

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 01-161013

Employee: Deann Henley
Employer: Fair Grove R-10 School District
Insurer: MUSIC c/o Gallagher Bassett Services, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)
Date of Accident: October 10, 2001
Place and County of Accident: Greene County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 29, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued August 29, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 18th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I

had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

William F. Ringer, Chairman

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee failed to meet the burden of proof regarding the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S.D. 1991). The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994). A single expert medical opinion will support a finding of compensability even where the causes of the occupational disease are indeterminate. *Id.*; *Kelley*, 1 S.W.3d at 48. Work conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. *Id.*

Employee has shown that her daily work environment exposed her to the hazard of contracting an occupational disease, mold sensitization, and that there was and is a direct causal connection between the conditions under which she performed this work, and the contraction of the occupational disease.

Employee testified that entry into her lower level classroom in the Fall of 2001 was delayed due to flooding. When employee entered the classroom she noticed a moldy odor, noticeable water damage on the books, spots of mold and black discoloration under the desks. She testified that within the first couple of weeks of starting the 2001-2002 school year that she became ill and missed several days of work. After a couple of months of working, she began experiencing fatigue, breathing difficulties, itchy eyes, a runny nose and cough; after a few more months, she began experiencing difficulty sleeping, snoring, and an unusual menstrual cycle. Prior to the Fall of 2001, employee had never experienced such problems and had never sought treatment for asthma or allergies. Employee noticed that symptoms improved when she was away from the classroom and got worse when she resumed working. She also noticed that her students were experiencing similar health problems.

Employee sought medical treatment and was initially diagnosed with viral bronchitis; she was prescribed allergy medication and a rescue inhaler. She notified the school's principal that she believed her symptoms were being caused by mold in her classroom; at that time, she was moved to a different classroom down the hall. Employee testified that her original classroom was sealed with plastic and duct tape and no longer used. The school performed air quality tests both inside the classrooms and outside of the school. Air samples were taken before and after the school cleaned the classroom. The testing was done when the classrooms were unoccupied which is noteworthy because the tests only pick up what is in the air at a particular time; without any activity in the classroom, the mold may have been left undisturbed on supplies. The tests, for the most part, did not reveal higher levels of mold inside than outside; however, mold was present in all locations. Employee testified that she collected dry samples of mold on her last workday in May of 2002. The samples revealed the presence of the

mold *Aspergillus Niger*. Employee resigned at the end of the 2001-2002 school year.

Since the exposure at work, employee continues to experience respiratory symptoms, including losing her breath when engaged in physical activities, the inability to read aloud for prolonged periods, the need to avoid exposure to chemicals and fumes as well as the need to take medications regularly to control her symptoms.

Testifying on behalf of the employee were co-employees, Pam Herd and Diana Horton, who also worked for the employer as teachers in lower level classrooms; in general, they testified as to the same type of work environment as described by employee. Ms. Horton testified that she began working for employer in 1971 and witnessed employee's classroom flooded ankle deep. She testified that the room flooded every time it rained and that the room was subsequently dried with fans. She noticed ongoing problems with mold in the classroom especially under the desks and on the children's mats. Employee's classroom wasn't the only lower level classroom that had problems with mold. Ms. Horton testified that during the 2001-2002 school year that she had similar problems in her classroom. In the Spring of 2002, Ms. Horton testified that she became ill as a result of her work environment, specifically mold exposure. She noticed difficulty breathing and was diagnosed with asthma and prescribed medication and an inhaler. Ms. Horton's treating doctor diagnosed her with asthma and noted that he had treated other teachers who were working at the same school for similar problems. He opined that her exposure to toxins/allergic substances in the classroom was the cause or contributing cause to her allergic asthma.

Ms. Herd testified that she began working for employer in 1981 and witnessed flooding over the years. She observed mold on bookcases and supplies and was reimbursed by the school district for her own supplies that were ruined due to mold. Ms. Herd testified that she had students removed from her classroom, due to illness or by the request of a parent, and transferred to a classroom upstairs that did not have a history of flooding and mold problems. She was also moved from her classroom to a classroom upstairs because of problems she was experiencing which she believed were due to mold exposure including persistent nose sores and an unusual menstrual cycle. She testified that her problems remained until she quit working for employer. Ms. Herd testified that she observed employee's symptoms including breathing difficulties when exposed to the environment in her classroom.

