

SUPREME COURT OF LOUISIANA

No. 98-CC-1602

MICHELE O'REGAN AND RYAN O'REGAN

Versus

PREFERRED ENTERPRISES, INC.
D/B/A NUMBER ONE CLEANERS ET AL.

LEMMON, J., Concurring

When the Louisiana Workers' Compensation Act provides basic coverage for the employee's claim, compensation is the exclusive remedy, even if the claim is denied because of the employee's failure to meet the burden of proof as to another element of the claim.

This employee's claim was based on contracting myelodysplasia, a disease that can be caused by exposure to toxic chemicals, and her claim therefore was a covered claim under the definition of occupational disease in La. Rev. Stat. 23:1031.1. Causation was an essential element of this employee's covered compensation claim, and her claim was denied (in the earlier compensation action) because she failed to prove causation, and not because her claim was not covered by the Act.

The issue thus becomes whether the Legislature's raising the burden of proof for certain employees with occupational disease claims either unconstitutionally discriminates against those employees or substantially departs from the 1914 trade-off that gave rise to the Workers' Compensation Act. Pretermittting the constitutionality issue, I conclude that the Legislature's raising the burden of proof for certain employees eliminated the compensation remedy for those employees, making the employer subject to tort liability.

If La. Rev. Stat. 23:1031.1 contained only the presumption that a covered occupational disease contracted by an employee who worked for the employer for less than twelve months was not contracted in the course of and arising out of employment, but the standard for the burden of proof for causation were the normal preponderance of the evidence, then the employee clearly would have a remedy under the Louisiana Workers' Compensation Act that would be the exclusive remedy. Under such a statute, the fact that the employee cannot meet the burden of proof of causation by a preponderance of the evidence does not mean that the employee (whether on the job more than twelve months or less than twelve months) does not have a remedy under the Workers' Compensation Act; the Act clearly provides a remedy, but the employee cannot meet the standard of the normal burden of proof that applies in every compensation action.¹ When the Workers' Compensation Act provides a remedy under the normal standard of proof, this is the employee's exclusive remedy, and that rule does not change simply because the employee loses the suit filed in pursuing that remedy, whether because of failure of proof of causation, prescription or some other reason not related to coverage under the Act.

The thing that makes this case different is the higher burden of proof (especially when combined with the presumption of non-causation). An employee who can prove employment-rooted causation of a covered occupational disease by a preponderance of the evidence, but cannot prove that causation by clear and convincing evidence (the interpretation of "an overwhelming preponderance of the evidence" by the court of

¹Without the higher burden of proof contained in La. Rev. Stat. 23:1031.1, the presumption is inconsequential. An employee with less than twelve months on the job has the same burden of proof of causation as an employee with over twelve months on the job – that is, to prove causation by a preponderance of the evidence (more probable than not).

appeal in this case²), has been denied a remedy under the Act because the Legislature has eliminated that employee's compensation remedy by raising the burden of proof.³ Such an employee therefore is entitled to a remedy in tort.

Of course, we do not know in the present case whether the employee (who filed a compensation action and lost under the higher burden of proof) could have proved causation by a preponderance of the evidence.⁴ Since the Legislature never gave this employee a chance to prove causation by a simple preponderance of the evidence, she has been denied a remedy under the Workers' Compensation Act, and the tort remedy is therefore available to her if she can prove causation (and negligence) by a preponderance of the evidence.⁵

²In my concurring opinion on original hearing, I noted that I would construe "overwhelming preponderance of the evidence" simply as more probable than not, rather than above the normal standard. However, that solution is not available for this employee, who allegedly has more than \$200,000 in medical bills, because the judgment denying her compensation under the higher standard of proof is *res judicata*. I therefore must address the consequences of the legislative raising of the burden of proof.

³The Legislature, whether intentionally or not, denied certain employees – those who can prove causation of a covered occupational disease by a preponderance of the evidence – the compensation remedy when the employee cannot prove causation by clear and convincing evidence. Such an employee has been denied the advantage contemplated in the 1914 trade-off of a tort remedy (with greater recovery, subject to proof of negligence with several defenses) for a compensation remedy (with lesser, but more certain, recovery).

⁴When the district court had original jurisdiction over both tort actions and workers' compensation action, an injured employee could cumulate alternative demands in the same action. Under the present jurisdiction rules, these demands could not be cumulated in the present action.

⁵Stated otherwise, the employer should not be entitled to immunity against the tort claims of an employee who can prove causation by a preponderance (but not an overwhelming preponderance) of the evidence, because the employer has been legislatively absolved of liability for that employee's valid compensation claim which the employee never had an opportunity to assert.

