BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: J. GUADALUPE OLIVERA DEC'D	**)**	**DOCKET NOS. 21 13955 & 21 25556**
	)	
CLAIM NO. SG-21191	**)**	**DECISION AND ORDER**

J. Guadalupe Olivera worked on an assembly line at Tyson Foods, Inc., (Tyson). On March 26, 2020, he developed cold-like symptoms and four days later, he tested positive for COVID-19. By April 20, 2020, his symptoms had worsened and he died as a result of the illness. At the time of his death, he was married to Maria Guadalupe Hernandez Armenta. Ms. Hernandez Armenta applied for surviving spouse benefits with the Department of Labor and Industries. The Department allowed Mr. Olivera's claim as an occupational disease and awarded her surviving spousal benefits. Tyson appealed and argued that because COVID-19 was present everywhere in March 2020, the distinctive conditions of Mr. Olivera's employment did not cause him to contract COVID-19. Our industrial appeals judge affirmed both Department orders. Tyson filed a Petition for Review. After careful consideration of the law and the record, we hold that although Mr. Olivera's employment did include distinctive conditions that increased his risk of contracting COVID-19, a preponderance of the evidence does not show a causal link between the conditions of his employment at Tyson and the illness. The Department orders are **REVERSED AND REMANDED** to deny Mr. Olivera's claim and deny Ms. Hernandez Armenta's application for spousal benefits.

DISCUSSION

Mr. Olivera worked full-time on the production floor at Tyson where he cut ribs on an assembly line. The work was performed in a large warehouse and in close proximity to coworkers. Typically, he worked with 50-60 people on the same line, about three feet apart, with a total of 700-750 workers on the production floor. The atmosphere in the facility was kept cool and dry in order to preserve the meat.

Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) causes the respiratory disease known as coronavirus disease 19 (COVID-19).[1] The disease transmits readily between individuals through respiratory droplets generated when they breathe, talk, cough, and sneeze. More forceful exhalations such as shouting, coughing, and sneezing project more virus over longer distances. An individual must be exposed to a sufficient viral load to become infected. It is nearly impossible to identify the specific exposure that caused the disease, so a window of time for exposure is typically considered to determine when viral transmission occurred. The disease is often

[1] There are many different name references for the virus in the record. They all refer to the same disease.

contagious before an individual experiences symptoms, and many infected individuals are asymptomatic throughout the course of the infection.

Prior to the onset of the COVID-19 pandemic, the Tyson facility was on a regular deep-cleaning schedule to meet federal food-safety guidelines. There was an extensive ventilation system in place, which recirculated the air on the production floor between 10 to 12 times an hour. As knowledge about the virus developed, Tyson rapidly developed and implemented new policies. Before Mr. Olivera developed symptoms, there was one confirmed case of COVID-19 at Tyson. Contact tracing did not establish contact between Mr. Olivera and any infected individual at Tyson. Twenty to twenty-five Tyson employees tested positive in March and April of 2020. But no evidence shows Mr. Olivera came into contact with those infected employees. Walla Walla County Department of Community Health data shows that just seven individuals in the county tested positive for COVID-19 during March 2020.

Despite the low number of confirmed cases in Walla Walla County, Mr. Olivera's family members were careful to limit personal contact as the pandemic developed. Mr. Olivera and his wife had limited contact with their children and community. His wife, Mrs. Hernandez Armenta cleans deserted office buildings, alone, at night, and the family kept outside trips to a minimum. Despite that, Mr. Olivera became ill on March 26, 2020, and was admitted to the hospital with COVID-19 on April 7, 2020.

The issue here is whether Mr. Olivera's COVID-19 constitutes an occupational disease that arose naturally and proximately out of the distinctive conditions of his employment with Tyson within the meaning of RCW 51.08.140. A worker is entitled to benefits under the Industrial Insurance Act if the injury or occupational disease developed in the course of employment is a proximate cause of the alleged condition for which benefits are sought.[2] To qualify as an occupational disease, the record must show the disease arose naturally and proximately from the distinctive conditions of his employment.[3] This analysis requires an in-depth look at the conditions of the claimant's employment to determine whether his particular work conditions more probably caused his disease, or disease-based disability, than conditions in everyday life, or all employments in general.[4] Where the

[2] *Wendt v. Dep't of Labor & Indus*., 18 Wn. App. 674 (1977).
[3] RCW 51.08.140.
[4] *Dennis v. Dep't of Labor & Indus*., 109 Wn.2d 467 (1987).

