis of the right hip may develop in time.

Dr. Burt performed a total hip replacement on the left on September 19, 2000.

Dr. Andrew W. Prychodko, then an Assistant Professor of Occupational Medicine at The University of Texas Health Center at Tyler, wrote to the claimant on December 8, 2000:

I am writing to summarize our two clinic visits and my impressions, with respect to the causal association of your pulmonary medical problems and orthopedic lower back problems and the exposures sustained in the course and scope of employment, and the subsequent treatment necessitated.

As you know, you were employed by Georgia Pacific Papermill Ashdown Arkansas Operations beginning in 02/91. You worked in production for five years, and moved to maintenance in 1996 where you continued to work until November of 1999 when you were no longer able to work. In the course of this employment you would have various assignments, however, in the maintenance position you would operate heavy equipment and cranes in the utility capacity and this would involve driving through the wood yard where rail cars containing wood chips were present. The shake down of these rail cars was going on as well....

You were able to provide me with industrial hygiene reports from the Georgia Pacific facility which documented extraordinarily high levels of Aspergillus fungal spores, along with the presence of high levels of other kinds of fungal spores. The information you were also able to provide included internal memoranda sent via e-mail indicating that there were difficulties with the turnaround time of the railroad cars from the Southern Missouri source of the wood, and that rather than having a ten day turnaround time, many of these rail cars had a turnaround time of upward of 30 days or longer. This was noted to result in the florid development of mold growth and spore

formation. According to one memo I noted, the candid observation was made that many workers in the area of the railroad cars were experiencing respiratory problems ostensibly because of the mold, and/or disinfectants that were being used in an effort to contain these molds. The containment efforts apparently were far from successful, given the very high level of mold spores noted on some of the industrial hygiene monitoring reports....

ASSESSMENT: It is clearly documented that you have experienced Aspergillus lung disease and that this was something that you contacted in the course and scope of your employment at the Georgia Pacific Mill in Ashdown, Arkansas. You also developed orthopedic problems secondary to the steroid treatments received for the lung condition and, as outlined by Dr. Burt, the aseptic necrosis led to the development of your herniated lumbar disc.

Since being removed from the environment, you have been able to recover significantly. At one point your lung capacity was reduced to approximately one-half normal and this restrictive change has improved through the course of time. The only medical recommendation we can give is that you continue to not work in that environment and hope that you can maintain with as few medical interventions as possible.

The purpose of this exam was largely to corroborate the causal (sic) associated between your work and your medical problems. I believe that the records clearly demonstrates (sic) both the pulmonary problem, and the secondary orthopedic side effects of the steroids used to treat the pulmonary problems, are approximately caused by the exposures sustained in the course and scope of your employment. According to the definition of a condition compensable under a workers compensation system, these would clearly fall into that category.

Dr. Nancy F. Rector, a physician at Little Rock Pulmonary Clinic, wrote to the Administrative Law Judge on July 9, 2001:

Enclosed is a copy of my independent medical evaluation conducted on the above named client on 06/15/01 at your request. Also enclosed are results of some laboratory tests and high resolution computed tomography scan of the chest requested by Dr. Gerald Kirby, expert witness for Georgia-Pacific. In addition to this information, I reviewed a large number of medical records and x-rays on this individual, provided by his attorney. I am also enclosing a copy of a review of Allergic Bronchopulmonary Aspergillosis from a peer reviewed medical journal.

In summary, Mr. Sikes apparently was an atopic individual who was unaware of that diagnosis and had never had any symptoms of asthma. He worked as a heavy equipment operator and was in and out of the wood yard at Georgia-Pacific but had no close or specific contact with unloading of the wood chip cars. He developed an acute illness in August of 1998 characterized by shortness of breath and bronchospasm. It should be noted that he was a cigarette smoker and it is not possible for me to determine that this specific illness was related to contact with aspergillus. He could have simply had an acute bronchitis or an initial episode of asthma. There are well established criteria for the diagnosis of allergic bronchopulmonary aspergillosis, specifically, eight primary criteria and three secondary criteria. Mr. Sikes did demonstrate one of the primary criteria with an elevated serum IgE level, and one of the secondary criteria partially in that he did have Aspergillus identified in his sputum on one occasion but I do not believe that it was demonstrated on repeated occasions. The presence of Aspergillus in the sputum is not a strong diagnostic criteria in that this is a very ubiquitous organism frequently present in

