Bean, Shannon

OCCUPATIONAL DISEASE (RCW 51.08.140)

Infectious disease

Where the record shows that a flight attendant more likely than not contracted COVID-19 from a passenger, the claim should be allowed as an occupational disease. This is true even where the infectious disease was pervasive in everyday life. The flight attendant's distinctive conditions of employment made it more likely for her to contract the infectious disease. The Board allowed the COVID-19 claim as an occupational disease. **….*In re Shannon Bean,* BIIA Dec., 21 18503 (2023)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 23-2-09441 KNT]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SHANNON M. BEAN	**)**	**DOCKET NO. 21 18503**
	)	
CLAIM NO. SY-30879	**)**	**DECISION AND ORDER**

On January 22, 2021, Shannon M. Bean worked on a commercial flight as a flight attendant for Alaska Airlines. Seven days later, Alaska Airlines notified her that a passenger on the January 22 flight had tested positive for COVID-19. Ms. Bean had been working near the passenger. On February 4, 2021, Ms. Bean also tested positive for COVID-19. The Department of Labor and Industries allowed Ms. Bean's occupational disease claim for COVID-19. Alaska Airlines appealed the order allowing the claim. After a hearing, our industrial appeals judge determined that COVID-19 did not arise naturally out of the distinctive conditions of Ms. Bean's employment because working in airplanes did not uniquely increase the risk of exposure to COVID-19. Ms. Bean and the Department both filed Petitions for Review. Alaska Airlines filed a response. We granted review to allow the claim and distinguish this case from our decision in *In re Christopher J. Sutherland.*[1] We hold that the distinctive conditions of Ms. Bean's employment increased the likelihood of her exposure to COVID-19, making it more likely that she would contract the virus while working as a flight attendant in the confines of an aircraft than in work environments generally or in her everyday life. A preponderance of the evidence establishes that Ms. Bean contracted COVID-19 naturally and proximately out of the distinctive conditions of her employment as a flight attendant. The Department properly allowed her claim. The Department order is **AFFIRMED.** Ms. Bean's motion for attorney fees is **DENIED**.

DISCUSSION

Ms. Bean has worked as a flight attendant for Alaska Airlines since 2011. On January 22, 2021, she worked a flight from Phoenix to Seattle. At this time, Alaska Airlines had COVID-19 precautions in place for flight attendants, including wearing masks and gloves. As part of the COVID-19 protocol, Alaska Airlines communicated potential exposures to flight attendants by calling the employee and providing the flight number, date, and seat assignment of the confirmed infected individual.

On January 29, 2021, Ms. Bean received a call informing her that the passenger in seat 15B on the Phoenix flight, a seat that was within her assigned area of the plane, had tested positive for COVID-19. Shortly thereafter, Ms. Bean tested positive for COVID-19. Ms. Bean became quite ill.

[1] Dckt. No. 21 15953 (Corrected Decision and Order, August 8, 2022).

She was bedridden. She felt sharp pain in her chest and back. She felt like she couldn't breathe, felt like she couldn't move, and was having trouble remembering things. She described this as brain fog.

Ms. Bean's severe symptoms lasted about four weeks. During that time, she had decreased lung capacity and fatigue. She testified that her brain fog still comes and goes. She often can't remember things, has found herself doing things that she would not normally do, such as losing her car in the airport, and she has trouble remembering appointments. So, she now writes everything down. Her loss of taste and smell lasted throughout the year, and it still comes and goes. She filed an industrial insurance claim. The Department of Labor and Industries allowed her claim as an occupational disease. Alaska Airlines appealed.

Alaska Airlines presented the expert testimony of John B. Lynch, M.D., M.P.H., and Julie Busch, a vocational counselor. Dr. Lynch is an Associate Medical Director at Harborview Medical Center and is board certified in infectious diseases. He is currently responsible for Harborview's Infection Prevention and Control Program, and for the last five years or so, he has advised Alaska Airlines' medical directors in the area of infectious disease and occupational health. Dr. Lynch has also led the clinical COVID-19 response team for the University of Washington Medicine since January 2020. He testified that at the time of Ms. Bean's alleged exposure the country was in the midst of a large surge of COVID-19. The United States was experiencing about 200,000 cases a day, and Washington was experiencing its highest number of cases during the pandemic to date.