"condition" is one like COVID-19 that is community spread, and can be contracted anywhere, this analysis becomes more challenging.

There is no dispute that complications from COVID-19 caused Mr. Olivera's death. The issue is whether more probably than not he contracted the virus naturally and proximately from the distinctive conditions of his employment on the Tyson production floor. The applicable Washington Court of Appeals opinion on the contraction of infectious diseases in the industrial insurance context is *Witherspoon v. Department of Labor and Industries.*[5] Patrick Witherspoon contracted meningitis after an infected coworker coughed on him. He filed an occupational disease claim. In rejecting the claim, the court held that there was nothing inherent in the conditions of Mr. Witherspoon's employment that would cause him to come in contact with meningitis at work more than in everyday life in general: "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."[6] Although Mr. Witherspoon established causation of his condition (his coworker's cough exposed him to meningitis), he failed to establish that a distinctive condition of his employment played any part in his contracting the condition.

In the recent case of *In re Christopher J. Sutherland*,[7] the claimant was a log scaler who generally worked outside with a teammate. He occasionally stood in a "shack" which allowed for 16-foot spacing between the two individuals. The employer also permitted Mr. Sutherland to work alone inside his vehicle. Masks were not required, but Mr. Sutherland was never required by the employer to have mandatory contact with his colleague. Mr. Sutherland's work partner tested positive for COVID-19, and Mr. Sutherland tested positive immediately thereafter. We held that "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."[8] Citing *Potter v. Department of Labor and Industries,*[9] we reasoned that the timing of Mr. Sutherland's infection was mere "happenstance" because COVID-19 was everywhere, including at his workplace. Critically, we found the Department's medical expert credible that there were no conditions in

[5] 72 Wn. App. 847 (1994).
[6] *Witherspoon*, at 851.
[7] Dckt. No. 21 15953 (August 8, 2022).
[8] *Sutherland,* at. 1.
[9] 172 Wn. App. 301 (2012).

Mr. Sutherland's job itself that resulted in increased exposure and transmission of COVID-19 as compared to the conditions of everyday life in general.

Here, Mr. Olivera was an essential worker who had to attend work in person. The production floor was large, loud, and crowded. Mr. Olivera worked with individuals on both sides laterally, and across from him, that were all spaced less than the six-foot limit established by the CDC. He worked significant overtime within the exposure window. The work was performed on an assembly line at a rapid pace, and the industrial machinery on the floor was loud enough for Tyson to require single-layer hearing protection for all the workers. The production environment was also cold and dry to help preserve the meat (and, unfortunately, the SARS-CoV-2 virus as well). Unlike the working conditions in *Sutherland* and *Witherspoon*, we hold that Mr. Olivera's work conditions were distinctive conditions of employment, which made contracting COVID-19 more likely than everyday life.

As set forth in RCW 51.08.140, workers are entitled to industrial insurance coverage if they contract a disease or infection that arises naturally and proximately from the distinctive conditions of employment. The term "naturally" in RCW 51.08.140, requires establishment of something more than proximate cause in order to establish it as an occupational disease. The infection must arise out of the distinctive conditions of employment. In *Dennis v. Department of Labor & Indus.,*[10] the Washington Supreme Court specifically held that:

> a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. 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, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.[11]

[10] 109 Wn.2d 467 (1987).
[11] *Dennis*, at 481.

Based on this language, and further reflection, we take this opportunity to clarify and correct erroneous language contained in our recent decision of *In re Christopher J. Sutherland*.[12] In that decision, we stated "we decline to allow the claim when the infection was simply not a distinctive condition of employment." We further indicated that we read *Witherspoon* to suggest "that communicable diseases are generally a function of everyday life rather than a distinctive condition of employment." More accurately, and as held in that case, Mr. Sutherland's infection did not arise out of any distinctive condition of his employment.