microbiology laboratories and is generally disregarded as significant unless it is actually seen invading lung tissue. Mr. Sikes was treated for corticosteroids for his illness. He did not receive particularly high doses for the first four months of treatment. He subsequently was placed on higher doses on an every other day basis which does minimize side-effects. The dose was tapered over the next several months. Again, in July of 1999 he was placed on fairly high dose steroids and stopped the steroids in November, 1999 when he was diagnosed with avascular necrosis of his hip. I have no reason to question the diagnosis of avascular necrosis of the hip but I would tell you that it is unusual in my experience to see this develop in a young man with the doses of steroid he received.

He presently has a normal chest x-ray and chest CT. His pulmonary function studies show mild small airways obstruction. His oxygen saturation is 96% on room air. He is on treatment for upper airway allergies by an allergist in Houston. He has stopped smoking cigarettes. He is not on any treatment for obstructive airways disease.

Unfortunately, I cannot support the diagnosis of allergic bronchopulmonary aspergillosis from the records that were provided to me or the current physical examination. If you need more information, please let me know.

Dr. Gerald R. Kerby, Professor, Division of Pulmonary Disease at The University of Kansas Medical Center, wrote to the respondent's attorney on August 6, 2001:

Mr. Sikes was seen as an outpatient 6-15-01 in the office of Dr. Nancy Rector in Little Rock, AK for evaluation of possible occupational lung disease....

In summary, Mr. Sikes developed acute asthmatic bronchitis in 8-98 and had subsequent flares of

asthma in 10-98 and 9-00. He is genetically atopic (allergic) as demonstrated by prior anaphylactic reactions to insect venom. He has a persistently elevated serum total IgE level typical of atopic individuals, which remains elevated at the present time. At that time of his first asthma attack fungal elements were present in the sputum which were cultured as *Aspergillus fumigatus*. These appear to represent colonization and there is no evidence to suggest that the fungi are pathologic. The source of the fungus in his sputum is unknown since a *fumigatus* is ubiquitous in the environment and can be acquired anywhere.

Mr. Sikes does not have the following characteristics of allergic bronchopulmonary aspergillus:

- 1) Recurrent fleeting eosinophilic infiltrates.
- 2) Elevated blood or bronchial eosinophil levels.
- 3) Central bronchiectasis.
- 4) Elevated IgE antibodies against *Aspergillus*.
- 5) Elevated specific IgE antibodies against *Aspergillus*. A diagnosis of allergic bronchopulmonary aspergillosis cannot be made with the absence of these findings.

In summary, Mr. Sikes suffers from allergic asthma with recurrent episodes of bronchospasm and an elevated total serum IgE level. During his first asthma attack his bronchial mucus was colonized by *Aspergillus fumigatus*. He does not meet the criteria for a diagnosis of allergic bronchopulmonary aspergillosis. I find no evidence of an occupationally induced lung disease.

Mr. Sikes claimed entitlement to worker's compensation, and a pre-hearing order was filed with the Commission on March 13, 2002. The claimant contended that he ingested aspergillus fungus during his employment, which ingestion led to the August 1998 diagnosis of "aspergillus allergic

pulmonary bronchial disease." The claimant contended that he was entitled to several periods of temporary total disability compensation, in addition to reasonably necessary medical treatment. The claimant contended that the problems with his back and hip were a compensable consequence of the occupational disease, and that left-hip surgery was reasonably necessary.

The respondent contended that the claimant could not prove by clear and convincing evidence or a preponderance of the evidence a compensable occupational disease. The respondent contended that the medical treatment sought by the claimant was not reasonably necessary for the exposure that he sustained. The respondent contended that the claim was barred, because the claimant failed to give written notice of his condition within 90 days of the first manifestation thereof. With regard to temporary total disability compensation, the respondent contended that the claimant's healing period ended no later than November 20, 2001.