Dr. Lynch testified that compared to similarly sized and staffed indoor spaces, there are conditions in airplanes that have remarkably decreased the risk of transmission of respiratory pathogens. First, wearing personal protective equipment was required of all flight crew and passengers in January 2021. Dr. Lynch testified that the proper use of masks has proven to be highly effective in preventing transmission of the virus. Second is management of the air exchanges. SARS-CoV-2, the virus that causes COVID-19, is predominantly an airborne-transmitted pathogen. In commercial airplanes, the air is brought into and exits from the passenger space at each row in a high-turnover fashion, thus there is no stabilization of the air where passengers are seated. Airplanes use HEPA-level filtration, meaning that the air handling is extremely high level, and as a result, the air that is breathed in and exhaled is being cleaned and moved very rapidly in a way that is not seen in other indoor spaces. Pathogens do not linger in the air, they continue to move through and be

filtered out via the HEPA filtration system. Dr. Lynch stated that these air exchanges are on par with what is seen in a hospital operating room.

Julie Busch testified about the duties of a flight attendant. In her opinion, there are no distinctive conditions of employment particular to flight attendants that place them at greater risk to contract COVID-19 compared to passengers on the flight.

The Department and Ms. Bean presented expert testimony from Juliet Liu, M.D., and Judith Anderson, a certified industrial hygienist. Dr. Liu testified that Ms. Bean contracted COVID-19, on a more-probable-than-not-basis, from the exposure she had on her flight on January 22, 2021. This is based on the fact that she was exposed to the passenger in seat 15B, who had COVID-19, there are no other known exposures to Ms. Bean, and Dr. Liu's understanding that Ms. Bean had been limiting how often she left her home. Dr. Lui is aware that Ms. Bean traveled on a personal trip to San Jose, California on January 17, 2021; however, Dr. Liu did not see any records of any potential COVID-19 exposures related to that trip. Given that the passenger in seat 15B had COVID-19 and Ms. Bean was in close contact with that person for more than 15 minutes, and was within 6 feet, Dr. Liu felt that Ms. Bean more likely than not contracted the virus from the passenger. Also, it is significant that Ms. Bean's symptoms manifested within eight days of this exposure.

Judith Anderson has been on staff for the Association of Flight Attendants' Air, Safety, Health and Security Department since 1999. She described the distinctive conditions in working on an aircraft. Flight attendants work in densely occupied and enclosed spaces and can't leave the airplane's cabin or open a window. Maintaining a social distance of 6 feet is not possible. She testified that in January 2021, it was an airline policy to require everyone on board to wear a mask. Flight attendants were expected to report for work regardless of the pandemic.

Ms. Anderson testified that in an aircraft cabin, the ventilation air is supplied at the top of the cabin side walls and then exhausted at the floor. There is a small amount of what is called dilution volume assigned to each person in an aircraft cabin, compared to an office building, a school, or an auditorium where the ceiling is much higher. She testified that studies have shown that the concentration of bioeffluents (the gases that people exhale) tend to be higher on an aircraft than in those other environments. Another distinctive condition of this employment is low relative humidity. Aircraft cabins tend to be very dry, typically less than 15 percent relative humidity, and dry air facilitates airborne disease transmission. Ms. Anderson explained that many viruses, including COVID-19, prefer dry air, which stabilizes the virus and allows it to travel further. When people exhale

virus particles, the dry air desiccates the particles and makes them smaller, allowing them to stay suspended longer and travel further. Moreover, airplanes are noisy, requiring people to raise their voices, which requires more effort and forces more air out of the mouth and nose. Low humidity environments have been recognized as higher risk for indoor disease transmission.

Ms. Anderson testified that as Flight Attendant B, Ms. Bean would be standing between rows 16 and 17, the exit rows. She would perform safety demonstrations, showing passengers how to use the oxygen masks and seatbelts, where the exit rows are located, and she would have had to ask the passengers seated in rows 16 and 17 if they were able to perform their exit row duties if there was an emergency. Ms. Bean would also hand out prepaid food and beverages using the cart service, and she would be responsible for trash pickup. Ms. Anderson testified that Ms. Bean would have been standing behind seat 15B for anywhere between 15 and 30 minutes.