In addition to the compelling testimony provided by employee and her co-workers, there was persuasive expert testimony. Through expert testimony, employee was able to establish that her work conditions were a major contributing factor to the disease. Dr. Schwartz, a pulmonary specialist, performed tests including a simple allergy test (IgE) as well as an allergic bronchopulmonary aspergillosis panel (IgG). The testing revealed a IgG reaction to *Aspergillus Niger*; which has a memory associated with it causing a systemic reaction as opposed to a local irritation as with simple allergies. Dr. Schwartz diagnosed her with an allergy to *Aspergillus Niger*. Dr. Schwartz opined that the amount of exposure or concentration of mold does not indicate whether or not a person will become sensitized; however, it is dependent upon whether the mold was recognized. Dr. Schwartz concluded due to employee's workplace environmental history, presence of visible fungal material, and exacerbation of symptoms by re-exposure that her workplace mold exposure was a substantial factor in the causation as well as later aggravation of her condition.

Dr. Mark Lichtenfeld offered a similar opinion. He reviewed Dr. Kerby's methocholine challenge test which revealed a 28% drop in forced vital capacity showing a definite sensitization to an allergen; a positive test in terms of having reactive airways disease. He also believed that employee's comprehensive pulmonary function test was consistent with occupational asthma. Dr. Lichtenfeld diagnosed employee with occupational asthma, systemic sensitization to *Aspergillus Niger*, allergic rhinitis, and conjunctivitis. Dr. Lichtenfeld further indicated employee's condition is permanent and that lifelong treatment is necessary. Dr. Lichtenfeld gave the following restrictions: avoid fumes, noxious scents, temperatures above 85 degrees, and excessive exertion or a rapid pace. In Dr. Lichtenfeld's opinion, employee's medical condition was a direct result of chronic exposure to mold, *Aspergillus Niger*, in the workplace and a substantial cause of the diagnosis. This opinion was based upon his examination of employee as well as a review of employee's medical records and test results. Dr. Lichtenfeld rated the employee at 27½% permanent partial disability to the body as a whole due to the exposure to mold while performing her job duties.

I find the opinions of Dr. Lichtenfeld and Dr. Schwartz to be most persuasive, credible and worthy of belief. Based on the medical evidence and testimony, it is reasonable to conclude that employee was exposed to mold at work;

and that the conditions were a substantial factor in the cause of her condition; and that her exposure was greater than that to the general public. Therefore, employee has a compensable occupational disease.

There was sufficient evidence to establish that employee's repeated exposure to Aspergillus Niger at her work was a substantial factor in the development of her mold sensitization. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee:	Deann Henley	Injury No. 01-161013
Dependents:	N/A	Before the
Employer:	Fair Grove R-10 School District	DIVISION OF WORKERS'
Additional Party:	Second Injury Fund is dismissed.	COMPENSATION
Insurer:	Music c/o Gallagher Bassett Services, Inc.	Department of Labor and Industrial
Hearing Date:	June 15, 2006 and July 14, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: VRM/meb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: October 10, 2001
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee -- a teacher -- alleged that she contracted an occupational disease as a result of exposure to mold at the school.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Alleged disease to the respiratory system.

14. Nature and extent of any permanent disability: None related to work.
15. Compensation paid to-date for temporary disability: None related to work.
16. Value necessary medical aid paid to date by employer/insurer? None.

17. Value necessary medical aid not furnished by employer/insurer? \$4,078.95
18. Employee's average weekly wages: \$494.18
19. Weekly compensation rate: \$329.42 PPD
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: Dismissed.

TOTAL: NONE

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Deann Henley

Injury No: 01-161013

Before the

**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A
Employer: Fair Grove R-10 School District
Additional Party Second Injury Fund is dismissed.
Insurer: Music c/o Gallagher Bassett Services, Inc.

