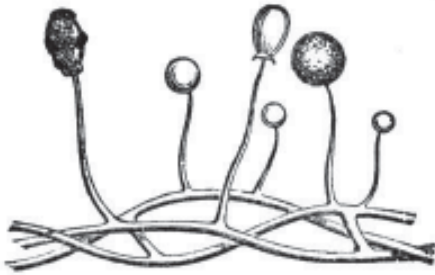


TECH Bulletin: Mold & Workers' Comp



A member of the Frankennuth Financial Group

Mold has been a high profile topic primarily focused on property and liability issues relating to allegations of construction defects and building maintenance because of the potential for large awards. With the increase in media coverage and growing public awareness of the supposed health risks associated with exposure to mold, workers compensation claim activity alleging exposure to mold is likely to increase, although, to date we have not heard that significant numbers of mold claims have been filed.



Common Mold

More and more media reports are focusing on the health hazards associated with exposure to mold. Molds are living organisms that exist everywhere. There are over 100,000 varieties of mold with some molds, under certain conditions, producing mycotoxins and volatile compounds that some experts suggest result in adverse health effects in humans. There are no conclusive scientific studies at this time that shows mold actually causes adverse health effects. However, it has been suggested that under specific conditions some molds, such as *Stachybotrys*, could be toxic and cause irritations, toxic reactions, allergies, and infections among individuals with compromised immune systems. A recent USA Today article focused on toxic mold in the workplace and the myriad of physical complaints employees are claiming such as memory problems, bloody urine, rashes, respiratory ailments and suppressed immunity, to name a few.

The headlines reporting the closure of schools, government buildings and other public places because of the presence of mold are becoming more frequent and commonplace. These stories often include reports of the physical ailments among groups of employees working in these buildings and the filing of workers compensation claims and in some instances lawsuits. The issues relating to workplace exposure to mold and workers compensation are varied and complex and include such things as causation; challenges to the exclusive remedy doctrine; the potential for a large number of claimants from one employer; subrogation; and overall workplace panic and hysteria. In general, for a workers compensation claim to be compensable the injury or occupational disease must arise out of and in the course of employment and there must be a causal relationship between the individual's symptoms or condition of ill-being and their employment. The test for causation varies from state to state but generally requires that the claimant prove that the work-related activity or exposure caused or contributed to the claimant's medical condition as a matter of medical fact.

The proof issues for determining compensability in mold exposure claims are the same as the proof issues for claims alleging "sick building syndrome" and multiple chemical sensitivities. In cases where the compensability of claims alleging sick building syndrome or multiple chemical sensitivities have been denied, the courts have reasoned that since there is no specific diagnosis attributed to the sick building or chemical exposure there is no definitive cause and effect relationship. The employee's symptoms are considered to be an ordinary disease of life. Since there are conflicting reports from the medical community as to the relationship of the exposure to certain molds and health problems, the same cause and effect issues for occupational exposure versus ordinary disease of life exist for workplace mold exposures. Other possible exposures to mold outside the workplace, such as in the home, are likely to be an issue in those cases.

Another issue to consider is exposure versus injury. An employee merely exposed to mold would not be considered to have suffered a work-related injury in most states. Exposure does not equate to injury or occupational disease if no medical condition results. There are no easy yes or no answers on the compensability of workers compensation mold claims. Each case has to be judged on its own merits and in some instances be subject to interpretation by the courts on a state-by-state basis.

Alleged workplace mold exposures could pose threats to the exclusive remedy protections in those states where the workers compensation statute contains exceptions to the exclusive remedy rule such as for "intentional tort," "willful and wanton gross negligence," and "deliberate act of the employer." Whether or not an employer's knowledge of and/or failure to act in remediation of mold on its premises would circumvent the workers compensation exclusive remedy protections for the exceptions provided by the workers compensation statutes would have to be determined by the courts.

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Because mold in office buildings and other places of employment has the potential for affecting numerous employees in a given location, it creates a situation that could lead to large numbers of employees pursuing workers compensation claims and/or suing their employer for damages for alleged physical, mental, and emotional injuries. Although many of these claims may subsequently be dismissed because of the causal relationship issues mentioned above, insurers still have to deal with increased claim frequency and in some instances claim severity and associated claim costs from classes of employees not typically considered to present a high risk of injury or exposure. The cost of defending against such claims, even if not compensable, could be substantial.

With the increased public attention on toxic molds, employees are also looking to other potentially liable parties. The employee may pursue benefits under workers compensation as well as file suit against building owners, maintenance companies and building contractors for construction defect or faulty building design. In cases where workers compensation benefits have been awarded and an action is pursued against some third party, the employer may have an opportunity for recovery of compensation benefits paid pursuant to the subrogation provisions under the workers compensation laws.

In some instances, where groups of employees have been affected, class action suits have followed. In November 2001 a petition for class action damages was filed in Louisiana District Court by a group of employees working in the Plaza Tower in Orleans Parrish. The plaintiffs allege that due to their occupancy of the Plaza Tower they have suffered from sinus and allergy problems, debilitating headaches, skin irritation, watery eyes and fatigue. They further allege that their physical ailments are the result of water leaks in the Plaza Tower resulting in the presence of unknown toxic substances. Named defendants include the employer, the leasing and management agent, the building owner, and the surplus line insurer. Similar class action suits are being filed in other jurisdictions.

The National Institute for Occupational Safety and Health (NIOSH) is currently conducting a study to determine if indoor mold is a genuine health threat causing work related respiratory illness and other health ailments. NIOSH has selected several buildings across the country for testing. Buildings selected for the study have an unusually high number of workers that are sick. NIOSH investigators are taking air and dust samples from workstations and work areas in the selected buildings. Building workers are also asked to complete a medical history questionnaire and to participate in allergy and lung function tests. The goal of the study is to determine if there is a cause and effect relationship between indoor air quality and the increased incidence of occupational asthma and respiratory ailments. It will be some time before NIOSH completes the study and makes its findings known.

The Alliance has formed a Mold Issues Task Force to examine the public policy implications of the mold issue. The task force has been charged with examining the range of issues created by the mold exposure, the litigation surrounding the issue, the media coverage, and the legislative/regulatory response. We will keep you advised of mold issues specifically impacting the line of workers compensation.