BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHRISTOPHER J. SUTHERLAND	)	**DOCKET NO. 21 15953**
	)	
	)	**DECISION AND ORDER**
CLAIM NO. SL-54303	)	**(Corrects order dated May 13, 2022)**

While working as a log scaler for Weyerhaeuser during the pandemic, Christopher Sutherland worked both in and out of doors with a teammate. When they were not working outdoors, they were permitted to sit in their vehicles or to occupy a shack. They were the only two people in the shack and they were required to maintain a social distance of at least 6 feet. Mr. Sutherland's colleague developed COVID-19. Mr. Sutherland soon followed. Our judge found that the requirement that Mr. Sutherland work with a teammate was a distinctive condition of employment at the time. He affirmed claim allowance. We disagree. We hold that COVID-19 was present in the general population and in everyday life in general. Simply being exposed to a single coworker from a distance greater than 6 feet did not give rise to a distinctive condition of employment. The Department order is **REVERSED** and the claim **REMANDED** with instruction to issue an order rejecting the claim.

This Corrected Decision and Order is issued to correct a scrivener's error in Conclusion of Law Number 2 in the May 13, 2022 Decision and Order. *Sua sponte*, we also correct the spelling of *Weyerhaeuser*, which was misspelled in the May 13 Decision and Order.

DISCUSSION

The employer, Weyerhaeuser, was engaged in essential infrastructure work. This meant that they needed to continue operations to supply lumber. The employer claimed that it strictly complied with COVID-19 guidelines. Weyerhaeuser formulated a COVID-19 response team, implemented policies, and updated employees in its Longview sawmill and export yard. As a log scaler with the company, Mr. Sutherland's job was to measure cut trees to determine the size and quality of the wood. He worked with a teammate while outside. When not working outside, Mr. Sutherland had the choice to socially distance up to 16 feet apart in a shack with his teammate or sit in his vehicle. He was never asked to have mandatory indoor contact with his colleague, although the coworker was the only other person allowed in the shack. The employer also claimed that masks were mandatory indoors prior to November 2020, and that Mr. Sutherland apparently chose not to wear a mask. Mr. Sutherland argued that masks were not required prior to his infection. Either way, Mr. Sutherland's job as a log scaler did not involve distinctive conditions of employment that would cause him a greater risk of contracting any communicable contagious disease, including COVID-19.

Simply working with a coworker does not connote a distinctive condition of employment, especially when distancing measures are both required and provided.

Mr. Sutherland's teammate tested positive for COVID-19 and Mr. Sutherland tested positive just a few days later. Even though it appears that the infection may have spread among colleagues, it is imperative that the disease be distinctive to the worker's vocation. In *Potter v. Department of Labor & Industries,*[1] the Court held that in order for conditions of employment to be distinctive, they must be conditions of the particular employment as opposed to conditions that coincidentally occur in the workplace. Potter failed to show that working in her office exposed her to a greater risk of developing multiple chemical sensitivity syndrome than the other surroundings she encountered. While Mr. Sutherland stayed home and his spouse tested negative, it is happenstance that the disease may have been contracted at Weyerhaeuser. Because COVID-19 was everywhere—much like the remodeling activity in *Potter*—it was not distinctive to Mr. Sutherland's employment as a log scaler. And even if the COVID-19 was likely spread from colleague to colleague, it is not relevant as it could've happened anywhere in Mr. Sutherland's everyday life, even if he was careful.

Dennis Stumpp, M.D., an occupational disease specialist, provided persuasive testimony regarding the distinctive conditions of employment. According to Dr. Stumpp, there is nothing Mr. Sutherland did on the job that made him at increased risk of contracting COVID-19, as it would if he had a job dealing with the general public. The doctor explained there weren't any conditions of the job itself that resulted in increased exposure to Mr. Sutherland. Dr. Stumpp also explained that COVID-19 was extant in the general population. He explained that many infected patients don't know where they were infected. Dr. Stumpp's testimony supports our determination that Mr. Sutherland's working conditions were not distinctive from everyday life in terms of increased risk of contracting COVID-19.