Checked by: VRM/meb

INTRODUCTION

On June 15, 2006, the parties appeared before the undersigned administrative law judge for a final hearing. Attorney Michael Mayes represented the Employer, Fair Grove School District R-10. The Employer is self-insured through Music c/o Gallagher Bassett Services, Inc. Deann Henley, the Claimant, was present and represented by her attorney David Jerome. The Claimant voluntarily dismissed any claim against the Second Injury Fund.

Shortly before the date of the scheduled hearing, the Claimant requested a continuance. Claimant's counsel had learned that there were other employees of the Fair Grove School who claimed to have suffered symptoms related to mold exposure. The request for continuance was denied but the record was left open to allow the parties the opportunity to submit additional evidence. The record closed on July 14, 2006. Parties filed suggestions in support of their positions on that same date.

STIPULATIONS

The parties stipulate that Claimant Deann Henley was an employee of the Fair Grove School District R-10, a covered employer. There is no dispute with respect to notice, statute of limitations, or venue. The parties agree that Claimant's permanent partial disability rate is \$329.42. There is no claim for temporary total disability.

ISSUES

The issues remaining for trial are as follows:

- Did Claimant suffer an occupational disease?
- Is Claimant's condition causally related to her work for the Employer?
- Is Employer liable for \$4,078.95 in past medical care?
- Is Employer liable for future medical care?
- What is the extent of permanent partial disability, if any?

EXHIBITS

The following exhibits are admitted on behalf of the Claimant without objection:

- Exhibit A - Deposition of Dr. Oscar Schwartz

- Exhibit B - Deposition of Dr. Mark Lichtenfeld
- Exhibit C - Medical Records of Dr. Scott Ellis
- Exhibit D - Medical Records of St. John's Physicians and Clinics
- Exhibit E - Medical Records of St. John's Regional Health Center
- Exhibit F - Medical Records of Dr. Tina Ward
- Exhibit G - Medical Bills Summary & Medical Bills
- Exhibit H - Air Samplings from Sunbelt Environmental Services, Inc.
- Exhibit I - Photographs of Classroom
- Exhibit J - Deposition of Dr. Timothy McNichols
- Exhibit K - Diagram of the school created by witnesses

These exhibits are admitted on behalf of the Employer without objection:

- Exhibit 1 - Deposition of Dr. Gerald R. Kerby
- Exhibit 2 - Deposition of Dr. Gerlad R. Kerby in the case of Diana Horton
- Exhibit 3 - Medical records of Diana Horton

Absent a specific ruling, all objections in all depositions are ruled upon in accordance with this award.

WITNESSES

The following witnesses testified on behalf of the Claimant:

- Deann Henley - Claimant
- Pamela Herd - Coworker
- Diana Horton - Coworker

No witnesses testified for the Employer.

FINDNGS OF FACTS

Deann Henley

Deann Henley is a 36-year-old second grade teacher who claims she suffers from occupationally-related asthma resulting from repeated exposure to mold at the Fair Grove School. She has no prior history of allergies or asthma. During the 2001 – 2002 school year, Claimant's classroom was in the lower level of the school. This level resembles a walk-out basement. Her classroom smelled, and there was visible mold under desks and on books.

Near the beginning of the school year, Claimant had problems sleeping; and she experienced menstrual irregularities. She developed trouble breathing upon exertion, which she believed was worse while she was at school. Initially, Claimant thought she had bronchitis. When her symptoms did not improve, she sought medical treatment. On her doctor's suggestion, the Employer moved Claimant's classroom. But her classroom remained on the lower level of the school, and Claimant continued to have symptoms of shortness of breath. Claimant's family physician prescribed for Claimant a number of medications, including a rescue inhaler. While these medications improved Claimant's condition, they did not completely

resolve them.

