

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

Injury No.: 07-134568

Employee: Nanette J. Kirkey

Employer: City of Springfield

Insurer: Self-Insured c/o Corporate Claims Management, Inc.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 13, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued May 13, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 24<sup>th</sup> day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Nanette J. Kirkey

Injury No. 07-134568

Dependents: N/A

Employer: City of Springfield

Insurer: Self-insured Employer

Additional Party: N/A

Hearing Date: April 9, 2010

Checked by: LTW

### 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: Allegedly February 8, 2007
5. State location where accident occurred or occupational disease was contracted: Allegedly Springfield, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Not Addressed. (See Award)
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? N/A (Self-insured Employer)
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleges occupational exposure to mold while performing administrative and clerical duties in the office.
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: Allegedly Body as a Whole
14. Nature and extent of any permanent disability: Not Addressed (See Award)
14. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Nanette J. Kirkey

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$683.48
- 19. Weekly compensation rate: \$455.65 for TTD / \$376.55 for PPD
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None

Unpaid medical expenses: None

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

Weeks of disfigurement from Employer: N/A

Permanent total disability benefits: None (Claim for Compensation Denied)

- 22. Second Injury Fund liability: N/A

TOTAL: None (Claim for Compensation Denied)

- 23. Future requirements awarded: None (Claim for Compensation Denied)

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Nanette J. Kirkey

Injury No. 07-134568

Dependents: N/A

Employer: City of Springfield

Insurer: Self-insured Employer

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on April 9, 2010. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about April 30, 2010.

The employee appeared personally pro se.<sup>1</sup> The employer and insurer appeared through their attorney, Jerry Harmison, Esq.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about February 8, 2007 the City of Springfield (a governmental entity) was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured.
- (2) On the alleged injury date of February 8, 2007 Nanette Kirkey was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The accident or incident of occupational disease occurred in Greene County, Missouri. The contract of employment between the employee and the employer was made in Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper. The Missouri Division of Workers' Compensation possesses jurisdiction in this case.
- (4) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.

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<sup>1</sup> The case was initially scheduled for evidentiary hearing on February 9, 2010. At this setting, and prior to commencement of the trial, the employee was informed of the adjudication process, including consideration that an evidentiary hearing is a formal proceeding governed by the rules of evidence. Additionally, the employee was informed of her right to secure legal counsel. Following this discussion, the employee requested a continuance in order to afford her opportunity to secure legal counsel. The motion was sustained, resulting in the case being rescheduled for April 9, 2010. The employee did not secure legal counsel and proceeded to evidentiary hearing pro se.

- (5) At the time of the alleged accident or incident of occupational disease the employee's average weekly wage was \$683.48, which is sufficient to allow a compensation rate of \$455.65 for temporary total disability compensation, and a compensation rate of \$376.55 for permanent partial disability compensation.
- (6) Temporary disability compensation has not been provided to the employee.
- (7) The employer and insurer have not provided medical treatment to the employee.

The sole issues to be resolved by hearing include:

- (1) Whether the claimant sustained an accident or incident of occupational disease on or about February 8, 2007; and, if so, whether the accident or occupational disease arose out of and in the course of employment?
- (2) Whether the employee gave the employer proper notice of the injury, as required by Section 287.420, RSMo?
- (3) Whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed?
- (4) Whether the employer is obligated to pay for certain past medical care and expenses?
- (5) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (6) Whether the employee is entitled to temporary disability benefits?
- (7) Whether the employee sustained any permanent disability as a consequence of the alleged accident or occupational disease; and, if so, what is the nature and extent of the disability?

### **EVIDENCE PRESENTED**

The employee testified at the hearing in support of her claim. Also, the employee offered for admission the following exhibits:

- Exhibit A..... Medical Records (Not Certified)
- Exhibit B..... Photographs  
(B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12, B-13, B-14, and  
B-15)
- Exhibit C. .Center for Disease Control/Online Source Information (Not Certified)

Exhibit D.....EPA Online Source Information (Not Certified)  
Exhibit E .....Letters from Employer Attorney & TPA  
Exhibit F .....Performance Evaluation Letters from Employer to Employee  
Exhibit G..Allergy & Asthma Network, Allergy & Asthma Today, Vol. 1, Issue 1  
Article (Not Certified)

Exhibits B, E and F were received and admitted into evidence. Exhibit E contained handwritten comments on pages 1 and 3; the handwritten comments were stricken in admitting the exhibit. Exhibits A, C, D and G were received but denied admission.

