BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CHARLES CACCHIOLI (DECEASED), Claimant,	)	
v.	)	Hearing No. 1501061
INFINITY CONSULTING SOLUTIONS, Employer,	)	

ORDER

This matter came before the Board on December 16, 2021, on a motion to lift a stay and dismiss for lack of jurisdiction.

On December 30, 2020, Anne Ingino-Cacchioli, the surviving spouse of Charles Cacchioli ("Claimant") filed a lawsuit in Superior Court against Infinity Consulting Solutions ("Employer") for monetary damages for personal injury and death arising from the wrongful conduct and wrongful failure to act of Employer, resulting in Claimant contracting COVID-19 while working at Employer in June of 2020. It is alleged that Claimant died on July 10, 2020, from COVID-19 and related complications of pneumonia and sepsis.

On March 12, 2021, Employer filed a motion to dismiss the Superior Court action on the basis that it was barred by the exclusivity provision of the Workers' Compensation Act. *See* DEL. CODE ANN. tit. 19, § 2304.

On May 24, 2021, an initial Petition to Determine Compensation Due was filed with the Industrial Accident Board ("IAB") by Claimant's surviving spouse. Claimant's position (articulated in the petition itself) was that Claimant's COVID-19 does not qualify as an "occupational disease" or injury under the Workers' Compensation Act. However, the petition was filed to protect the statute of limitations in case it may be determined that Claimant did sustain

an occupational disease or injury. The parties agreed to stay the IAB petition pending resolution of the issue by a higher court.

On August 19, 2021, the Superior Court issued an order ruling that because the IAB is vested with jurisdiction to hear all cases arising under the Workers' Compensation Act, the issue of whether the IAB has jurisdiction over this matter should be decide in the first instance by the IAB. Accordingly, the Court stayed the Superior Court action pending the IAB's determination. *See Ingino-Cacchioli v. Infinity Consulting Solutions*, Del. Super., C.A. No. N20C-12-243, Jurden, J., 2021 WL 3702442 at * 2 (August 19, 2021).

Accordingly, on November 19, 2021, Claimant, through his estate/spouse filed a motion with the IAB to lift the stay of the IAB petition for the limited purpose of dismissing Claimant's petition for lack of jurisdiction. Employer agrees to the lifting of the stay for this limited period, but it opposes the dismissal of Claimant's petition.

As a preliminary matter, it should be noted that Claimant, in both the Superior Court action and the IAB petition, alleges that he contracted COVID-19 at work. Claimant alleges that, on June 8, 2020, seven employees returned to work at Employer in a small one-room office with no barriers or ability to keep a safe social distance. Claimant is an office worker, and not medical or emergency personnel. Claimant alleges that, from June 8 to June 15, 2020, he was in close contact with another employee (who allegedly did not wear a mask continuously while at work) and that this other employee tested positive for COVID-19 on June 17, 2020. Employer allegedly told the workers in the Delaware office not to return to the office on June 16, 2020, due to a COVID-positive employee. Claimant himself then tested positive for COVID-19 on June 20, 2020, and was hospitalized on June 23, 2020. The issue presented is whether this fact-pattern, if proved, constitutes a compensable workplace injury or illness under the Workers' Compensation Act.

Claimant's Argument: The term "injury" or "personal injury" is defined as:

> Violence to the physical structure of the body, such disease or infection as naturally results directly therefrom when reasonably treated and compensable occupational diseases and compensable ionizing radiation injuries arising out of and in the course of employment.

DEL. CODE ANN. tit. 19, § 2301(16)

Claimant notes that COVID-19 infection is not violence to the physical structure of the body, nor a disease or infection resulting from such violence. It is also not an ionizing radiation injury. Thus, for it to compensable under the Workers' Compensation Act, Claimant's COVID-19 infection would need to qualify as a compensable occupational disease. Claimant observes that this is similar to other inhalation-related diseases (such as asbestosis) which have been classified as occupational diseases.

