

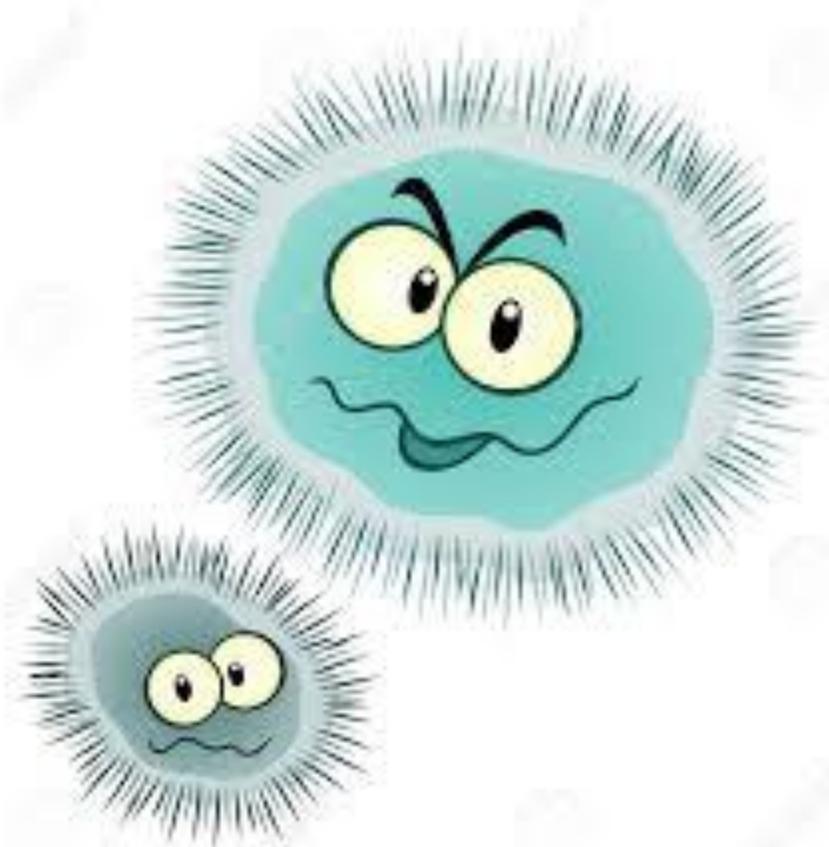
OUT WITH THE MOLD IN WITH THE NEW

A LEGAL PERSPECTIVE

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SOURCES OF EXPOSURE

- ▶ Most mold exposure related injuries are asserted by employees in buildings with consistent water or sewage leaks, water stained ceilings, and water stained carpets.
- ▶ Claimants frequently testify to musty smells.



IDENTIFYING MOLD RELATED HEALTH ISSUES



- ▶ Mold allergy can cause:
 - ▶ cough,
 - ▶ itchy and/or watery eyes,
 - ▶ restricted breathing,
 - ▶ sneezing,
 - ▶ runny or stuffy nose,
 - ▶ dry and scaly skin,
 - ▶ shortness of breath,
 - ▶ wheezing, and
 - ▶ asthma.

ANCILLARY ISSUES:

- ▶ Unusual Injuries include: fatigue, neck pain, nausea, vertigo, and psychological conditions
- ▶ More severe allergic conditions caused by mold: mold-induced asthma; allergic fungal sinusitis; allergic bronchopulmonary aspergillosis; hypersensitivity pneumonitis; and infections of the skin or mucous membranes.
 - ▶ However, systemic infections are rare except for individuals with impaired immune systems, such as those who have HIV/AIDS or who are taking immunosuppressant medication.





"I'm going to need a little help cleaning the staff fridge."

OCCUPATIONAL DISEASE OR INJURY?

Claimants want to classify a mold related injury as an "occupational disease" per Section 301(c)(2) because it affords them procedural benefits

Benefit 1: Presumption of Causation

Benefit 2: Discovery Rule Applies

School district employees are unlikely to meet the Occupational Disease burden. Claims by school district employees for injuries caused by mold exposure will likely be analyzed under the "injury" standard of Section 301(c)(1)

OCCUPATIONAL DISEASE BENEFIT 1: PRESUMPTION OF CAUSATION



Claimant does NOT have to establish the existence of mold in the workplace!