The employer and insurer presented one witness at the hearing of this case – Tim Sterling, CIH, CSP. In addition, the employer and insurer offered for admission the following exhibit:

Exhibit 1..... Environmental Report

The exhibit was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing (April 9, 2010)
- Notice of Hearing (February 9, 2010)
- Minute Entry
- Request for Hearing-Final Award
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury
- Transcript of February 9, 2010 Proceeding

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

### **FINDINGS AND CONCLUSIONS**

The employee Nanette J. Kirkey, is 53 years of age, having been born on May 4, 1957. Ms. Kirkey resides in Springfield, Missouri.

Ms. Kirkey obtained employment with the City of Springfield in May 1987, and continues to engage in employment with the City of Springfield. In her employment with the City of Springfield Ms. Kirkey has worked in administrative or clerical positions, including working as an executive secretary in three different city departments.

In her employment with the City of Springfield, Ms. Kirkey worked in the former terminal building of the Springfield Airport [Springfield now has a new terminal building].

Notably, prior to working in the Airport department Ms. Kirkey was noted to be allergic to mold. According to Ms. Kirkey, upon transferring and engaging in work in the Airport department she began to experience health concerns. In this regard, Ms. Kirkey noted that the former terminal building had many water leaks. And while working in the former terminal building she experienced recurring sinus infections, for which she repeatedly sought and obtained medical care through her primary care physician. Additionally, she sought and obtained treatment with an allergist.

In April 2008 Ms. Kirkey took a Leave of Absence pursuant to FMLA; while off work, in September 2008, she underwent gall bladder surgery. Ms. Kirkey returned to work following use of her FMLA leave. The City of Springfield subsequently terminated Ms. Kirkey from its employment, but reinstated her following an appeal. Ms. Kirkey is now working in a different building at a different location. Ms. Kirkey notes that she is no longer suffering from sinus infections.

Exhibits offered for admission by Ms. Kirkey and admitted into evidence included favorable performance evaluation letters. Additionally, Ms. Kirkey introduced photographs of her work place, which depicted water marks and other marks on certain bricks, which Ms. Kirkey assumed to be mold.

The Employer and Insurer presented the testimony of Mr. Tim Sterling of Sterling Consulting. Mr. Sterling testified that he is a certified environmental specialist. He is not an employee of the Employer. Mr. Sterling verified that Employer/Insurer Exhibit 1 is a copy of the mold assessment report he completed on November 7, 2008, regarding the Springfield airport terminal.

The employer and insurer secured Mr. Sterling as an environmental expert to assess qualitatively the presence of mold and possible amplification in the terminal building of the Springfield Airport. Mr. Sterling testified that "amplification" means that when the indoor mold count is one to two times higher than the outdoor mold count, the air quality indoors is jeopardized. He explained there are no governmental regulations addressing the acceptable level of mold in the work place. He further noted that mold is naturally occurring in the environment.

In his environmental assessment Mr. Sterling compared samples taken in complaint areas or areas where mold growth was suspected, as well as in non-complaint areas and in the outdoor environment. In addition to taking samples in these areas, the complaint areas are also visually inspected for mold growth or evidence of amplification. In the airport terminal no mold growth or evidence of amplification was found. The air sampling revealed that the mold count for all of the complaint areas was at least ten times lower than the outdoor mold count. Additionally, the non-complaint area was actually higher than the complaint areas, but still lower than the outdoor mold count. Consequently, Mr. Sterling opines there is no evidence to suggest there is mold amplification in the area evaluated.

Mr. Sterling testified that on the date of the evaluation, the outdoor mold count was 1,190. It is not unusual in the Ozarks for the outdoor mold count to be 2,000 to 3,000. The non-complaint area which was randomly selected, the hallway next to the baggage claim, had a mold count of 224. The complaint areas included the file copy room (mold count 59), administrative

secretary office (mold count 24), terminal services location (mold count 141), and airport board room (mold count 118).

Mr. Sterling was asked to view various photographs of the work place, as reflected in Exhibit B. In multiple photographs, the photographs depict a white substance on bricks situated in the terminal building. Upon evaluating these photographs, Mr. Sterling testified that based on reasonable degree of professional certainty, the white substance on the bricks is lime leaching through the bricks. He testified that, based on a reasonable degree of professional certainty, the white substance is not mold because mold is a living organism and must have a food source. Bricks cannot provide an adequate food source to support mold growth.