As for what constitutes an "occupational disease," Claimant asserts that it has been defined by the Delaware Supreme Court in *Air Mod Corp. v. Newton*, 215 A.2d 434 (Del. 1965). The Court observed that the "statutory definition of 'compensable occupational disease,' in 19 Del. C. § 2301, leaves the term undefined." *Air Mod Corp.*, 215 A.2d at 441.[1] The Court rejected as overly broad the idea that a "compensable occupational disease" was just "any disability which arises out of, or is aggravated by, particular conditions of employment." *Id.* Lacking any statutory definition, the Court reviewed the common elements of how the term was defined in other jurisdictions and, informed by that, the Court held that

> a compensable occupational disease, within the meaning of our Act, is one resulting from the peculiar nature of the employment, i.e., from working conditions which produce the disease as a natural incident of

[1] At the time, the term "compensable occupational diseases" was defined as: "includes all occupational diseases arising out of and in the course of employment only when the exposure stated in connection therewith has occurred during employment and the disability has commenced within 5 months after the termination of such exposure." *See Air Mod Corp.*, 215 A.2d at 441. Since that time, the final clause (regarding commencement of disability with 5 months) has been deleted, but the remainder of the definition remains the same as was considered in *Air Mod Corp.* *See* DEL. CODE ANN. tit. 19, § 2301(4).

> the particular occupation, attaching to that occupation a hazard different from, and in excess of, the hazards attending employment in general.

Air Mod Corp., 215 A.2d at 442. The point of this definition is to separate out ordinary diseases which might just as readily be contracted in any occupation or in everyday life apart from employment. It limits "occupational disease" to those cases where there is a distinctive relation of the disease to the nature of employment. *See Air Mod Corp.*, 215 A.2d at 441-42.

Claimant argues that, in the present case, Claimant was just an administrative office worker and that there was nothing natural or inherent in that workplace to produce a higher risk of contracting COVID-19. As such, it fails to meet the definition of a compensable occupational disease in relation to his work. Claimant was not, for example, a medical professional or emergency first responder, where arguably the employment would carry higher risk of exposure than everyday life. He was just an office worker.

Employer's Argument: Employer states that Claimant's petition before the IAB and his claim in Superior Court are expressly based on exposure at work when proper safety precautions were not taken. The allegation, therefore, is that the condition did arise from and was causally related to the employment and workplace. COVID-19 is not a routine communicable disease like the flu or common cold. Rather, it is a global pandemic that triggered changes in how business was conducted, with requirements of social distancing, remote working and wearing facemasks. Employer notes that the IAB has already considered compensation in connection with an alleged workplace exposure to COVID-19. *See Fowler v. Perdue*, Del. IAB, Hearing No. 1501167 (December 31, 2020). Although that Board decision did not specifically address the issue of whether COVID-19 qualified as a compensable occupational disease, Employer argues that the

Board implicitly must have considered that it did have jurisdiction over the claim because it heard the case.

Board's Analysis: The Board concludes that, while COVID-19 exposure can certainly be a compensable occupational disease in a proper situation, in the limited office setting described in the petition in this case, there is no assertion that Claimant's occupation produced a hazard of contracting COVID-19 distinct from and greater than the hazard attending employment in general. As such, Claimant's motion to dismiss on jurisdictional grounds is GRANTED.

The Board will start its analysis by considering the Board's own *Fowler* decision. The Board noted that "Claimant bears the burden of proving that it is more likely than not that he contracted COVID-19 at Perdue and that COVID-19 is an occupational disease." *Fowler*, at 20. The Board then reviewed the evidence and concluded that Claimant had failed to prove that, more likely than not, he had contracted COVID-19 at work. "Since Claimant did not meet his burden of proof regarding his exposure, the Board does not need to discuss whether or not COVID-19 is an occupational disease within the meaning of the Delaware Workers' Compensation Act." *Fowler*, at 24-25. Clearly, then, Employer's argument that the Board must have implicitly considered it to be an occupational disease must be rejected. The Board itself denied making such a determination. Because the claimant in *Fowler* failed to establish that he even contracted COVID-19 at his employment, there was no need to consider whether the facts concerning the nature of the employment would have supported a finding that the illness was a "compensable occupational disease."

It may seem odd that the "jurisdictional" issue was not reached because of a factual finding, but as we will see in reviewing occupational disease cases, the determination of whether something is an "occupational disease" frequently can only be made after a review of the pertinent facts.

For example, in *Anderson v. General Motors*, 442 A.2d 1359 (Del. 1982), the question was whether a claimant's allergic rhinitis was an occupational disease. The Board denied the claim. The Supreme Court, while observing that the Board had misstated the applicable standard, found that the evidence was insufficient as a matter of law to support an award for an occupational disease for the claimant's diagnosis of allergic rhinitis. *See Anderson*, 442 A.2d at 1360. The Court reiterated that "simply because there was evidence to believe it had either been contracted or aggravated on his employer's premises is legally insufficient to find it to have been an occupational disease." *Anderson*, 442 A.2d at 1360. Rather,

> for an ailment or disease to be found to be a compensable occupational disease, evidence is required that the employer's working conditions produced the ailment as a natural incident of the employee's occupation in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general.