The facts in *Sutherland* are distinguishable from Mr. Olivera's. In *Sutherland,* the record did not identify any distinctive conditions of Mr. Sutherland's employment that made log scalers more likely to contract COVID-19 than other employments or everyday life. Here, however, we have identified such distinctive conditions in Mr. Olivera's work at Tyson that could make it more likely for him to contract the disease than other employments or everyday life. We also clarify that a worker with COVID-19 doesn't need to prove that the presence of SARS-CoV-2 is a distinctive condition of their particular employment. SARS-CoV-2 is present everywhere. The analysis turns on whether the distinctive condition of one's employment makes it more likely that they would contract COVID-19 than other employments or everyday life in general.

That does not end our inquiry, however. As to proximate causation, a preponderance of the evidence does not show that Mr. Olivera's work proximately caused him to develop COVID-19. The record in the present case does not establish Mr. Olivera more probably than not contracted COVID-19 as a result of the distinctive conditions of his employment. When Mr. Olivera contracted COVID-19, the virus was present in the community and in everyday life in general. Exposure could occur in any aspect of everyday life. And even though Mr. Olivera was careful, he could have contracted the virus from anywhere he encountered other people. The evidence does not show that Mr. Olivera ever came into contact with a person at work who had COVID-19. Per the contact tracing evidence, Mr. Olivera didn't contact or come near the single confirmed positive COVID-19 Tyson worker in the weeks preceding his illness. He and his family were careful, but he did have contacts outside his home and work during the relevant exposure window. It is possible, and given the available evidence, more probable, that he contracted the disease during one of these outings, as any two people in close proximity create the opportunity for transmission. We will never know the exact exposure that ultimately resulted in Mr. Olivera's death. Without evidence of Mr. Olivera

[12] Dckt. No. 21 15953 (August 8, 2022).

working near a COVID-19 positive person, there is insufficient evidence to suggest his condition more probably than not proximately arose out of his work at Tyson.

During March 2020, two individuals at the Tyson plant (including Mr. Olivera) tested positive for COVID-19, and seven individuals in the county tested positive. No evidence confirms Mr. Olivera came into contact with the infected Tyson employee. While a number of people at Tyson *may* have been infected with COVID-19 at the time Mr. Olivera became ill, the burden of persuasion requires proof of more than possibility; it requires probability. While Mr. Olivera and his family were careful with contact, his wife still cleaned office buildings, which while deserted at night, were still active offices. And while COVID-19 was present in the Tyson facility, there was nothing inherent in the nature of Mr. Olivera's employment causing him to be in direct contact with the virus. The record doesn't show it was more probable than not that Mr. Olivera's work conditions proximately caused him to develop COVID-19. We must reject this occupational disease claim.

DECISION

In Docket No. 21 13955, the employer, Tyson Foods, Inc., filed an appeal with the Board of Industrial Insurance Appeals on April 8, 2021, from an order of the Department of Labor and Industries dated February 12, 2021. In this order, the Department affirmed its January 29, 2021 order allowing J. Guadalupe Olivera's claim for COVID-19 as an occupational disease. This order is incorrect and is reversed and remanded.

In Docket No. 21 25556, the employer, Tyson Foods, Inc., filed a protest with the Department of Labor and Industries on October 29, 2021. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The employer appeals a Department order dated August 27, 2021. In this order, the Department affirmed its February 17, 2021 order that approved an application for benefits for the worker's surviving spouse. This order is incorrect and is reversed and remanded.

FINDINGS OF FACT

1. On January 6, 2022, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. J. Guadalupe Olivera worked on the production floor at Tyson Foods, Inc., in March 2020. He worked cutting kosher ribs in an assembly line on a full-time basis while consistently performing overtime. He worked in close proximity to his coworkers. The temperature in the facility was usually between 40 to 45 degrees Fahrenheit and the humidity was kept as close to zero as possible. Mr. Olivera worked on the same line with approximately 50 to 60 workers, and with about 700 to 750 workers on the

production floor. These are distinctive conditions of Mr. Olivera's employment.