Burden of Proof

In an employer appeal from a Department order, the employer must present a prima facie case.[2] Upon that happening, the burden of persuasion shifts to the claimant to establish the correctness of the Department order by a preponderance of the evidence, and the Department may assume the claimant's burden of defending its order.[3] No party contends that Alaska Airlines did not establish a prima facie case through the testimony of Dr Lynch and Ms. Busch. Alaska Airlines met its prima facie burden with the testimony of Dr. Lynch and Ms. Busch. We therefore proceed to weigh the evidence as a whole to determine whether the Department order allowing Ms. Bean's claim was correct by a preponderance of the evidence.

Ms. Bean's Occupational Disease Claim

An occupational disease is a disease or infection contracted by a worker that arises "naturally and proximately" from the distinctive conditions of her employment.[4] The term "naturally" requires establishment of something more than proximate cause—more than a showing that the worker contracted a disease while in the workplace—in order to establish it as an occupational disease. Coincidental timing or onset of a disease does not entitle a worker to coverage.[5] It is necessary, therefore, to consider the conditions of a claimant's employment and determine whether those

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[2] RCW 51.52.050(2)(a).
[3] *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 506 (1949), overruled on other grounds, *Windust v. Dep't of Labor and Indus.,* 52 Wn.2d 33 (1958); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).
[4] RCW 51.08.140; *Dennis v. Dep't of Labor & Indus*., 109 Wn.2d 467 (1987).
[5] *Witherspoon v. Dep't of Labor & Indus.*, 72 Wn. App. 847 (1994).

"particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general."[6] These "distinctive conditions of employment" must be specific conditions of the worker's particular employment as opposed to conditions that coincidentally occur in the workplace.[7]

The condition of COVID-19 presents new and difficult considerations to the analysis of the criteria for an occupational disease. In our previous decisions that have addressed occupational disease claims in the context of infectious diseases, we have held "that communicable diseases are generally a function of everyday life rather than a distinctive condition of employment."[8] The COVID-19 pandemic pervaded every aspect and physical space of daily life, including both our homes and workplaces, as it aggressively spread throughout our communities. While the ubiquity of COVID-19 meant that the risk of exposure was also present everywhere where one encounters other people, Ms. Bean's case compels us to examine when and how particular work conditions uniquely heighten the risk to the point that the disease is a foreseeable consequence of performing one's job.

Our industrial appeals judge found that Ms. Bean more likely than not contracted COVID-19 from the passenger in seat 15B. A preponderance of the evidence supports this finding. But Ms. Bean must do more than prove that she contracted COVID-19 in the workplace. Whether the claim should be allowed turns on the presence or lack of distinctive conditions of employment that exposed her to the virus in particular ways that differ from daily life or other work environments.

In *Witherspoon v. Department of Labor & Industries*,[9] the Court of Appeals rejected a worker's claim for meningitis due to a lack of evidence establishing that the condition arose "naturally" due to the distinctive conditions of his employment at a meat packing plant. In that case, the worker developed meningitis after a coworker coughed on him. The Court explained, "[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. 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 . . . ."[10]

Recently, in our decision in *Sutherland*, we explained:

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[6] *Dennis*, at 481.
[7] *Potter v. Dep't of Labor & Indus.*, 172 Wn. App. 301 (2012).
[8] *Sutherland,* at 3. *See also Witherspoon,* at 850.
[9] 72 Wn. App. 847 (1994).
[10] *Witherspoon,* at 851.

> 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 doesn't matter.[11]

Following *Sutherland* and *Witherspoon*, allowance of a contagious disease like COVID-19 as an occupational disease claim requires a fact-specific analysis of a worker's duties and environment.