Although Claimant eventually resigned her position at the Fair Grove School and moved to the state of Texas, she continues to have problems breathing and with chest tightness when exposed to vapors, chalk, and cleaning supplies. She experiences difficulty reading aloud or playing with children for extended periods of time. She currently takes Singulair, Rhinocort, Advair, and Allegra. She uses a rescue inhaler only infrequently and no longer uses a nebulizer. **Pamela Herd - coworker**

Pamela Herd had been employed at the Fair Grove School as a teacher since 1981. In July 2000, Ms. Herd observed water in a lower level classroom, a water line of six to eight inches on the walls, wet carpet, and a strong odor and obvious mold on books. In the Fall 2001, she experienced sores on her nose and had problems with her menstrual cycle. She substantiated that Claimant experienced breathing problems that year. Ms. Herd also noted that the parents of an asthmatic child in her class had asked that the child be moved to a different classroom because he was experiencing more illnesses that year. After Ms. Herd's classroom was moved to the upper level of the building, the child improved; and the witness's own symptoms resolved by the end of the school year.

Dianna Horton - coworker

Another teacher, Dianna Horton, testified that she had been employed at Fair Grove School from 1971 until she retired after the 2004 school year. She explained, however, that she had taken a few years off from teaching before her retirement. Ms. Horton iterated that the school had experienced a number of flooding or water problems over the years, requiring extensive repairs. While the repairs lessened the severity of the moisture problems, Ms. Horton said the problems still existed, including observable mold on cabinetry and on her desk, and water spots on the carpets.

During the 2001-2002 school year, Ms. Horton began having chest pains and breathing problems. She believed her problems were worse while at school. She saw the school nurse who eventually referred her to a physician. Ms. Horton began taking a number of prescribed medications and found that she could not function without them. Ms. Horton has filed a workers' compensation claim alleging that her physical problems are related to mold at the school. Ms. Horton admitted that, in addition to certain molds, she also has allergies to ragweed and juniper. She admitted that there are molds to which she has no identified allergy.

Medical Records – Dr. Scott Ellis

When Claimant saw her family physician, Dr. Ellis, on November 13, 2001, she complained of fatigue, body aches, and chest congestion with a productive cough. The doctor's initial diagnosis was viral bronchitis, but he indicated that asthma was a possibility. Claimant saw Dr. Ellis again in January 2002, but the physician's records do not reflect any complaint of breathing problems. His medical notes from March 2002 indicate that claimant's peak flow level was below normal. He prescribed for Claimant a number of medications, including an Albuterol inhaler and Advair. In a letter dated April 25, 2002, Dr. Ellis wrote: "With all other factors being the same, it seems pretty clear that the patient was reacting to some type of allergen or irritant in the school building." Dr. Ellis then sent Claimant for a pulmonary function study. The

results were interpreted as a normal spirometry. Dr. Ellis referred Claimant to Dr. Gregory Lux, an allergist, and to Dr. James Hargis, a pulmonologist.

Medical Records – Dr. James Hargis

Claimant saw Dr. Hargis on May 1, 2002, after she had been off her medication for approximately one week. Her physical examination was normal. Repeat pulmonary function test results were normal. A subsequent methocholine challenge test performed in July 2002 was negative for asthma. Dr. Hargis noted that Claimant exhibited no evidence of asthma or hypersensitivity pneumonitis.

Medical Records – Dr. Gregory Lux

Dr. Lux saw Claimant on May 30, 2002. He noted that the environmental mold survey taken at the Fair Grove School produced relatively unremarkable results because the mold content of the indoor spaces was less than similar cultures obtained outside of the school rooms with an ambient environmental survey. Dr. Lux diagnosed chronic rhinitis and chest discomfort with an unknown etiology.

Medical Records – Dr. Tina Ward

Dr. Ward saw Claimant in 2004 for a number of complaints. Dr. Ward questioned whether claimant suffers from asthma, writing “Unclear whether truly has asthma or just allergies and reaction to mold in past.” (Claimant’s Ex. F – entry of 3/7/04).