3. The evidence does not show that Mr. Olivera's distinctive work conditions caused him to come into contact with, or even come close in proximity to any individual suffering from COVID-19 like symptoms, or who was diagnosed with COVID-19 within the communicable time period before he tested positive for the disease.

4. Mr. Olivera tested positive for COVID-19 on March 30, 2020, and passed away from the disease on April 20, 2020.

5. Mr. Olivera's condition diagnosed as COVID-19 did not arise naturally and proximately out of the distinctive conditions of his employment.

6. Maria Guadalupe Hernandez Armenta is J. Guadalupe Olivera's surviving spouse.

CONCLUSIONS OF LAW

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

2. J. Guadalupe Olivera's condition, diagnosed as COVID-19, is not an occupational disease within the meaning of RCW 51.08.140.

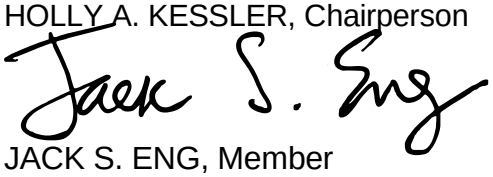
3. The Department order dated February 12, 2021, is incorrect and is reversed. This matter is remanded to the Department to issue an order rejecting the claim.

4. The Department order dated August 27, 2021, is incorrect and is reversed. This matter is remanded to the Department to deny Maria Guadalupe Hernandez Armenta's application for surviving spouse benefits.

Dated: March 9, 2023.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson



JACK S. ENG, Member

DISSENT

Because I believe the industrial appeals judge got it right and his decision should be adopted by the Board, I dissent.

In the Board's first case where a worker likely contracted COVID-19 in the workplace, *In re Christopher Sutherland*,[13] the majority found that Mr. Sutherland's COVID-19 infection was not an occupational disease. The majority cited *Witherspoon v. Department of Labor & Indus*.[14] In *Witherspoon,* the worker caught bacterial meningitis after a coworker coughed on him. The Board rejected that claim and Division Three of the Court of Appeals agreed, holding that "[t]here 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."[15] Last year, the Board found that Mr. Sutherland's contraction of COVID-19 was no more likely to be work related than Mr. Witherspoon's meningitis and denied the claim. In my dissent in the *Sutherland* case I took issue with applying the reality of a 1987 world and a longtime disease such as meningitis to a 2020 pandemic and a brand-new disease. I likened it to applying rules made for a horse and buggy to a race car.

Here, the majority clarifies that the test is not the presence of the disease in the workplace that is the distinctive condition of employment, but the conditions of that particular employment that make it more likely that worker contracted the disease at his work than in his daily life or other employments in general. Here, Mr. Olivera has shown that the conditions of his employment are indeed distinctive, and the majority agrees, and yet it is still not enough. The horse and buggy rules are still being applied in a race car world.

I concur with the majority's determination that Mr. Olivera's conditions of employment were distinctive. But it is not expansive enough. I would hold that all employments that were deemed essential during the Governor's Stay Home order had distinctive conditions merely by being deemed essential. After all, that's essentially what the legislature did in 2021 when it passed the protection for frontline workers. But, here, a preponderance of the evidence shows that Mr. Olivera's COVID-19 infection resulted from the distinctive conditions of his particular employment, essential or not.

---

[13] Dckt. No. 21 15953 (August 8, 2022).
[14] 72 Wn. App. 847 (1994).
[15] *Witherspoon*, at 851.

> "'Arises naturally' requires a worker to" establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment.[16]

Mr. Olivera tested positive for COVID-19 on March 30, 2020, a short time after Governor Inslee issued the Stay Home Stay Healthy proclamation that required all Washington residents to stay home except to conduct essential activities or to work in essential business services.[17] Businesses that weren't deemed essential were closed and encouraged to work remotely if they could. Public gatherings were banned. In that proclamation, the Governor listed the number of confirmed cases in Washington at that time as 2,221. By doing simple math, the number of COVID-19 cases in Washington a week before Mr. Olivera tested positive was less than ten thousandths of a percent of the population of Washington.[18] Although the increase in cases was cause for alarm, it is clear from the numbers that COVID-19 was not yet ubiquitous in Washington. In fact, the purpose behind the Stay Home order was to "substantially slow down the spread" of COVID-19.[19]