Ms. Bean argues that the facts surrounding her work activities and exposure to COVID-19 while working as a flight attendant are distinguishable from *Witherspoon* and *Sutherland*. We agree. Ms. Bean's working conditions specifically exposed her to the COVID-19 virus in particular ways that differed from daily life and other work environments. In order to fulfill her duties as a flight attendant, she was required to work inside airplanes with numerous passengers. She was confined to an airplane cabin, sharing air with everyone in the cabin. The dry air of an airplane, unlike an office building or outdoors, provided a hospitable environment for the COVID-19 virus. Unlike the work environment examined in *Witherspoon*, these particular conditions of Ms. Bean's employment put her directly in greater contact with the virus.

In *Sutherland*, the claimant worked outdoors. He had no job-specific conditions distinctive to his duties or work environment that required him to be in close contact with others. He worked with a "teammate" while outside, but was not required to be in direct contact with his coworker at all. Even though it seemed likely that he nonetheless contracted COVID-19 from this coworker, "working with a coworker does not connote a distinctive condition of employment."[12]

In contrast to the workplace considered in *Sutherland*, Ms. Bean spent hours confined to an airplane cabin with numerous other people. This environment required her to be in close contact with passengers and breathe dry, recirculated air. During boarding and flights, she interacted directly with the public and often while fewer than 6 feet away from an individual passenger. On the day in question, her assignment required her to stand for at least 20 to 40 minutes continuously in proximity of a passenger who was later confirmed to have COVID-19, as well as continue to interact with the infected passenger, serve this passenger, and throw away the passenger's garbage. As a flight attendant, these were job-specific conditions distinctive to her duties and environment.

[11] *Sutherland*, at 3.
[12] *Sutherland*, at 2.

The inherent nature of Ms. Bean's employment caused her to be in direct contact with the COVID-19 virus in a way that was distinguishable from her exposure to its presence at any other place or time. Working on a commercial airplane is unique and presents a particular set of distinctive conditions that results in increased exposure to COVID-19 for flight attendants. When Ms. Bean went to work, she spent her working hours confined to an airplane cabin, and could not leave, in order to do her job. This unique work environment was particular to her job as a flight attendant and relevant to the question of COVID-19 transmission. In January 2021, without a federal mask mandate and before the availability of vaccines, contracting COVID-19 was a natural and foreseeable consequence of working in this environment.

The dissent argues that the flight attendants and passengers were required to mask despite the lack of a federal mandate. However, as stated by Ms. Anderson, the flight attendants have very little control over whether passengers wear masks. Passengers are allowed to take them off while eating and drinking, and as stated by Ms. Anderson, "[s]ome passengers don't want to wear masks, and so they will spend a three-hour flight sipping a drink, sipping the same drink."[13] It is also common sense that people would remove their masks to eat and drink as the flight attendants walk the aisles to distribute the food and beverages. We can't know whether the passenger in seat 15B, who had COVID-19, actually wore a mask when Ms. Bean was near them.

While the ubiquity of COVID-19 also meant that it was conceivable that Ms. Bean could be exposed outside of work, the conditions of her particular employment necessitated an increased risk in order for her to perform her flight attendant duties. Unlike the types of employment considered in *Witherspoon* and *Sutherland*, Ms. Bean's working conditions made it more likely than not that she would encounter the virus than in other types of employment generally or in everyday life.

The standard of proof in industrial insurance appeals is proof by a preponderance of the evidence. Certainty isn't required. While the evidence shows that Alaska took steps to reduce the chance of spreading the virus, we hold by a preponderance of the evidence, in this particular case, that Ms. Bean's contact with the passenger in 15B on January 22, 2021, more likely than not caused her to contract COVID-19. The Industrial Insurance system is a no-fault system. We are not holding Alaska Airlines at fault. Instead, we hold that it is more likely than not that this particular worker developed COVID-19 from the specific circumstances of her exposure to the infected passenger in seat 15B. We also hold that her infection more likely than not arose naturally out of the distinctive

[13] 4/29/22 Tr. at 16.

conditions of her employment as a flight attendant. The Department's order allowing the claim as an occupational disease is correct.