The respondent called Dr. Kerby as a witness at a hearing held before the Commission on May 16-17, 2002. Dr. Kerby testified that aspergillus was "Everywhere. It's on the floor here, it's on the table here, it's all over. It

is ubiquitous. It is one of the environmental fungi that exists almost everywhere in the world." Dr. Kerby testified that "Allergic bronchopulmonary aspergillosis is a disease of the lungs which occurs in people who develop a sensitivity to the fungus." Dr. Kerby said this was a rare disease - "I've probably seen more than 10 and less than 20 cases in my whole life."

The respondent's attorney questioned Dr. Kerby:

Q. Within a reasonable degree of medical certainty based on your review of the things we have talked about, does Mr. Sikes now or has he ever suffered from allergic bronchopulmonary aspergillosis?

A. No....

Q. Within a reasonable degree of medical certainty, does Mr. Sikes now or has he ever suffered from any aspergillus related condition or illness?

A. Possibly an organic toxic dust syndrome on an occasion or two which would be related to the toxin from the aspergillus....It is a self-limited condition that usually lasts 8 to 12 hours.

Q. It doesn't require hospitalization?

A. No.

Q. Within a reasonable degree of medical certainty, did Mr. Sikes's hospitalization for any respiratory condition result in whole or in part from any exposure to aspergillus fungus?

A. Not in my opinion....

Q. He testified yesterday that he has had excellent breathing since he has been away from the mill. Does that suggest that his condition is related to exposure to aspergillus?

A. Well, it is consistent with - if he were allergic to aspergillus and he avoided it, that would minimize symptoms. Since there is no evidence that he is allergic to aspergillus, then it probably doesn't have anything to do with it.

Q. Is it your testimony, Dr. Kerby, that Mr. Sikes would have experienced the same hospitalizations, suffered the same conditions and had the same problems even if he was not exposed to aspergillus at Georgia Pacific?

A. In my opinion that is the case, yes.

Q. And is that opinion stated within a reasonable degree of medical certainty?

A. Yes, it is.

Dr. Kerby testified that he did not think medical science recognized the condition diagnosed by Dr. Vorhease in October 1998, that is, "Acute bronchitis secondary to aspergillosis."

The Administrative Law Judge filed an opinion on August 21, 2002, and found, "Claimant has failed to prove by clear and convincing evidence that he sustained an occupational disease which arose out of and in the course of his employment." The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Burden of proof

Ark. Code Ann. § 11-9-601 formerly provided:

(e) (1) (A) "Occupational disease", as used in this chapter, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee, or naturally follows or unavoidably results from an injury as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by clear and convincing evidence.

Act 1281 of 2001 (effective July 1, 2001) substituted "a preponderance of the" for "clear and convincing" in (e) (1) (B). The Administrative Law Judge found in the present matter, "Act 1281 of 2001 made substantive law changes to the burden of proof for occupational disease claims and is thus to be applied prospectively." The Administrative Law Judge therefore found, "Claimant must establish the compensability of his occupational disease claim by clear and convincing evidence; the law in effect at the time claimant's claim arose."

The Administrative Law Judge erred as a matter of law. Act 1281 of 2001 provides that the claimant must prove a causal connection between his occupation or employment and the occupational disease by a preponderance of the evidence. The Full Commission finds that the substitution of "a preponderance of the" for "clear and convincing" in Ark.

Code Ann. § 11-9-601(e)(1)(B) by Act 1281 was remedial legislation. As such, Act 1281 of 2001 supplied a new or more appropriate statutory remedy for the claimant and was meant to be applied retroactively by the legislature. See, Forrest City Machine Works v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981). Because it simply altered the claimant's burden of proof, Act 1281 might fairly be characterized as a procedural change, not a substantive one. Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987), citing Aderhold. Distribution of the burden of proof is a procedural matter. Arkansas State Police v. Welch, 28 Ark. App. 234, 772 S.W.2d 620 (1989). In Welch, the Court of Appeals held that changes in statutes relating only to remedies or procedural matters are generally held to be immediately applicable to existing causes of action and not just to those which may accrue in the future, unless a contrary intent is expressed in the statute. In the present matter, we find that Act 1281 of 2001 was a procedural change to Ark. Code Ann. § 11-9-601. The Legislature did not express an intent to apply this procedural change prospectively. The Full Commission therefore reverses the Administrative Law Judge on this issue, and we find that the Legislature meant for Act 1281 to apply retrospectively.