The claimant bears the preliminary burden of “prov[ing] that he has an occupational disease, and this burden a claimant must meet in the ordinary fashion, by competent medical testimony.”



Claimant need not produce scientific evidence to prove the existence of a hazard.

BENEFIT 2: DISCOVERY RULE APPLIES

The 3 year filing deadline imposed by Section 315 of the Act may be tolled based on the discovery rule in “occupational disease” cases brought under Section 108 of the Act.

Kochan v. WCAB: Commonwealth Court denied Claimant’s request to extend the discovery rule to a mold case brought under Section 301(c)(1).

Kochan v. WCAB (Keystone Automotive Operations), 2012 WL 8685268 (Pa. Cmwlth. April 13, 2012).

STANDARD WORKERS' COMPENSATION INJURY CLAIM CLAIMANT'S BURDEN

- ▶ Standard Burden of Proof
 - ▶ Injury
 - ▶ Which occurred during the course and scope of employment, AND
 - ▶ Injury affected earning power
- ▶ Burden of Proof is on Claimant to establish all elements.



LEGAL RAMIFICATIONS FOR MOLD RELATED INJURIES



PRE-LITIGATION

Employers can minimize liability exposure by carefully describing injuries in the TNCP

Relocate the employee!

- Lower medical costs and instances of litigation

- Undermine Claimant credibility

Return to work conditioned on remediation

- Air purifier or relocation

Verizon Pennsylvania, Inc. v. WCAB (Hernandez), 2009 WL 9102822 (Pa. Cmwlth. Sept. 16, 2009).

CLAIMANT BURDEN

Injury

- Any symptom can be an injury
- Aggravation of Pre-Existing Condition

Course and Scope of Employment

- Injury must be caused by exposure to mold in the workplace
- Claimant testimony re: mold in workplace
 - Expert testimony unnecessary: *Wise Foods v. WCAB*
- Doctor opinion: claimed injury caused by work mold exposure
 - Reliance on Claimant's assertion
 - Medical expert opinion viewed as a whole: *Verizon v. WCAB**

Earning Power

- Inability to work at time of injury job
- Possible alternative assignment and modified duty

**Verizon Pennsylvania, Inc. v. WCAB (Hernandez)*, 2009 WL 9102822 (Pa. Cmwlt. Sept. 16, 2009).



"I'd say it's a fungal infection."