COVID-19 as an Industrial Injury

In Ms. Bean's Petition for Review, she raises for the first time the argument that her claim should alternatively be allowed as an industrial injury. Ms. Bean did not identify this as an issue at any point during litigation of this appeal. The Department order on appeal allowed the claim as an occupational disease and Ms. Bean's request to allow the claim as an industrial injury was not timely. Nonetheless, we have found that Ms. Bean's claim should be allowed as an occupational disease so we do not reach this issue here.

Ms. Bean's Motion for Attorney Fees

In Ms. Bean's Response to Employer's Motion to Amend Witness Confirmation, she requested attorney fees. There is no ruling on this motion in the record or the Proposed Decision and Order, so we address it here.

In Ms. Bean's written response and request for fees, she cited and summarized the case law pertaining to RCW 4.84.185 (the frivolous claims statute) in support of her request. She did not explain how this statute applied to her request. The frivolous claims statute allows the *prevailing* party to move for fees after entry of the final order. Our decision is the final order and Ms. Bean is the prevailing party. However, she has not provided adequate facts or argument to support a contention that the self-insured employer's appeal was frivolous. Nonetheless, it is our view that awarding fees to Ms. Bean under this statute is not warranted. The allowance of COVID-19 as an occupational disease is a developing question of law and the self-insured employer's position was reasonably supported by *Witherspoon* and our decision in *Sutherland*.

At the motion hearing and in a supplemental letter filed after the motion hearing, contrary to the original request, Ms. Bean did not argue that the employer's appeal "was frivolous and advanced without reasonable cause."[14] During these subsequent communications, she requested fees only to compensate claimant's counsel for time spent responding to the Motion to Amend Witness Confirmation. She argued that she was entitled to attorney fees because the employer did not request a 26(i) conference and neglected to prepare its case in a timely manner. No party alleged that discovery violations had occurred; nor does the record establish that a discovery violation occurred. The employer's motion was granted and the amended witness confirmation did not

[14] RCW 4.84.185.

postpone the litigation. Ms. Bean is not entitled to fees for time spent responding to the motion because there is no legal or factual basis upon which to award them. The motion for attorney fees is denied.

DECISION

In Docket No. 21 18503, the self-insured employer, Alaska Airlines, Inc., filed an appeal with the Board of Industrial Insurance Appeals on August 2, 2021, from an order of the Department of Labor and Industries dated July 23, 2021. In this order, the Department allowed the claim as an occupational disease. This order is correct and is affirmed.

FINDINGS OF FACT

1. On October 12, 2021, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Shannon M. Bean worked as a flight attendant in January 2021. Ms. Bean's employment as a flight attendant required her to travel on commercial airplanes. While working, Ms. Bean was confined to an airplane cabin for extended periods of time in close contact with members of the general public. Her job duties included preparing the aircraft for flight, greeting passengers, assisting with luggage and seat assignments, advising passengers on the aircraft's safety features and emergency protocols, handing out food and beverages, collecting trash, and generally assisting passengers as needed.

3. On January 22, 2021, Ms. Bean worked the Flight Attendant B position on a flight from Phoenix, Arizona to Seattle, Washington. On January 29, 2021, Ms. Bean was advised that the passenger in seat 15B on that flight had tested positive for SARS-CoV-2 (COVID-19). Ms. Bean would likely have been in close contact (within 6 feet) of the passenger in 15B for more than 15 minutes.

4. In January 2021, there was no federal masking mandate in place and the COVID-19 vaccine was not widely available. In the confined work environment of an airplane cabin, social distancing was not possible. The interior of an airplane cabin contains dry air that is hospitable to viruses, including COVID-19. During commercial flights, airplane cabins have a high occupant density in a confined space and higher levels of bioeffluents in the air. Alaska Airlines took several precautions to protect their employees from exposure to COVID-19, such as requiring passengers and crew to wear face masks and conducting screening of passengers. However, passengers and crew members removed face masks while eating and drinking. The aircraft's air and filtration systems allowed the air to be cleaned and moved rapidly in a manner that decreased the risk of exposure to pathogens, such as COVID-19, but viruses still spread between people on airplanes. These precautions served to reduce the risk

of transmission but did not eliminate the risk of transmission. Flight attendants must work in airplane cabins on commercial flights serving the general public. This unique work environment put flight attendants, including Ms. Bean, at increased risk of contracting COVID-19 in January 2021.