The instant claimant must establish a causal connection between his occupation or employment and the occupational disease by a preponderance of the evidence.

B. Whether the claimant's disease arose out of his employment

The Administrative Law Judge found that the claimant failed to prove by clear and convincing evidence that he sustained an occupational disease which arose out of and in the course of his employment. The Full Commission finds that the claimant failed to establish a causal connection between his occupation or employment and the occupational disease by a preponderance of the evidence. We therefore affirm, as modified, the opinion of the Administrative Law Judge.

The Full Commission recognizes the claimant's testimony that he could not breathe beginning in August 1998, and that the claimant attributed this condition to "the Aspergillus fungus that is out there in the wood chips." However, when the claimant first began seeking medical treatment in August 1998, he was assessed with "asthmatic bronchitis," and there was no alleged causal connection between this condition and the claimant's workplace. An August 1998 x-ray was compared to a similar study performed in May 1991, and the findings

were consistent with the claimant's history of asthma with bronchitis. In addition, no focal infiltrates were shown on x-ray in August 1998.

We also recognize Dr. Prychodko's December 2000 letter to the claimant where he stated, "It is clearly documented that you have experienced Aspergillus lung disease and that this was something that you contacted in the course and scope of your employment at the Georgia Pacific Mill in Ashdown, Arkansas." The Commission's authority to resolve conflicting evidence also extends to medical testimony. Maverick Transp. v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000). Noting that Dr. Prychodko is an occupational and environmental specialist, the Commission attaches more weight to the independent opinion of an expert pulmonologist, Dr. Rector, who determined that, "Unfortunately, I cannot support the diagnosis of allergic bronchopulmonary aspergillus from the records that were provided to me or the current physical examination." Dr. Kerby, also an expert pulmonologist, stated in August 2001, "The source of the fungus in his sputum is unknown since a fumigatus is ubiquitous in the environment and can be acquired anywhere." Like Dr. Rector, Dr. Kerby thoroughly and impartially examined the case and was unable to diagnose

"allergic bronchopulmonary aspergillus" as a result of workplace exposure.

Dr. Kerby testified at hearing regarding his qualifications, which included undergraduate training in chemistry, a medical degree, residency training in internal medicine and a fellowship in pulmonary disease. Dr. Kerby opined that the claimant had never suffered from allergic bronchopulmonary aspergillus. Dr. Kerby stated, "within a reasonable degree of medical certainty," that the claimant's hospitalizations for respiratory problems did not result from exposure to aspergillus fungus. Based on the record before us, the Full Commission agrees with the Administrative Law Judge's determination that the claimant had not sufficiently shown he had come into contact with aspergillus at work, that the claimant had not shown that his condition was related to this alleged workplace exposure.

Based on our *de novo* review of the entire record, the Full Commission finds that Act 1281 of 2001 was remedial or procedural legislation. As such, the Legislature intended for Act 1281 to operate retrospectively, so that the claimant must prove a causal connection between the occupation or employment and the occupational disease by a

preponderance of the evidence, pursuant to Ark. Code Ann. § 11-9-601(e) (1) (B). The Administrative Law Judge erred as a matter of law in finding that Act 1281 was to be operate prospectively in applying the "clear and convincing evidence" standard in the statute. However, we find that the claimant failed to establish a causal connection between his occupation and employment and the occupational disease by a preponderance of the evidence. The Full Commission therefore affirms, as modified, the opinion of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I must respectfully dissent from the principal opinion which affirms as modified an Administrative Law Judge's August 21, 2002 denial of benefits for an occupational disease. While I agree with the finding that Act 1281 of 2001 made procedural changes that should be applied retroactively, I disagree that claimant failed to meet his burden of proof.