It has long been held that to qualify as an occupational disease the worker's disease must arise naturally out of the distinctive conditions of one's employment.[2] The requirement that the employment conditions must be distinctive to the employment at issue is so ingrained in industrial insurance law that it's even in the Washington Pattern Jury instruction for occupational disease litigation.[3] *Witherspoon v. Department of Labor & Industries*[4] is directly on point with Mr. Sutherland's

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[1] 172 Wash. App. 301, 315 (2012).
[2] *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d. 467 (1987); *Street v. Weyerhaeuser Co*., 189 Wn.2d 187 (2017).
[3] WPI 155.30 (7th ed.)
[4] 72 Wash. App. 847 (1994).

case. In *Witherspoon*, a colleague with meningitis coughed on the claimant. The worker contracted meningitis and filed an application for benefits. In affirming the rejection of the claim, the Court said that the conditions of employment must cause the worker to be in contact with bacteria. There was nothing inherent in the nature of Mr. Witherspoon's employment that caused him to be in contact with meningitis any more than he would be in everyday life. Similarly, Mr. Sutherland was not required to be in direct contact with his coworker at all. The fact that he contracted COVID-19 was a mere coincidence. Like the Court in *Witherspoon*, we decline to allow the claim when the infection was simply not a distinctive condition of employment.

In *In re Ronny L. Bays,*[5] the Board echoed the holding in *Witherspoon,* agreeing that the presence of meningitis at work is coincidental and bears no relationship to any distinctive requirements of the worker's particular job. The Board explained that distinctive conditions are required because the Industrial Insurance Act is not a general insurance policy. Rather, it protects against foreseeable risks associated with particular kinds of employment. Although the Board ultimately found that the conditions of Mr. Bays' employment were distinctive, the analysis reiterated the holding in *Witherspoon*. The Board's comments adopt the language of *Witherspoon*, further suggesting that communicable diseases are generally a function of everyday life rather than a distinctive condition of employment.

We are mindful that we continue to face historic challenges levied by the pandemic. Yet, the well-established case law squarely addresses the issue of contagious disease. We cannot deviate from industrial insurance law precedent in the absence of more compelling COVID-19 exposure on site. Even if it seems likely the worker contracted the disease at the workplace, *Witherspoon* tells us that it doesn't matter. Due to a lack of distinctive conditions of employment, Mr. Sutherland's claim for a COVID-19 infection fails to meet the definition of an occupational disease.

DECISION

In Docket No. 21 15953, the employer, Weyerhaeuser Co. & Subsidiaries, filed an appeal with the Board of Industrial Insurance Appeals on May 25, 2021, from an order of the Department of Labor and Industries dated May 6, 2021. In this order, the Department allowed the claim. This order is incorrect and is reversed. This matter is remanded to the Department to issue an order rejecting the claim.

[5] Dckt. No. 12 22019 (January 9, 2014).

FINDINGS OF FACT

1. On July 6, 2021, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Mr. Sutherland worked both in and out of doors with a teammate. Mr. Sutherland could avoid going indoors with his colleague by taking breaks in his vehicle. When indoors, the two occupied a shack where they could social distance up to 16 feet. They were required to social distance at least 6 feet. These do not constitute distinctive conditions of employment that differ from the conditions of everyday life or all employments in general.

3. Although both Mr. Sutherland and his teammate contracted COVID-19, Mr. Sutherland's infection was a coincidence and not particular to the conditions of his job. Mr. Sutherland's infection did not arise proximately and naturally out of the distinctive conditions of employment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. The worker, **Christopher** J. Sutherland, did not develop an occupational disease within the meaning of RCW 51.32.140.

Dated: August 8, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson

JACK S. ENG, Member

DISSENT

In 2020 the citizens of the entire world began to systematically lock themselves into their homes as the horrifying reality of the new COVID-19 pandemic swept from continent to continent. As refrigerated trucks sat outside of overflowing morgues to take the ever-increasing number of bodies away, governments began issuing strict stay at home orders. Here in the United States, some states issued stay-at-home and masking orders and some made them voluntary. Millions of people began working from home if they were able to do their work remotely.

In Washington State emergency orders were issued and then new laws were passed to protect essential workers who had to continue to work in person so that food and healthcare would be available. Some workers did jobs that, although not essential for the immediate needs of the people, were essential to keep the infrastructure of the state and the country solid. Headlines about numerous supply chain problems made it apparent that the behind-the-scenes jobs were just as important at keeping goods flowing as the people who were working directly with the public to provide staples of everyday life. In this new and dangerous world, workers often had to make the choice between ensuring their safety and keeping their jobs. Many reported to work despite dangers and some became infected with COVID-19. Some of those infected workers applied for workers' compensation coverage. Appeals of the COVID-19 orders have begun to reach this Board. Instead of recognizing the COVID-19 world for the unique situation it is, the majority reasons as if nothing changed in 2020. But applying pre-COVID-19 reasoning to mid-COVID-19 reality is like applying rules made for a horse and buggy to a race car.