5. Ms. Bean tested positive for COVID-19 on February 4, 2021.

6. Ms. Bean's condition diagnosed as COVID-19 arose naturally and proximately out of the distinctive conditions of her employment with Alaska Airlines.

CONCLUSIONS OF LAW

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

2. Shannon M. Bean's condition, diagnosed as COVID-19, is an occupational disease within the meaning of RCW 51.08.140.

3. The Department order dated July 23, 2021, is correct and is affirmed.

Dated: April 24, 2023.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson

ISABEL A. M. COLE, Member

DISSENT

I dissent. The majority's decision fails to follow the reasoning in our previous decision and a Washington appellate court decision that addressed allowance of occupational disease claims in the context of infectious diseases. For nearly 30 years in Washington, the law has been that "communicable diseases are generally a function of everyday life rather than a distinctive condition of employment."[15] COVID-19 was a ubiquitous communicable disease present throughout society in January 2021. It is not the function of the industrial insurance system to protect people from communicable disease they would have contracted anywhere.

As the majority observes, the question of whether Ms. Bean's claim should be allowed requires a showing that distinctive conditions of her employment exposed her to COVID-19 "in particular ways

[15] *In re Christopher J. Sutherland,* Dckt. No. 21 15953 (Corrected Decision and Order, August 8, 2022). *See also Witherspoon v. Dep't. of Labor & Indus.,* 72 Wn. App. 847 (1994).

that differ from daily life or other work environments."[16] While COVID-19 was present among airplane passengers throughout the world in January 2021, COVID-19 was also present throughout the United States and every community and the risk of exposure pervaded everyday life. At that time there was a surge of COVID-19 in the United States with 200,000 cases a day and Washington State experienced its highest number of cases up to that date. There was nothing inherent in the nature of Ms. Bean's employment causing her to be in contact with the virus that was distinguishable from her exposure at any other place or time. Due to COVID-19's ubiquity, even though Ms. Bean took precautions in her personal life, she could have contracted the virus anywhere. The presence of COVID-19 in her workplace was coincidental, indistinguishable from its presence in any workplace or any place. Coincidental exposure to a virus is not a distinctive condition of employment.[17] And industrial insurance isn't meant to provide coverage for incidents that occur away from employment.

Moreover, even if Washington workers' compensation did cover people who contract ubiquitous contagious viruses, the majority appears to have failed to consider the most persuasive testimony–that of John B. Lynch, M.D. He testified that compared to grocery stores and everyday life, conditions in a commercial airliner has a remarkably lower risk of transmission of COVID-19, for the following reasons.

1. Ms. Bean was not in "close contact" with passenger 15B.
    a. Masks: all flight attendants and passengers were required to wear masks in January 2021. The use of masks was proven to be highly effective in preventing transmission of COVID-19. In order to be considered to have had "close contact" with someone possibly with COVID-19, one must be within 6 feet for at least 15 minutes *without* wearing a mask. Although there was no federal mask mandate, all flight crew and passengers were required by Alaska Airlines to wear masks. The majority concludes contrary to the preponderance of the evidence that Ms. Bean was required to be in "close contact" with a passenger (15B) with COVID-19. The evidence does not support this conclusion. First of all, Ms. Bean did not have "close contact" with 15B. The majority completely failed to consider that fact that the definition of "close contact" not only requires spending 15 minutes within 6 feet but also requires that this take place *without* wearing a mask. It is undisputed that all

[16] *Sutherland*, at 3.
[17] *Sutherland*, at 2; *Witherspoon,* at 850.

flight attendants, including Ms. Bean, wore masks as required by Alaska Airlines. Further, all passengers were also required to wear a mask. Although passengers were permitted to not wear their mask while eating and drinking, this exception to wearing a mask did not apply to flight attendants. The evidence does not support the majority's conclusion that Ms. Bean was in "close contact" with 15B.