Claimant contracted lung disease from *Aspergillus* fungus, a substance produced at respondent's plant. Claimant worked for Georgia-Pacific in Ashdown, Arkansas from 1991 until 1999, at which time he contends that he developed an occupational disease from exposure to the disease-causing fungus produced at the plant. Respondent acknowledges the presence of this fungus, but contends that claimant was not exposed to the substance enough to warrant this claim.

Ark. Code Ann. § 11-9-601(e) (1) (A) and (B), as amended, provides that occupational diseases are compensable when a causal connection with the employment is proven by a preponderance of the evidence.

"Occupational disease," as used in this chapter, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined by this chapter.

However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

Respondent concedes that *Aspergillus* fungus was, at one time, present in its facility, but asserts claimant

exaggerated his level of exposure to the fungus and that neither his lung nor his orthopedic problems are work-related.

Claimant worked in production, converting and shipping from 1991 until 1996, at which time he transferred to maintenance where he operated heavy equipment, i.e., cranes, bulldozers, backhoes, trackhoes and bushhogs, and grounds-keeping (weedeating whenever necessary and hauling trash). Claimant worked the first shift, from 7 a.m. to 3:30 p.m., and occasionally worked overtime on the second and third shifts. He testified that more than half of his jobs were in the woodyard (around the purchased chip area where the dust containing the Aspergillus fungus was generated) and that when operating the bushhog or weedeater, he was within five feet of where purchased chips were dumped. He stated:

One of the key things, I was the low man on the totem pole which meant that I didn't get the most desirable jobs, and we would haul lime from the lime pond and there was a superintendent named Bob Jordan that would not allow us to drive on the road because there was pedestrians and that lime dust made people's eyes burn, so we would have to go through the woodyard, right by the purchased chips, then turn - make a right hand turn and drive back over the powerhouse and dump it, which from

purchased chips to where they dump that lime reclaimer, it's 50 yards. (Transcript, p. 19-20).

On August 14, 1998, claimant said he and a co-worker were at truck wood west rolling up fire hoses due to a problem that day with the clear water well which was sprinkling quarter-mile long stacks of hardwood timber into the well.

- Q: As you were doing your job that day, what happened?
- A: I had been feeling pretty poorly that week. I would come home and, my wife would say, just fall out on the couch. I'd come home, eat something, go to sleep, get up and go to work.
- Q: What kind of symptoms had you been having before that day?
- A: Couldn't hardly breathe, my chest was killing me.
- Q: Were you coughing?
- A: Continuously.
- ***
- Q: Okay. On the 14th did your symptoms seem to worsen?
- A: I couldn't breath. Yes, they were - I'd never had anything affect me like that.
- Q: Were you short of breath?
- A: I couldn't breath at all, Greg.
- Q: Were you coughing?
- A: Yes.
- Q: Was it a wet cough or a dry cough?
- A: Dry cough.
- Q: Could you bring up anything when you would cough?
- A: Nothing, just wheezing.
- Q: Were you audibly - could you hear yourself wheezing?
- A: Yes, and the boys that I was working with could hear me.

Q: Were you having chest pains at the time?

A: Yes. (Transcript, p. 22-23).

Physicians later diagnosed work-related Aspergillus lung disease and claimant subsequently began experiencing hip and back complaints. On September 9, 2000, Dr. Burt diagnosed claimant with a collapsed articular surface of the aseptic necrosis of the left hip, also opining this condition to be a compensable consequence of claimant's work-related lung disease. Dr. Peeples performed an independent medical evaluation at respondent's request and agreed with Dr. Burt's assessment.

Dr. Prychodko also examined the claimant and reported on December 8, 2000 that claimant's lung disease and associated problems were work-related:

It is clearly documented that you have experienced Aspergillus lung disease and that this is something that you contracted in the course and scope of your employment at Georgia-Pacific. You also developed orthopedic problems secondary to the steroid treatments received for the lung condition and, as outlined by Dr. Burt, the aseptic necrosis led to the development of your herniated lumbar disc.

