

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., Subscribing to the Opinion and Assigning Additional Concurring Reasons

The employee has the burden of proving causation in every workers' compensation case. The so-called "presumption" in La. Rev. Stat. 23:1031.1D does not shift the burden of proof as to causation, which always remains with the employee.

The statutory imposition of the "presumption" itself therefore had no effect upon the employee's burden of proof.

The more problematic provision in Section 1031.1D is the requirement of proving causation by "an overwhelming preponderance of evidence." In theory, the Legislature could grant a remedy under the Act for a particular occupational disease (thereby apparently excluding a tort remedy against the employer), but could set the burden of proof so high that the compensation remedy was in fact no remedy at all. However, that did not happen in the present case. Whatever the meaning of "overwhelming preponderance of evidence,"¹ the standard is not so high as to

¹The jurisprudence has established only three types of burdens of proof: by a preponderance of the evidence, by clear and convincing evidence, and beyond a reasonable doubt. See, e.g., Chatelain v. State, Dep't of Transp. and Dev., 586 So. 2d 1373 (La. 1991). If called upon to do so, I would interpret "overwhelming preponderance of the evidence" to fall within the first category. Under this interpretation, the Legislature clearly has not deprived an employee, who has contracted an occupational disease characteristic of his or her employment, of any remedy. The exclusive remedy is for compensation if the employee can prove by

effectively preclude any remedy under the Act and arguably entitle the employee to a tort remedy against the employer.

Moreover, even if the statutory standard were the usual preponderance of evidence and plaintiff had failed to meet that burden in this case, the issue would still be the same — whether the Act is exclusive only when the employee actually recovers compensation under the Act, or whether the Act is exclusive when the Act provides a compensation remedy for the occupational disease, irrespective of whether the employee can prove by the usual standard of proof that the employment caused the disease. The majority correctly resolves that issue by holding that the compensation scheme does not contemplate a tort remedy whenever the employee cannot prove that the particular occupational disease (which falls within the definition in the Act) was not caused by his or her employment.

a preponderance of the evidence that the employment caused the disease.