Proclamation 20-25 listed all of the occupations that were deemed essential to maintain the infrastructure of the state while people were hunkered down at home. Food manufacturing is one of the essential occupations. This, in and of itself, is a distinctive condition of Mr. Olivera's employment. People were told to stay home and not gather in order to stop the spread of COVID-19, except for particular necessary occupations where workers were expected to continue to work in the face of the viral threat. Although several occupations were deemed "essential," that does not mean continuing to work in any of those employments during the pandemic rendered them not "distinctive" because, as stated by the Washington Supreme Court in *Street v. Weyerhaeuser Co.*, the distinctive conditions need not be peculiar to, nor unique to, the worker's particular employment. The requirement to continue working is a distinctive condition in each of those employments. At least, as a matter of public policy, it should be in the time of a statewide emergency mandate. To make a contrary determination is to fly in the face of the intent of the Industrial Insurance Act, which was designed to provide "sure and certain relief for workers, injured in their work, and their families and dependents . . . ."[20] The legislature recognized that "[t]he welfare of the state depends upon its

---

[16] *Street v. Weyerhaeuser Co*., 189 Wn. 2d 187, 194 (2017), citing *Dennis v. Dep't Labor & Indus.,* 109 Wn.2d 467, 481 (1987).
[17] Proclamation 20-25 Stay Home Stay Healthy issued on March 23, 2020.
[18] Proclamation 20-25.
[19] Proclamation 20-25.
[20] RCW 51.04.010.

industries, and even more upon the welfare of its wage worker."[21] Certainly this is even more true in the midst of a pandemic where we are relying upon workers like Mr. Olivera to continue to go into work so that we can keep food in the grocery stores?

The Washington Legislature appears to agree that during a public health emergency, there are special rules that apply to determinations of what constitutes an occupational disease. It amended the Industrial Insurance Act in 2021 to protect frontline employees during a public health emergency by creating a presumption that communicable diseases that are the subject of the health emergency are occupational diseases.[22] Mr. Olivera would have been protected under that presumption, but unfortunately, he contracted COVID-19 and died prior to the passage of the new protection for frontline employees.

But even without the help of the presumption, Mr. Olivera has shown that his claim should be allowed as an occupational disease. "As noted, to succeed on an occupational disease claim, a worker must prove that the disease "arose naturally and proximately" out of employment. The "arises proximately" requirement "must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment. If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient."[23] Mr. Olivera was a frontline employee who was expected to continue to work during the pandemic. COVID-19 was growing quickly at the time he became ill, but confirmed cases were still relatively rare in Washington in the general population. Proclamation 20-25 forbade people from leaving their homes unless they needed to conduct an essential activity or work in an essential business service. Mr. Olivera was very careful. He did not even hold his new grandson for fear of virus transmission. He restricted his exposure to others when he was off of work including restricting his time with his own children.

But Mr. Olivera did not have that same freedom while at work. He worked in conditions that were ripe for the transmission of COVID-19. Mr. Olivera was required to work on a conveyor line, shoulder to shoulder with his coworkers on each side and more across from him.[24] He worked in a facility with 1,400 employees, and with approximately 700 to 750 other coworkers working on the production floor with him at any given time. He did not have protective equipment such as barriers,

---

[21] RCW 51.04.010.
[22] RCW 51.32.181.
[23] *Street* at 205-206.
[24] Ex. 8.

masks, or temperature checks to reduce exposure. He worked in a climate-controlled environment that was good for keeping the meat fresh, but testimony shows that climate would also allow the virus to flourish. It was loud on the floor, and although the decibel level did not require hearing protection, workers were provided hearing protection. The employer testified that one could speak in a normal tone, but if it was loud enough for them to provide hearing protection, people likely spoke more forcefully to ensure they were heard. All of these were conditions that increased the risk of COVID-19 transmission if an infected person was at work.