Since being removed from the environment, you have been able to recover significantly. At one point your lung capacity was reduced to approximately one-half normal and this restrictive change has improved through

the course of time. The only medical recommendation we can give is that you continue not to work in that environment and hope that you can maintain with as few medical interventions as possible.

The purpose of this exam was largely to corroborate the causal connection between your work and your medical problems. I believe that the records clearly demonstrates both the pulmonary problem and the secondary orthopedic side effects of the steroids used to treat the pulmonary problems, are proximately caused by the exposures sustained in the course and scope of your employment. According to the definition of a condition compensable under a workers' compensation system, these would clearly fall into that category.

Claimant stated he connected the existence of Aspergillus fungus in his body to his exposure at work after discovering that the fungus was found at the plant, but respondent maintains that claimant did not spend enough time in the affected areas to be harmed by his exposure.

I understand the basic argument to be that claimant failed to prove a causal relationship between his work and his current condition, primarily because he could not detail exactly when his symptoms began. However, even under prior law, which required clear and convincing proof of an occupational disease, the Arkansas Supreme Court found a causal connection between appellee's work and his injury

where the employee breathed dust over a period of years, gradually damaging his heart, and where the employee could not show the precise instant his disability occurred.

Batesville White Lime Co. v. Bell, 212 Ark. 23, 205 S.W.2d 31 (1947). In reversing the Commission's denial of benefits, the court stated:

We held in the case of Murch-Jarvis Company v. Townsend, 209 Ark. 956, 193 S.W.2d 310, that where an employee was disabled by the aggravation of a bronchial asthma by dust inhaled by him in his working place the disability was the result of an accidental injury as the phrase is used in the Workmen's Compensation Law.

We conclude that, even though the evidence did not show the exact instant at which the disability of appellee could be said to have occurred by reason of breathing the dust, nevertheless, as shown by the proof, the inhalation of this dust did aggravate appellee's heart ailment to the point of totally disabling him, and therefore the finding of the referee that appellee suffered an accidental injury in the course of his employment was correct. Id. at 28.

Causal connection generally is a matter of inference, and possibilities may play a proper and important role in establishing that relationship. Hope Brick Works v. Welch, 33 Ark. App. 103, 802 S.W.2d 476 (1991). However, the Workers' Compensation Commission is not required to rely

upon such inferences where there is positive medical testimony to the contrary. Carter v. Flintrol, Inc., 19 Ark. App. 317, 720 S.W.2d 337 (1986).

Based on this record, I found few inferences to be made. In fact, there were a strikingly great many medical reports which affirmatively link claimant's lung disease and accompanying orthopedic problems to his work environment.

Ark. Code Ann. § 11-9-601 releases employers from liability for ordinary diseases of life to which the general public is exposed and specifically provides that the occupational disease must be "due to the nature of an 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."

Nevertheless, 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 employments. Osrose 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). To constitute an occupational

disease, there must be a recognizable link between the nature of the job and an increased risk contracting the disease. Sanyo Mfg. Corp., supra.

Respondent concedes that its plant did produce the Aspergillus fungus at the same time it employed claimant and that claimant was exposed to this fungus. Claimant's medical records clearly establish the presence of this fungus in claimant's body. Respondent's defense is simply that claimant "exaggerated" his exposure to Aspergillus fungus and that he could not have contracted his problems from work.

I do not find the evidence supportive of this position and believe that the Administrative Law Judge's decision should be reversed and benefits awarded. For the foregoing reasons, I respectfully dissent from the principal opinion finding no causal connection between the disease-causing fungus admittedly produced at respondent's plant and claimant's subsequent injuries.

SHELBY W. TURNER, Commissioner

Commissioner Yates concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the principal opinion. Specifically, I concur in the principal's ultimate conclusion that the claimant has failed to prove that he sustained an occupational disease.

However, I find that the changes effected by Act 1281 of 2001 were to be applied prospectively, not retrospectively, as found by the majority.