Anderson, 442 A.2d at 1361. The Court observed that the treating physician's causation opinion was expressed in terms of "expectation" and "suspicion" rather than any actual knowledge of the conditions of the claimant's workplace, such as the levels of dust and fumes. In addition, that physician also diagnosed the allergy as attributable to household dust and to "nature's pollens" such that the claimant's allergy-induced breathing difficulty resulted from the stimuli of the everyday world. In other words, there was no substantial competent evidence that the ailment resulted from the peculiar nature of his employment and, therefore, it was not an occupational disease in relation to that particular workplace. *Anderson*, 442 A.2d at1361.

By contrast, in *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060 (Del. 1999), the Supreme Court found that the claimant had produced evidence that heating fuel oil #2 was a known health hazard (including linked to kidney disease) and that his employment (unlike employment in general) involved exposure to heating fuel oil # 2 over a span of many years, such that his kidney

disease could be seen as a natural incident to his employment in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending to employment in general. *Diamond Fuel Oil*, 734 A.2d at 1066.

In *Evans Builders, Inc. v. Ebersole*, Del. Super., C.A. No. S12A-02-004, Stokes, J., 2012 WL 5392148 (October 11, 2012), *aff'd*, Del. Supr., 2013 WL 2371705 (February 11, 2013), the claimant worked for employer as a carpenter in poultry houses and processing plants. He was hospitalized for pneumonia and, eventually, it was found that he had mycobacterium avium intracellulare ("MAI"). *See Evans Builders*, 2012 WL 5392148 at *1. The Superior Court affirmed the Board's finding of an occupational disease because there was evidence that MAI was more prevalent in sawdust, in soil and around chickens, as compared to such things as in milk, in water or on pets. The Board concluded that the claimant "was exposed to MAI more at work where the organism is more prevalent." *Evans Builders*, 2012 WL 5392148 at *3. As such, under those facts, the claimant's illness was found to be a natural incident of his occupation, attaching to that occupation a hazard greater than that attendant to employment in general.

Obviously, on this motion to dismiss, there has been no presentation of evidence concerning the workplace. However, assuming the allegations made in the IAB petition (and, for that matter, in the Superior Court pleading) are true, Claimant is asserting that he contracted COVID-19 at work, but there is no allegations as to how that could be deemed a natural incident of his occupation in such a way as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general. He was just an office worker and one of his co-workers had COVID-19. There is no allegation that his occupation involved substantial contact with the public (greater than employment in general) or has a higher rate of exposure to potentially sick people.

Employer, in its response to Claimant's motion, similarly does not identify anything that might reach the *Air Mod Corp./Anderson* standard. Employer argues that COVID-19 is more virulent than other airborne illnesses (such as influenza), but that alone does not make Claimant's employment more hazardous than employment in general. A mere allegation that the illness was contracted on Claimant's employer's premises is legally insufficient to support a finding that it was an occupational disease. *See Anderson*, 442 A.2d at 1360.

Certainly, it is theoretically possible for COVID-19 to be a compensable occupational disease provided that the occupation or employment can meet the *Air Mod Corp./Anderson* standard. While discussing a very different issue (an OSHA vaccine mandate), the U.S. Supreme Court used language that is very similar to what is needed for finding a compensable occupational disease under Delaware law. The Court found that OSHA had overreached itself by issuing a general public health measure rather than one tailored to occupations.

> That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID-19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." 29 U.S.C. §655(b) (emphasis added).

National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, Nos. 21A244 & 21A247, slip op. at 7 (U.S., January 13, 2022)(Per Curiam).[2]

[2] To be reported at 595 U.S. _____ (2022).

So, too, could allegations of special risks in the workplace, such as particularly crowded or cramped environments, form the possible basis for finding that a COVID-19 exposure was a compensable occupational disease. However, because neither party in this case has identified any aspect of Claimant's employment that would allow a finding that that employment posed a hazard to contracting COVID-19 greater than employment in general, there is no basis for finding that Claimant's COVID-19 was an "occupational disease" for purposes of the Workers' Compensation Act. As such, Claimant's motion to dismiss his petition on jurisdictional grounds must be granted.

IT IS SO ORDERED this 9th day of MARCH, 2022.

INDUSTRIAL ACCIDENT BOARD

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I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: CMW 3/11/22
OWC Staff

Raeann Warner, Esquire, for Claimant
H. Garrett Baker, Esquire, for Employer