

BEFORE THE WEST VIRGINIA  
INTERMEDIATE COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

VAUGHN HUTCHISON,

Petitioner,

vs.

BOR Appeal No. 2058242  
Claim No. 2021019542  
Order Date: 08/19/2022

RAYTHEON CORPORATION

Respondent.

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BRIEF ON BEHALF OF PETITIONER  
VAUGHN HUTCHISON

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September 16, 2022

INTERMEDIATE COURT OF APPEALS

VAUGHN HUTCHISON

Petitioner

JCN: 2021019542

Appeal No.: 2058242

RAYTHEON CORPORATION

Respondent

**TYPE OF PETITION**

The claimant/petitioner, (hereinafter claimant) Vaughn Hutchison, petitions for review of the August 19, 2022, decision of the Workers' Compensation Board of Review which upheld the April 21, 2022, final order of the Workers' Compensation Office of Judges which had affirmed the April 16, 2021, Claim Administrator's order rejecting the claim for benefits. The claimant asserts that he contracted and suffered from COVID-19 in the course of, and as a result of his employment and his claim should be held compensable.

**FINDING OF THE FACTS**

The employer's OSHA Form 300 is the employer's report of work-related injuries and illnesses, that documented several employees contacted COVID-19 from the Raytheon Plant on October 2, 2020, through October 12, 2020.

On January 13, 2021, the claimant filed a completed WC-1 report of injury or disease. Dr. Halsey completed the physician's section of the form. He found that his condition was the direct result of an occupational disease and described the injury as a COVID-19 due to workplace exposure.

The claimant submitted the West Virginia Department of Health and Human Resources correspondence dated October 16, 2022. This correspondence reflects that the claimant has a presumption or a confirmed diagnosis of COVID-19.

The claimant was treated at Appalachian Regional Healthcare from October 9, 2020, to October 15, 2020. The claimant was referred to Dr. Z. Gul.

On November 17, 2020, the claimant followed up again with Dr. Gul. Dr. Gul stated that the claimant may return to work on December 1, 2020.

The claimant completed the AIG employee questionnaire. The claimant is a full-time employee at Raytheon Corporation as a builder.

- Q: How often do you come in direct physical contact with other employees or customers as part of your job?
- A: **Day**
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- Q: Did your employer provide daily precautionary COVID-19 screening at the time of your alleged exposure?
- A: **They started after the fact but we did mask at that point.**
- 
- Q: Describe specifically how the claimant was exposed to 'COVID-19. If applicable, provide specific names; dates of contact
- A: **From what I know the shipping manager came to work after being exposed to COVID from spouse. It quickly spread through the office and to the work area.**
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- Q: Prior to experiencing symptoms of COVID-19 did you do any of the following within 14-30 days prior; Had you traveled to any of the following regions/countries in the 14-30 days prior? China, Italy or EU countries, Hong Kong, S. Korea, Asia, Iran. If yes, did you have a COVID test prior to traveling?
- A: **No**
- 
- Q: Have you or a family member been in contact with anyone who has travelled to those regions? If so, they had been tested for COVID-19?
- A: **No**

The claimant submitted the Timeline of COVID-19 cases at Raytheon Technologies Corporation and is summarized as follows:

- On October 2, 2020, the employees were notified of a positive test and a department sent home. The employer started a deep cleaning process. On October 5, 2020, the business opened up and then everyone was sent home between 2:00 p.m. and 3:00 p.m.
- On October 6, 2020, the Union was notified by Tanner Jones that there were a total of 7 cases currently, none of which are in the bargaining unit. Tanner Jones also stated that we will be closed tomorrow as well. The Union made Tanner aware that they heard as high as seventeen positive cases.
- On October 9, 2020, the Union Vice President sent Tanner Jones that Vaughn Hutchinson had tested positive and contact tracing will begin very soon.

- On October 31, 2020, the company furnished the OSHA Form 300 to the Union which logged 9 positive cases beginning on October 2, through October 12.

The claimant's December 8, 2021, deposition transcript was submitted into evidence. The claimant stated he had worked for the employer for fourteen years. He would interact on a daily basis with coworkers in that room and his supervisors, whoever comes into the room normally. Sometimes the plant manager and other people came into the room, and sometimes engineers. There was a common area in the plant which is the cafeteria and everybody in the plant chooses to go in there because it had vending machines. Supervisors and office staff also used that area. (Tr. pgs. 3-4 ).