The majority cites to *Witherspoon* where a worker contracted spinal meningitis from a coworker coughing in his face. The court found that:

> There was no showing that the conditions of Mr. Witherspoon's employment caused him to be in contact with the bacteria any more than he would be in ordinary life or other employments. His exposure to meningitis in the workplace as opposed to elsewhere was merely coincidental and not a result of any distinctive conditions of his employment with IBP.[6]

There was no global pandemic in 1987 when Mr. Witherspoon contracted meningitis. It is true that, in that time period, it was not a distinctive condition of employment that workers were in close proximity to one another and in danger of contracting any number of communicable diseases. But in 2020 when Mr. Sutherland contracted COVID-19 it was a different world. Millions of people were working from home and only those who had no choice to work from home were still going in to work in person.

> The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease . . . and not upon whether the disease itself is common to that particular employment. The worker . . . must show that his or her particular work conditions more probably caused his or her disease . . . than conditions in everyday life or all employments in general.[7]

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[6] *Witherspoon*, at 851.
[7] *Witherspoon*, at 850, citing *Dennis v. Dep't of Labor & Indus.,* 109 Wn.2d 467 (1987).

Later, in *Street v Weyerhaeuser Co.* the Supreme Court reiterated that in *Dennis* they had eschewed the requirement that the employment had to create a greater risk than other employments or everyday life, the worker need only show “distinctive conditions” of employment to meet the “arises naturally” requirement.[8] Here, Mr. Sutherland has shown that, in the midst of the pandemic, he was required to work in close proximity to others. And those "particular work conditions" more probably than not caused his illness. Especially in light of the fact that his coworker that he spent time in the shack with tested positive a few days before Mr. Sutherland did.

Special times call for special measures. A time when a deadly contagion is at pandemic proportions is different than a time when that contagion becomes endemic and an expected danger in everyday life. The legislature recognized this and passed laws to protect many of the frontline workers specifically during the pandemic. Because not all workers who continued to work during the pandemic were covered under these new laws does not mean that we should blindly apply pre-pandemic caselaw to a global pandemic world. Legal reasoning should adapt to the times at hand.

Additionally, it seems that the water is a bit muddied by the fact that the Department allowed Mr. Sutherland's condition as an occupational disease. There are many places in workers' compensation where industrial injuries and occupational diseases overlap. COVID-19 is considered a disease, but most occupational diseases are merely the residual effects of a lifetime of using one's body as a tool for labor. Knees, backs, hands wear down over time and the law has slowly adjusted to that reality by making a distinction between a sudden happening that creates an immediate injury and a long drawn-out process that creates a disability through long term overuse. There are many conditions that fall into the gray area in between. If a worker is exposed to a great amount of toxic chemicals at once and that worker succumbs, it is usually considered an industrial injury. If that same worker is exposed to lower levels of the chemicals over a period of time and succumbs, it is usually considered an occupational disease. COVID-19 can infect a person after a single exposure to the virus. Would that be an industrial injury? Sometimes, however, it takes multiple exposures for a person to get infected. Would that be an occupational disease? Some people become ill immediately, others take longer. Some people have a brief illness and get better, for others the initial illness leads to a cascade of increasingly destructive symptoms that lead to death. The only reason that we are even having the discussion about distinctive conditions of employment is because

[8] *Street v. Weyerhaeuser Co*., 189 Wn.2d 187 (2017).

Mr. Sutherland's claim was allowed as an occupational disease. But an industrial injury claim would only need to be shown to be "during the course of employment," which is a much lower bar than "distinctive conditions of employment."

During the height of the pandemic we saw ingenuity and adaptation on a daily basis. It was necessary in order for us as a society to continue to thrive or even just survive. The law does not often adapt quickly. It is a slow, sometimes even glacial, process. But if the Department of Labor and Industries, arguably one of the largest bureaucracies in the state, can adapt, it is within the Board's ability to adapt as well. A failure to quickly adapt to a new reality means a failure to live up to the promise made to injured workers more than a century ago when they were promised "sure and certain relief for workers, injured in their work, and their families and dependents . . . regardless of questions of fault."[9] I would adapt to the new reality of the COVID-19 pandemic by evaluating "distinctive conditions" of employment under a new pandemic analysis rather than utilizing a pre-pandemic rubric into which it doesn't fit, or consider these cases as industrial injuries. Therefore, I dissent.

Dated: August 8, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

[9] RCW 51.04.010.

Addendum to Decision and Order
In re Christopher J. Sutherland
Docket No. 21 15953
Claim No. SL-54303

Appearances

Claimant, Christopher J. Sutherland, Self-Represented

Self-Insured Employer, Weyerhaeuser Co. & Subsidiaries, by Eims, Tedrow & Ladenburg, per Nicole D. Tedrow

Department of Labor and Industries, by Office of the Attorney General, per Jason Dickey-North

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on February 4, 2022, in which the industrial appeals judge affirmed the Department order dated May 6, 2021. The Department filed a response to the Petition for Review.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.