In addition, Mr. Sterling was asked to view photographs 7-10 of Exhibit B which show water damage to ceiling tiles. He testified that based on reasonable degree of professional certainty, these photographs do not show mold growth. According to Mr. Sterling, in order to determine whether mold existed on ceiling tile, the top side of the ceiling tiles would need to be examined. The photographs merely demonstrate water damage.

Mr. Sterling concluded his testimony by verifying the indoor mold count was well below the outdoor mold count and, therefore, there was no mold amplification in the areas evaluated. As a result, Mr. Sterling opines, the air quality at the Springfield airport terminal was adequate.

### **Conclusions of Law**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

In addition, in order to be entitled to workers' compensation benefits, the claimant has the burden of proving . . . that the alleged injury . . . was directly caused by the accident. In other words, a claimant must establish a causal connection between the accident and the compensable injury. *Kerns v. Midwest Conveyor*, 126 S.W.3d 445,453 (Mo.App.2004). Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and asserted cause. *Gordon v. City of Ellisville*, 268 S.W.3d 454, 461 (Mo.App.2008).

#### **I.**

#### **Accident / Incident of Occupational Disease**

Ms. Kirkey testified that prior to working at the Springfield airport terminal as an executive secretary she was diagnosed with a mold allergy. She submitted into evidence Exhibit B, comprising various photographs of the Springfield airport terminal. Ms. Kirkey testified that she was of the belief that the white substance on the bricks depicted in multiple photographs is mold. She further testified that the multiple photographs of water damage on the ceiling tiles

demonstrate the existence of mold. Ms. Kirkey, however, offered no admissible evidence of her mold allergy diagnosis, the nature and extent of her mold allergy, or a causal connection between her work place and the extent of her mold allergy.

The testimony of Mr. Sterling, a certified environmental specialist, verified the white substance shown in the photographs on the terminal bricks is the leaching of lime. He testified this is not mold. He also testified that photographs depicting water damage on ceiling tiles does not verify mold exists on those tiles. The tops of the tiles would need to be analyzed to make such a conclusion. Mr. Sterling testified regarding his qualitative assessment of the presence of mold at the Springfield airport terminal and he defined “amplification”. Mr. Sterling testified that mold is naturally occurring in the environment. He took samples and visually inspected complaint areas, a non-complaint area, and the general outdoor environment to make comparisons. His assessment revealed the mold count for all of the complaint areas was at least ten times lower than the outdoor mold count. In fact, the non-complaint randomly sampled area was higher than all of the complaint areas, but still lower than the outdoor mold count. Since the indoor mold count was well below the outdoor mold count, there is no evidence to indicate mold amplification existed in the indoor areas evaluated. As a consequence, the indoor air quality at the Springfield airport terminal is adequate.

I do not find the Ms. Kirkey's opinions regarding the bricks and ceiling tiles credible or reliable, as she is not an expert and identified no specialized knowledge or education pertaining to the existence and effect of mold. I find the testimony of Mr. Sterling credible, reliable and worthy of belief. He is persuasive.

Based on the testimony of Mr. Sterling, the indoor air quality at the Springfield airport terminal was adequate at all relevant times. The white substance on the bricks is lime that leached through the bricks. Mold is a living organism and must have a food source for growth, which bricks cannot provide. The photographs of the ceiling tiles that experienced water damage do not demonstrate mold growth existed. Mold is naturally occurring in the environment. The air sampling performed by Mr. Sterling revealed that the mold count for all of the complaint areas was at least ten times lower than the outdoor mold count, verifying no “amplification” was in existence.

Further, Ms. Kirkey has failed to submit admissible medical evidence regarding her pre-existing mold allergy diagnosis, the nature and extent of her current mold allergy, and any expert opinion regarding a causal connection between her mold allergy and her work environment. As a consequence, I find claimant has failed to carry her burden of proof, and I find claimant did not sustain an accident or occupational disease on February 8, 2007, or any other date, while she was employed by the City of Springfield.

Therefore, for the foregoing reasons, the Claim for Compensation is denied. All other issues not addressed herein are rendered moot.

Made by: \_\_\_\_\_

L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*  
(Signed May 11, 2010)

This award is dated and attested to this 13<sup>th</sup> day of May, 2010.

/s/ Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*