In 2001, the General Assembly amended Ark. Code Ann. §11-9-601. Act 1281 of 2001 substituted "a preponderance of the" for "clear and convincing." Now occupational disease claims carry the same burden of proof as all other compensation claims. Act 1281 of 2001 was both enacted and went into effect subsequent to the date the claimant's claim arose, as well as, subsequent to the date the claimant filed his claim. Thus, when claimant's claim arose and as of the date claimant filed his claim, the Act placed a higher burden of proof upon the claimant. This higher burden of proof may allow the respondent to successfully resist the claim. If the new lower burden of proof is to be applied retroactively, then the respondent's ability to successfully defend the claim may be removed. If

the burden of proof is now retroactively lowered from clear and convincing evidence, or evidence so clear, direct, weighty and convincing, to a preponderance of the evidence or evidence of greater convincing force, then the respondent faces a prejudicial change in position.

Generally, the law in effect at the time of an injury governs the disposition of the case for the duration of the claim. Arkansas State Police v. Welch, 28 Ark. App. 234, 772 S.W.2d 620 (1989); Chism v. Phelps, 228 Ark. 936, 311 S.W.2d 297 (1957); Lucus v. Handcock, 266 Ark. 142, 583 S.W.2d 491 (1979). In Arkansas State Police v. Welch, supra, the Arkansas Court of Appeals stated:

It is well settled that changes in statutes relating only to remedies or procedural matters are generally held to be immediately applicable to existing causes of action and not just to those which may accrue in the future unless a contrary intent is expressed in the statute. Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987). However, any changes in statutes relating to vested rights are characterized as substantive and require application of the law as it existed at the time the claimant sustained a compensable injury. See id. A vested right exists when the law declares that one has a claim, or that one may resist enforcement of a claim. Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981).

In 1987, the workers' compensation act was amended to state that "... the commission shall weigh the evidence impartially and without giving the benefit of the doubt to either party." In determining whether this amendment was substantive or procedural, the Arkansas Court of Appeals stated in Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987); "As we have seen, however, the burden of proof has always rested upon the claimant and this rule was not affected by the amendment." The Court concluded that a claimant did not have a vested right in the procedure the Commission uses to weigh the evidence and thus the amendment was not found to be substantive in nature. Accordingly, the Court applied the procedural change in the law retroactively. Although the Court in Fowler stated, "We note that even if the amendment had changed the burden of proof, the amendment still might be fairly characterized as procedural," I find this statement in Fowler to be mere dicta and is not controlling in the case presently before the Commission. First, the amendment did not change the burden of proof, so the Court did not address or analyze a change in the burden of proof in a procedural or substantive light. Second, the amendment addressed the procedure for

weighing the evidence - not the actual weight of evidence the claimant must produce in order to prevail.

All statutes are to be construed as having only a prospective operation, unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. See, Gannett River Pub. V. Ark. Dis. & Disab., 304 Ark. 244, 801 S.W.2d 292 (1990). A strict rule of construction applies to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These types of statutes should be given a retrospective effect whenever that seems to have been the intention of the legislature. When construing remedial legislation, one should give appropriate regard to the spirit which prompted the legislation's enactment, the mischief it sought to abolish and the remedy proposes. See, Aluminum Co. of America v. Neal, 4 Ark. App. 11, 626 S.W.2d 620 (1982).

It is clear from a review of Act 1281 of 2001 that the legislature did not intend a retrospective application. The changes brought on by Act 1281 of 2001 did not change the procedure or manner in which the Commission is to view

the evidence - it changed the weight the evidence must carry. Act 1281 of 2001 lowered the burden of proof, and thus removed a vested right and valid defense of the respondent. See, Wall v. Doctor's Hospital, Full Commission Opinion filed December 12, 1990 (D502329) (1986 amendment requiring objective and measurable findings to support an impairment rating is substantive and cannot be retroactively applied.) Therefore, I find that Act 1282 of 2001 made substantive changes to the workers' compensation act and may not be applied to this claim retroactively.

JOE E. YATES, Commissioner