The majority concedes that Mr. Olivera's conditions of employment were indeed distinctive, but finds that he did not meet the proximate cause element of the occupational disease statute RCW 51.08.140 because he "could" have caught it anywhere. But the standard for proximate cause is not "beyond a shadow of a doubt," it is "more probable than not." Is it more probable that the cause of Mr. Olivera's COVID-19 infection were the conditions of his work or the conditions outside of his work? As shown above, the conditions at his work were a veritable petri dish for transmission of COVID-19. Outside of work Mr. Olivera was very cautious. He didn't interact with his family, he restricted his movements in the community at large, and he chose not to hold his new grandson out of caution. Just based on this information the circumstantial evidence points to a greater probability that the infection occurred at work.

The majority points to the fact that there was one other confirmed case prior to Mr. Olivera's diagnosis and contact tracing shows that the infected person and Mr. Olivera didn't interact. But this ignores the fact, as admitted by the majority, that people who have COVID-19 don't always show symptoms. And requiring Mr. Olivera's beneficiary to provide proof that he had actual contact with a person who not only had COVID-19 but was tested for it and tested positive is setting an impossibly high bar, especially in light of the fact that Mr. Olivera had no control over how and when COVID-19 testing was done, just like he had no control over his working conditions. There were at least 10 other people who had symptoms that could have been COVID-19 in early March 2020. Mr. Olivera tested positive for COVID-19 on March 30, and less than a month later he died. Around the time of his death 237 workers at the plant tested positive. So, in about a month the plant went from 2 confirmed cases to 237. It is highly unlikely that only those 2 confirmed cases resulted in all of those 237 cases in that short of a period of time.

Further, the Walla Walla Community Health Department's epidemiologist testified about incidence of COVID-19 in the community in March and April of 2020. Out of a total population of 62,850 in Walla Walla County there were 7 positive COVID-19 cases in March, and that number rose to 69 in April. Compare that to Tyson, which employed 1,400 people and had two positive COVID-19 cases in March. But in April that number had increased to 237. By, once again, doing the math the number of positive cases in the general public in Walla Walla County was similarly rare as that of the rest of the state in March. In April the county cases had increased more than 886 percent to 69, but still incredibly rare, at about a tenth of a percent of the population. By contrast, in March 2020, the number of positive COVID-19 cases at Tyson was 2, a tenth of a percent of the employees there. And in April it increased 11,750 percent to 237, or 17 percent of the workforce. The COVID-19 positive tests increased from a tenth of a percent of the employees to 17 percent of the employees at Tyson in that short time period. The math says it's more probable than not that Mr. Olivera was infected with COVID-19 at work.

This huge increase at Tyson illustrates two points. One, considering how rare COVID-19 remained in the greater community in which Mr. Olivera lived during those two months when he contracted the disease and died from it, the opportunities for him to have contracted it in the greater community were few and far between. Two, such a rapid increase in positive COVID-19 tests in such a short period of time at Tyson as compared to the general community shows just how transmissible Mr. Olivera's worksite was.

In addition to the rapid increase in cases at Tyson is the testimony by Mr. Stebbins on viral load.[25] He first explained that the virus is exhaled in secretions that are basically just large and small moisture droplets. The virus needs the droplets to remain viable. Larger droplets carry enough viral load for transmission, but they also drop off fairly quickly after being expelled. This is why distance is important. If a person is close enough to inhale those larger droplets before they drop off then that person is more likely to get enough viral load to be infected. Mr. Stebbins then explained why duration is important. "[W]e are looking at transmission of the disease doesn't occur with just a single viral particle. It requires a substantial loading, substantial transmission of virus. So, the longer people are

[25] 4/18/22 Tr. at 146.

in close proximity, the more opportunity there is for that transmission to occur."[26] Mr. Olivera worked more than 51 hours a week the 2 weeks prior to testing positive.[27]

Visits to the Home Depot or the local supermarket are brief, transient contacts. A person walks in, finds products, wheels them to the front of the store, pays the cashier, and leaves, likely spending the most time the closest to the cashier (if the person didn't use the self-checkout), and even that would usually only be 5-10 minutes. This is likely especially true of Mr. Olivera as it is unlikely that he would spend a lot of time close to strangers while not allowing himself to spend time with his own family. Compare this to him standing for at least 8 hours a day with people on either side of him, within an arm's length. More people were across from him, and they were further away from him, but due to the noise level of the machines and the hearing protection, they were likely talking a little louder than normal, projecting more. And all of this was being done in an atmosphere that was conducive to keeping the virus alive and transmissible. Opportunity for transmission and viral load say it is more likely than not that Mr. Olivera caught the COVID-19 virus at work.