Deposition - Dr. Oscar Schwartz

Dr. Schwartz, board certified in internal medicine-pulmonary disease, said the test results from the Global Environmental Laboratories revealed the presence of a mold known as *Aspergillus Niger* on the dry erase board in classroom LL2, in the lower level of the building. He said Claimant showed a positive IgG reaction to *Aspergillus Niger* on a RAST (Specific Allergen Test) and an IgE reaction on a test for simple allergies. According to Dr. Schwartz, the positive RAST result demonstrates that Claimant has a systemic reaction to the *Aspergillus Niger* mold, and not just a simple allergy. Based upon the history of the workplace environment, visible fungal material, the confirmation of agents that could be implicated in the development of the employee’s disorder, and Claimant’s complaints of exacerbation of symptoms when reexposed, Dr. Schwartz concluded that Claimant’s exposure at school to the mold was a substantial factor in the causation and aggravation of her condition.

Dr. Schwartz admitted that *Aspergillus Niger* is a “very common mold,” generally not found in high concentrations except where organic materials are decomposing, such as in mulch piles or gardens (Ex. A, p. 15). Dr. Schwartz did not believe one could completely avoid molds. Dr. Schwartz did not have a copy of the air quality sampling from the school. He admitted that the bulk samples did not have a reference to the concentration of *Aspergillus Niger* in the outside air. He acknowledged that the *Aspergillus Niger* was not found in high concentrations at the school, but opined that the concentration of the mold was unimportant. “It is whether it is present or not.” (Ex. A, p. 18).

Deposition - Dr. Mark Lichtenfeld

Dr. Lichtenfeld believed that Claimant suffers from occupational asthma, sensitization to *Aspergillus Niger*, allergic rhinitis, and conjunctivitis. He rated Claimant as having a 27.5 percent permanent partial disability. He also stated that Claimant required ongoing treatment, including a number of medications. He agreed that Claimant's current complaints regarding aggravating factors and her treatment are not peculiar to occupational asthma. He also admitted that there was no *Aspergillus Niger* found in the air quality testing.^[1]

Deposition – Dr. Timothy McNichols – Ms. Horton's case

Dr. McNichols treated Ms. Horton, Claimant's coworker. Dr. McNichols diagnosed Ms. Horton with allergic asthma and prescribed for her a number of medications for the treatment of asthma. While Dr. McNichols believed Ms. Horton's condition was triggered by an exposure to something at the Fair Grove School, he was unaware of any toxins to which Ms. Horton was exposed at the school. He agreed that adult onset asthma may be idiopathic.

Deposition of Dr. Gerald Kerby – Ms. Henley's case

Dr. Kerby is board certified in internal medicine with a subspecialty in pulmonary disease. He has had an interest in occupational lung disease for 30 years. He examined claimant, reviewed x-rays, and administered pulmonary function tests. Dr. Kerby said the claimant's x-rays were normal and her lung function was normal, although he did observe that claimant had "sort of borderline bronchial hyperreactivity." (Kerby Depo. p. 7). While this result could indicate the presence of asthma, it could also indicate allergic rhinitis, hay fever, or any kind of an inflammatory process in the airways such as viral bronchitis.

Dr. Kerby said people are genetically predisposed to develop antibodies against environmental antigens. A person is only bothered by the molds to which they have antibodies. When exposed to higher than usual concentrations of an inhaled antigen, the body develops antibodies of the IgE class or IgG class. The former manifests as upper and lower respiratory allergies, including asthma, which is an obstructive problem. The IgG class results in hypersensitivity pneumonitis or allergic alveolitis – a restrictive lung disease. Dr. Kerby said nothing suggests that Claimant suffers from hypersensitivity pneumonitis in that her chest x-rays and pulmonary function tests were normal.

Dr. Kerby also explained that the development of a sensitization to mold occurs when "one is exposed to very high concentrations of the mold." (Kerby Dep. P. 16). While Dr. Kerby admitted that there is no defined level of what is a "very high concentration," in Claimant's case there is no evidence that the concentration of a mold in the school was greater than that outdoors or at her home. Dr. Kerby opined that Claimant probably suffered an acute inflammatory bronchitis in the summer of 2001, which was likely viral in nature. It has slowly subsided, although she continued to have some borderline bronchial hyperreactivity.