EXPERT TESTIMONY: IME

IME with a pulmonary specialist

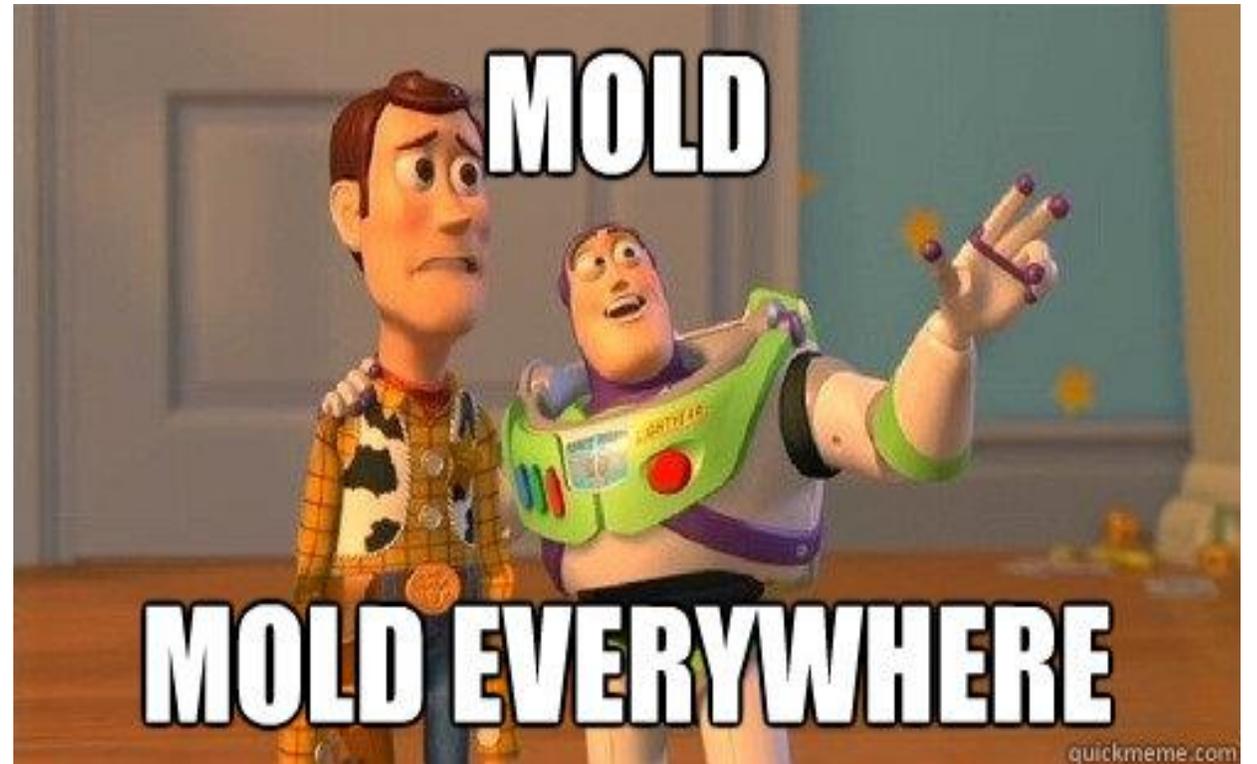
IMEs for mold related injuries may include diagnostic testing!

Always need to obtain all medical records

IME physician's testimony regarding causation

EXPERT TESTIMONY: ENVIRONMENTAL SPECIALIST

- ▶ Environmental specialist regarding causation / existence of mold
 - ▶ Be aware of Claimants self-testing the office space!
 - ▶ Specialist testimony re: veracity of self testing



EXPERT TESTIMONY: CHANGES IN CONDITIONS



- ▶ Change in condition from injury to environmental evaluation
 - ▶ *Wise Foods, Inc. v. WCAB (Carvell)*, 2018 WL 5986085 (Pa. Cmwlth. May 25, 2018).
 - ▶ *Evasew v. WCAB (Great Valley School Dist.)*, 2015 WL 5446863 (Pa. Cmwlth. June 5, 2015).

AGGRAVATION OF A PRE-EXISTING CONDITION & BASELINE

Claimant's benefits are suspended when she returns to "baseline"

Verizon Pennsylvania, Inc. v. WCAB:

Commonwealth Court determined that claimant returned to baseline as of the date of an IME rendering full recovery to establish a closed period on a claim for TTD

The Claimant is not entitled to receive benefits for pre-existing non work related conditions when the Claimant is fully recovered from any work-related injury caused by an aggravation of that condition.

If exposure results in an ongoing condition benefits continue

No restriction of work-related injury and only threat of future recurrence prevents job performance → Claimant no longer entitled to benefits at baseline

Verizon Pennsylvania, Inc. v. WCAB (Hernandez), 2009 WL 9102822 (Pa. Cmwlth. Sept. 16, 2009)

FILING A TERMINATION PETITION

- ▶ IME with diagnostic testing
 - ▶ Baseline Rule
- ▶ Surveillance
- ▶ Previous Medical Records
- ▶ Cross-examination:
 - ▶ Claimant's home environment

TERMINATED

CASE STUDY

- ▶ Claimant allegedly exposed to fumes at work
- ▶ Developed symptoms
- ▶ Intermittent disabilities



THEY FOUND BLACK MOLD IN MY HOUSE

**SO I GOT THAT GROWING
FOR ME WHICH IS NICE**