Finally, there is the testimony of Nicholas K. Reul, M.D. He is the current medical officer for the Department of Safety and Health at the Department of Labor and Industries. He is also the former medical director of occupational disease at the Office of the Medical Director at the Department of Labor and Industries. He is also Board Certified in Occupational and Environmental Medicine and has a Master's in Public Health in Occupational and Environmental Medicine and is a Fellow of the American College of Occupational and Environmental Medicine. Occupational medicine is the study of illness or injury that results from work, and environmental medicine is the study of illness or injury that occurs in the community. The comparison of these two environments is exactly what this case is about. Dr. Reul reviewed the file for Mr. Olivera and reviewed extensive articles and studies on COVID-19 for both of his positions at the Department of Labor and Industries. Dr. Reul testified that Mr. Olivera's COVID-19 infection was an occupational disease on a more-probable-than-not basis.[28]

As the Supreme Court stated above, even without a direct statement by a medical expert that there is a causal connection between the distinctive conditions at work and the disease, as long as all of the testimony combined allows a reasonable person to infer that there is a causal connection,

[26] 4/18/22 Tr. at 146- 147.
[27] 4/18/22 Tr. at 73.
[28] Reul Dep. at 11.

that is enough. Here we have both. Therefore, a preponderance of the direct and circumstantial evidence says that Mr. Olivera's work was the proximate cause of his COVID-19 infection.

The occupational disease proximate cause rules are generally applied to diseases caused by physical use of the body. Backs, shoulders, knees, hips, arms, and hands wear out with continual use in physical labor. The vast majority of the case law arises out of cases about this physical wear on the body. Usually the Board is being asked to determine if the cement worker's constant work on his knees caused his knee problems, or was it his power lifting outside of work? Was the worker's constant work over her head responsible for her shoulder problems, or was it her penchant for spending a lot of time swimming in her off hours? Those proximate causation arguments are easier because there is generally some form of tangible evidence of the disease manifestation in imaging and treatment records. But applying that type of standard to a nebulous airborne disease transmission puts those workers who contract a communicable disease at a great disadvantage.

Would a communicable disease normally be an occupational disease? In *Witherspoon* the Board said no, and the Court of Appeals agreed. But the pandemic was not and is not normal times. In each case we have to look at the individual facts in that case and determine if those facts can be distinguished from precedential cases. If they can be distinguished, and we have nothing that is factually close enough, then we have to decide by looking at all of the evidence and determining what makes the most sense to the spirit of Industrial Insurance Act as a whole. Allowing frontline workers to be sacrificial lambs is not in the spirit of the Industrial Insurance Act. It is also not in the spirit of social justice. The majority of the workers who went into work while the rest of us were staying at home were the "unskilled workers" or the workers who worked with their hands and could not do their jobs online or via a Zoom meeting. The vast majority of the time, those are the workers who have the least amount of money or power and rely on those of us that do to make sure they are protected by industrial insurance. We should not fail them.

DATED: March 9, 2023.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

Addendum to Decision and Order
In re J. Guadalupe Olivera Dec'D
Docket Nos. 21 13955 & 21 25556
Claim No. SG-21191

Appearances

Claimant's Beneficiary, Maria Guadalupe Hernandez Armenta, by Trejo Law Firm, per George P. Trejo Jr

Self-Insured Employer, Tyson Foods, Inc., by Reinisch Wilson, P.C., per Casondra J. Albrecht, and by Perkins Coie, LLP, per Jessica L. Everett-Garcia and Kathryn E. Boughton

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

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 self-insured employer filed a timely Petition for Review of a Proposed Decision and Order issued on September 2, 2022, in which the industrial appeals judge affirmed the orders of the Department dated February 12, 2021, and August 27, 2021. On November 28, 2022, the Department of Labor and Industries 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.