Deposition of Dr. Kerby and Medical Records – Ms. Horton's case

Ms. Horton (Claimant's co-worker) was tested for allergen responses to mold and exhibited an increased response to *Alternaria* mold. This is not the same mold to which Claimant had a reaction. Ms. Horton also had a positive allergy skin test for several grasses, juniper and ragweed. Dr. Kerby did not believe Ms. Horton suffered from asthma.

Sunbelt Environmental Air Quality Testing

The Employer engaged the services of Sunbelt Environmental to perform air quality testing at the Fair Grove School. Air samples taken on May 31, 2002, from classroom LL4, demonstrate mold counts lower than those outside the school. Air samples taken on June 21, 2002, demonstrate that only *Penicillium* and *Sporotrichum* in classroom LL3 and *Penicillium* and *Geotrichum* in classroom LL4 were greater than those outside the school. There also was a low level of *Aspergillum* variety 1 in LL4. Additional tests performed in August 2002 showed that all strains of mold in the school were at levels lower than that found in outside air. A test in September 2002 detected only two classrooms having mold greater than that found in outside air: Classroom LL1 had a low level of *Stachybotrys*; and classroom LL4 had a low level of *Drechslera*. *Aspergillus Niger*, to which the claimant was found to have an allergy, was not identified on the air quality testing.

Other Mold Testing

Claimant took dry, bulk samples of mold she observed at the school. Testing on these samples revealed a low level of *Aspergillus Niger* present on a dry erase board stored on the stage in room LL2, and on an air intake vent in LL4.

CONCLUSIONS OF LAW

Lay testimony, the pictures of the inside of the school, and the diagram demonstrate that some type of visible mold was present in the lower level classrooms of the Fair Grove School during the 2001-2002 school year. The testimonies of Ms. Herd, Ms. Horton, and Claimant establish that some teachers and some students experienced physical complaints during the same school year. But, the simultaneous presence of some mold in a building and an increase in physical complaints among some of its inhabitants is hardly proof that the mold is a substantial factor in the cause of the complaints.

Claimant bears the burden of proving a direct causal relationship between the conditions of her employment and an alleged occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo. App. W.D. 1999), *overruled in part by Hampton*, 121 S.W.3d at 226. In meeting that burden of proof, Claimant must have expert testimony establishing that the claimed occupational disease was caused by conditions in the workplace. *Smith v. Donco Const.*, 182 S.W.3d 693, 699 (Mo. App. S.D., 2006); *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48-49 (Mo. App. E.D. 1999). Expert evidence must establish the causal connection by a reasonable probability. *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. E.D. 1996) overruled on other grounds, *Hampton*, 121 S.W.3d 220. Absent expert testimony on the issue of causation, a finding for Claimant would be based on mere conjecture and speculation and not on substantial evidence. *Jacobs*, 991 S.W.2d at 696. Where there are conflicting medical expert opinions, as in the instant case, the fact-finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. S.D. 1984). The Administrative Law Judge may reject all or part of one party's expert testimony and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993).

No expert evidence or medical records suggest that the sores on Ms. Herd's nose had any relationship to an exposure to mold. That Claimant and Ms. Herd both experienced menstrual difficulties may be nothing more than pure coincidence, and there is no medical evidence tying such conditions to mold. And, while Ms. Horton contends she has asthma as a result of her work at Fair Grove, her situation is different from that of Claimant.

First, Ms. Horton worked for the Fair Grove School for many years more than Claimant and during those years experienced flooding and moisture problems at the school. Thus, her purported exposure to mold may have been much greater or for a longer period of time. The mold to which each woman has shown some reaction is also different. Claimant exhibited reactions only to *Aspergillus Niger* and *Hormodendrum* molds, only one of which was shown to have been present in the school. Ms. Horton's reaction was to a different mold. Dr. Kerby explained that a person is only bothered by the molds to which they have antibodies. Thus, even if Ms. Horton had exhibited some symptoms similar to Claimant, such fact would not necessarily support a finding of causation when they had antibodies to different substances. I do not find the testimonies of Ms. Horton and Ms. Herd to be persuasive on the issue of causation.