b. The evidence does not support the majority's conclusion that Ms. Bean spent 20 to 30 minutes within 6 feet of passenger 15B. It is merely speculation that the majority concludes that Ms. Bean spent 20 to 30 minutes within 6 feet of 15B. Ms. Bean testified that she had no recollection of that particular flight, so she did not provide any specific information to support this conclusion. Ms. Bean's witness that the majority relies upon for this conclusion is based entirely on assumptions that are pure conjecture and difficult to believe. There is no evidence of when passenger 15B arrived. In all the flights Dr. Lynch has taken to speak and present at conferences in the United States and internationally, he has never experienced a particular flight attendant spending 15 minutes within 6 feet of him. Based on one's own experience in taking a commercial flight on Alaska Airlines, ask yourself, how often have you ever had a particular flight attendant spend 20 to 30 minutes within 6 feet of you? And in January 2021 not wearing a mask as required?

2. Air Exchangers: COVID-19 is predominantly an airborne-transmission pathogen. In commercial airplanes, air is brought into and exits from the passenger space of each row at a high rate and any possible pathogen does not linger in the air as it continues to move through and is filtered via the HEPA filter system. As a result, air breathed in and exhaled is cleaned and moved very rapidly in a way seen in very few indoor spaces. The airplane air exchangers are on par with what is seen in hospital operating rooms.

Dr. Lynch testified that there was no reason to think that a flight attendant would be a unique or special occupation that would put that person at a high risk of contracting COVID-19. He testified that, based on all the available literature and evidence and considering the requirement of masks and the use of air exchangers, the risk of transmission of COVID-19 on a commercial airplane is extraordinarily low. As our industrial appeals judge concluded, Dr. Lynch's "expertise as the Associate Medical Director responsible for Harborview Hospital's Employee Health Program and its Infection Prevention and Control Program; his role in advising Alaska Airlines in the area of infectious

diseases and occupational health; and significantly, his leadership in the clinical COVID-19 response team for the University of Washington Medicine, makes him eminently qualified to offer opinions on occupational risks related to COVID-19."[18] There were no distinctive conditions of Ms. Bean's employment that made her more susceptible to COVID-19 than everyday life.

In Ms. Bean's everyday life, she took a personal trip on January 17, 2021, and flew to and from San Jose, California. On this personal flight she would have had greater potential exposure to COVID-19 than while working as a flight attendant. While working, she would be moving about doing her job, not standing in a stationary position for 20-40 minutes next to passengers as discussed above. To the contrary, while a passenger she would have an assigned seat that she would have spent the vast majority of her time in this stationary position. She would have been exposed to a lot more than 20 minutes to passengers next to her, in front of her, and in back of her. She would have had a significantly greater potential exposure to a COVID-19-positive passenger in her everyday life of than while working. The evidence does not support the majority's conclusion that Ms. Bean contracted COVID-19 from passenger 15B.

Accordingly, I dissent from the decision reached by the majority. The reality is that the risk of COVID-19 exposure in January 2021 was pervasive in all public *and* private settings, including in airports and on commercial flights, for all people, whether they were in these spaces for work or personal reasons. Accordingly, the Department's order allowing the claim as an occupational disease is not legally nor factually supported because Ms. Bean's possible work exposure cannot be distinguished from her risk of exposure while living her everyday life, and thus her infection did not arise naturally from the distinctive conditions of her employment. The most persuasive evidence supports our judge's decision to reverse the Department's order and reject the claim.

Ms. Bean's Motion for Attorney Fees

I join the majority in its denial of Ms. Bean's motion for attorney fees.

Dated: April 24, 2023.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Jack S. Eng

JACK S. ENG, Member

[18] Proposed Decision and Order at 12.

Addendum to Decision and Order
In re Shannon M. Bean
Docket No. 21 18503
Claim No. SY-30879

Appearances

Claimant, Shannon M. Bean, by Reck Law, PLLC, per Tara J. Reck

Self-Insured Employer, Alaska Airlines, Inc., by Gress, Clark, Young & Schoepper, per James L. Gress

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 claimant and Department filed timely Petitions for Review of a Proposed Decision and Order issued on September 12, 2022, in which the industrial appeals judge reversed and remanded the Department order dated July 23, 2021. The self-insured employer filed a response to the Petitions 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.

Other

The claimant's motion for attorney fees is denied.