During the COVID-19 outbreak the employer and employees were deemed necessary and/or essential workers. The claimant first found out he had COVID-19 in October. (Tr. pgs. 5). The claimant described that the supervisor in shipping that had been in contact with COVID-19 and they seem to think that is where it spread from in the claimant's office. (Tr. pgs. 6) The claimant stated that he first tested positive on October 1<sup>st</sup> or 3<sup>rd</sup> following that Monday. (Tr. pgs. 8)

Outside of the plant he would go to work and come straight back and the reason he knew this was because he was kind of in a state of depression, he was just working and going home, work and going home. He had not traveled outside the country and he went to church once in a while. (Tr. pgs. 10) The claimant was treated at the emergency room due to his oxygen levels dropping. He was taken by ambulance to Beckley ARH from Summers County. (Tr. pgs. 12, 13) The claimant described other physical symptoms and problems which included foggy head, a lot of body pain, severe cough. (Tr. pgs. 14-16).

The employer submitted the West Virginia Insurance Bulletin No. 21-01. This bulletin finds that every employee of an employer that is required to insure for workers' compensation liabilities in this state who has sustained an occupational injury in the course of and resulting from his or her covered employment has the absolute right to file a claim for workers' compensation benefits. In this context, the term occupational injury includes an occupational disease. Every employee who sustains an occupational injury must immediately, or as soon thereafter as practicable, give written notice of the injury to his or her employer.

The bulletin states that it is the duty of every employer to report every injury, including claims of occupational disease, sustained by any person in its employ to its workers' compensation insurer within five (5) days of the employer's receipt of the notice of an employee's desire to file a workers'

compensation claim or an employee's report of injury.

This bulletin further explains that the COVID-19 pandemic has raised unique concerns and questions regarding the filing and compensability of workers' compensation claims. It also states that employers and healthcare providers must cooperate with those investigating workers' compensation claims for COVID-19 by providing medical records or other necessary information to the insurer or the self-insured employer in a timely manner so that investigations are not unnecessarily delayed. This bulletin clearly states that importantly, employers may not advise employees that they cannot file workers' compensation claims for COVID-19 and/or threaten to retaliate or discriminate against employees who do file workers' compensation claims for COVID-19.

The employer submitted the West Virginia Department of Health and Human Resources report dated October 2, 2020, regarding the total number of confirmatory lab results of the diagnosis for COVID-19.

On February 15, 2022, the employer submitted its Closing Argument stating that the workers' compensation statute did not cover an ordinary disease of life to which the general public was exposed outside of the employment.

On April 21, 2022, the Administrative Law Judge incorrectly applied W.Va. Code §23-4-1(f), Case Law and the facts in affirming the Claim Administrator's ruling.

By order dated August 19, 2022, the Workers' Compensation Board of Review adopted the Findings of Facts and Conclusions of Law of the Administrative Law Judge and affirmed the final order upholding the rejection of the claim. The claimant now petitions for a review of this decision before the Intermediate Court of Appeals.

### **ISSUE**

Was the claimant exposed to COVID-19 at his place of employment, and if so, is he entitled to benefits under the West Virginia Workers' Compensation statutes?

### **POINTS OF AUTHORITY**

W. Va. Code § 23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of

weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality, and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

W. Va. Code § 23-4-1 provides for benefits to employees who receive an injury in the course of and as a result of their covered employment. Three elements must coexist in compensability cases: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E. 2d 698 (1970); Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E. 2d 497 (1972).

W.Va. Code § 23-4-1(f) provides "...for the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment is compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease is considered to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon the consideration of all of the circumstances: (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the

character of the business and not independent of the relation of the employer and employee; (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction...."

Powell v. SWCC, 166 W.Va. 327, 273 S.E.2d 832 (1980), the Court found that a claimant who has an occupational claim does not have to negate all possible non-occupational causes for his injury (Myers v. SWCC, 160 W.Va.766, 239 S.E.2<sup>nd</sup> 124 (1997)).

Also, that the statute is not to be read as imposing any additional burden on the claimant beyond that contemplated by the language of the statute. Bannister v. SWCC, 154 W.Va. 172 174 S.E.2<sup>nd</sup> 605 (1970).