Of the two molds to which Claimant exhibited a reaction, only *Aspergillus Niger* was present in small amounts on two bulk samples obtained on a dry erase board and on an air intake vent. But Claimant's contention is that she developed occupational asthma – a respiratory condition. Thus, the air samples, rather than bulk samples, appear to be the most accurate measure of determining the concentration of the mold and its potential causal effect. The air sampling did not reveal the presence of *Aspergillus Niger* in any concentration greater than the outside ambient air.

Dr. Schwartz was unaware of the air quality sampling, but he said the concentration of the mold made no difference anyway. He said the mere presence of the *Aspergillus Niger* at the school was a substantial factor in the causation of the Claimant's alleged occupational disease. This opinion on causation is not credible when the doctor also readily admits that *Aspergillus Niger* is a common mold, often found in high concentrations in places such as mulch piles and gardens (neither of which was shown to be around the school building). And he admitted that one could not avoid mold. In effect, Dr. Schwartz's opinion indicates that Claimant could have been exposed to the *Aspergillus Niger* at any number of locations and any exposure could have been sufficient to cause her condition.

Dr. Kerby stated that sensitization to a mold occurs when one is exposed to a high concentration of the mold. Even if a small concentration could be sufficient, when the mold is present in greater concentration outside than inside, "then you're probably more likely to be sensitized from being outdoors rather than being in a school room." (Ex. 1 p. 29). Since *Aspergillus Niger* was not found in a high concentration within the school, Dr. Kerby stated that there was nothing to support a mold-induced environmental occupational lung disease. I find this opinion credible and conclude that Claimant's alleged exposure to *Aspergillus Niger* at the Fair Grove School was not a substantial factor in the development or exacerbation of an occupational illness. Moreover, the Claimant's records raise significant question as to whether she even suffers from asthma, much less occupational asthma. The results of tests administered by Dr. Lux and Dr. Hargis and their medical records suggest that claimant does not have asthma. Even Dr. Ward, who treated the claimant two years after her

employment with Fair Grove, questioned the diagnosis of asthma. Dr. Kerby believed claimant suffers from viral bronchitis, but not asthma. In any event, Claimant's condition is not work related.

Claimant's counsel submits as precedent the case of *Montgomery v. Sachs Electric Co.*, Inj. No. 98-160233 (LIRC Feb. 25, 2003), in which the employee was found to have a permanent partial disability after her exposure to "toxic mold" in the course and scope of her employment as an electrician. The *Montgomery* case presents more differences than similarities to the instant case. As the opinion in the *Montgomery* reveals, the employee was exposed to *Stachybotrys*, a mold that can have toxic properties. This is not the same type of mold to which Claimant Henley exhibited a reaction. Testing on materials from Montgomery's workplace revealed "high toxicity." There is no evidence of "high toxicity" in the instant case. There was no dispute by the employer's doctor in *Montgomery* that the employee could have inhaled *Stachybotrys* toxins. Here, there is substantial dispute as to whether the claimant inhaled any mold. The testimony in *Montgomery* was that the level of mold contamination in the work place was "excessive, extreme, and very unusual." (Slip op. 12). There is no evidence of high concentration of the mold in the instant case. Further, Ms. Montgomery was diagnosed as suffering from "fungal mycotoxicosis" which is "poisoning by fungal exposure." (Slip. Op.12). No evidence of such poisoning is alleged or suggested in any medical record in the instant case. The *Montgomery* case does not support Claimant's contentions in the instant case.

Based on the record as a whole and the foregoing discussion, the claim of Ms. Henley is denied.

Date: August 29, 2006

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret
Director
Division of Workers' Compensation

^[1] Dr. Lichtenfeld speculated as to what might have been found on a carpet sample removed from the school prior to the 2001-2002 school year. Counsel's objection to the physician's comments as speculation is sustained.