In Casdorph v. West Virginia Office of the Insurance Commission, 225 W.Va. 94, 690 S.E.2d 102, the claimant filed a claim due to gasoline exposure which developed into the disease chronic myelogenous leukemia (hereinafter CML) as not compensable as an occupational disease. Specifically, the denial found that this was an ordinary disease of life and that he had been aware of his condition more than three years prior to his filing. The claimant appealed the decision and the Court found that the claimant's CML resulted from his occupation, therefore, was compensable. Again, the Court found that the claimant was not required to prove that the conditions of his employment whether exclusive or sole cause of the disease, nor does it require the claimant to share that the disease is particular to one industry, work environment or occupation. Syl. pt.3 of Powell v. SWCC.

Pursuant to W.Va. Code §23-5-12a(b), the Intermediate Court of Appeals shall reverse, vacate or modify the order or decision of the Workers' Compensation Board of Review if the substantial rights of the petitioner have been prejudiced because the Board of Review's findings are (1) in violation of statutory provisions; or (2) in excess of statutory authority or jurisdiction of the Board of Review; or (3) made upon unlawful procedures; or (4) affected by other error of law; or (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. In the instant case, the decision of the Board of Review is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record and the decision is unsupported by the record developed below.

## ARGUMENT

As in Casdorph, the claimant's evidence clearly shows that he was exposed to COVID-19 at his place of employment. The employer identified that COVID-19 was in the plant based upon their Federal OSHA Form 300 logs report of injuries and illnesses. The employer did not show that the claimant was exposed to COVID 19 outside of his workplace, but only suggested that it could happen.

The claimant, as an essential worker was required to report to work during the COVID-19 shutdown. His job required him to work around co-workers in common areas and, the cafeteria which was used by supervisors and hourly employees. The claimant testified that during this time period, he would work and go home. He did not travel outside of the country or had any other type of exposures from family members. This testimony has not been refuted by the employer or that he was exposed to COVID-19 at work.

The employer has merely submitted data on the COVID-19 numbers which are general and not specific on how individuals were exposed to COVID-19. The claimant was required to work during the COVID-19 pandemic. As stated in Powell and Myers, the statute does not impose a greater burden on the claimant to file and successfully receive workers' compensation benefits. The Administrative Law Judge erred by creating a greater burden finding that COVID-19 is an ordinary disease of life to which all people have been equally exposed and therefore, exposure to this disease is not incidental to employment. The Administrative Law Judge clearly ignored the facts in applying a greater burden to the claimant to be successful in his workers' compensation claim.

As required by the six factors of W.Va. Code § 23-4-1(f), the claimant has shown that there was a direct causal connection between the conditions under which work was performed and the occupational disease and that the disease followed as a natural incident of work when he was exposed by co-workers. The OSHA logs submitted by the claimant show that COVID-19 can be fairly traced to his employment as the proximate cause of his exposure. The employer closed the plant down and did a deep clean because of COVID-19. The claimant was not exposed to the hazard outside of his employment. This exposure was incidental to the character of the business since the claimant had to work around co-workers who tested positive for COVID-19 and continued to work. This exposure finds that its origin a risk connected with his employment and had flown from source as a natural consequence. He was



required to work around co-workers with COVID-19. The claimant, if he had worked in an isolated area without exposure to his co-workers throughout the day, would have negated that he contracted COVID-19 due to his employment.

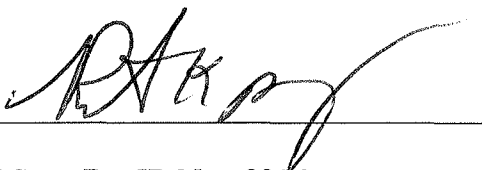
The Board of Review and Administrative Law Judge clearly ignored all of the claimant's facts and failed to properly apply the statute and case laws regarding occupational disease. Therefore, the Workers' Compensation Board of Review's decision should be reversed and the claim be held compensable.

### **CONCLUSION**

Wherefore, the claimant/petitioner, Vaughn Hutchinson, respectfully requests that the aforesaid final order be reversed and the claim be held compensable for exposure to COVID-19.

Respectfully yours,

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By   
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WV State Bar ID No: 8956

September 16, 2022

CERTIFICATE OF SERVICE

I, Patrick K. Maroney, counsel for Petitioner herein, do hereby certify that I served the foregoing Petition upon the following by E-File, hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 16th day of September, 2022.


E-FILE

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