

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CARL FOWLER,)	
)	
Employee,)	
)	
v.)	Hearing No. 1501167
)	
PERDUE INC.,)	
)	
Employer.)	

**DECISION ON PETITION TO
DETERMINE COMPENSATION DUE**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on November 17, 2020, via videoconference, pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020. The record was left open for the submission of written closing arguments. The Board concluded its deliberations on December 17, 2020.

PRESENT:

MARY DANTZLER

GREGORY FULLER, SR.

Julie G. Bucklin, Workers' Compensation Hearing Officer

APPEARANCES:

Walt F. Schmittinger, Attorney for the Claimant

Francis X.D. Nardo, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDING

Carl Fowler ("Claimant") alleges he developed COVID-19 related to exposure at work at Perdue Inc. ("Perdue") on or about March 22, 2020, and that his exposure qualifies as an occupational disease within the meaning of the Delaware Workers' Compensation Act. On July 14, 2020, Claimant filed a Petition to Determine Compensation Due seeking acknowledgment that COVID-19 is a compensable industrial illness. Perdue disputes that Claimant sustained a compensable disease.

The parties agree that Claimant was diagnosed with COVID-19 and has been medically unable to work since March 29, 2020, as a result of COVID-19 and the sequelae therefrom. There is no dispute regarding the reasonableness and necessity of Claimant's treatment for COVID-19 and the sequelae therefrom. Claimant earned in excess of the Statewide Average Weekly Wage at the time of his illness, which results in a workers' compensation rate of \$725.89 per week.

On November 17, 2020, the Board entertained a hearing via videoconference on Claimant's petition. The record was left open for the submission of written closing arguments, which were submitted according to the prescribed schedule, with the final submission made on November 30, 2020. The Board concluded its deliberations on December 17, 2020 and this is the Board's decision on the merits of the case.

SUMMARY OF THE EVIDENCE

Barrington Brown, M.D., board-certified in family medicine, testified by deposition on behalf of Claimant. Dr. Brown began treating Claimant several years ago. He believes it is likely that Claimant contracted Covid-19 due to an exposure at Perdue.

Dr. Brown saw Claimant on March 16, 2020 for a routine check-up for his diabetes, high blood pressure, and high cholesterol. Claimant was feeling well, sleeping well, had a good energy level, and was not having any new complaints. Claimant had a cardiac assist device implanted years ago.

On April 4, 2020, Claimant was admitted to Bayhealth Hospital via ambulance in respiratory distress. He was given oxygen, because he was not absorbing enough oxygen into his bloodstream. He had been notified that he tested positive for COVID-19 earlier in the day. He had shortness of breath beginning a couple of days prior to April 4th and a COVID-19 test was administered. On April 4th, the initial workup in the emergency room reflected a diagnosis of acute hypoxic respiratory failure suspected to be associated with COVID-19 and Claimant was admitted at that time for what turned into an extended hospital stay until June 9, 2020.

The diagnoses on admission to the hospital were acute hypoxic respiratory failure associated with COVID-19, multilobar pneumonia bilaterally secondary to COVID-19, septic shock secondary to COVID-19, and an acute kidney injury. As Claimant's family physician, Dr. Brown or his partner saw Claimant on a daily basis during his hospital stay. Due to the septic shock, Claimant had to be intubated and put on pressers, which are medications that elevate the blood pressure to help perfusion. COVID-19 tends to increase inflammation throughout the body, including in the lungs, which required Claimant to be on a ventilator to sustain life. Claimant's kidneys progressively worsened and later required dialysis for more than a month. Claimant developed gastrointestinal bleeding and required treatment with the gastroenterologist. Claimant ended up with atrial fibrillation, which is an erratic heartbeat, so his medications were changed to slow down the heart rate. Many specialists were involved in Claimant's care during his hospitalization and they were all necessary as a direct result of his severe COVID-19 course.

After Claimant was discharged from the hospital, he went to a rehabilitation facility for a period of time. He still had a Foley catheter because he had difficulty urinating on his own. He was still very weak and had difficulty even following the physical therapist's commands or evaluation in terms of going up one step. Claimant was discharged from the rehabilitation facility on July 15, 2020.

Dr. Brown saw Claimant on July 15, 2020 via video telemedicine in connection with his hospitalization for COVID-19. Dr. Brown still treats Claimant for that condition, because he is still substantially debilitated by it. Most of the appointment was between Dr. Brown and Claimant's wife, Felicia Fowler. Claimant was just seated there and only answered yes/no to certain questions while Mrs. Fowler provided most of the details. Claimant was severely depressed from the overall condition and he was seeing a psychiatrist, who Dr. Brown advised Claimant to continue to see. Claimant was placed on two medications from the rehabilitation facility and he was supposed to follow up with the psychiatrist to see if he needed any changes to those medications. Claimant also had worsening creatinine function throughout his hospital stay, so he had to follow up with the nephrologist about that issue. Claimant had general weakness and was being seen by a physical therapist and a visiting nurse in his home.

On August 10, 2020, Dr. Brown noted that Claimant described not feeling well and having decreased energy, cough, shortness of breath, and weight loss. Claimant continued to follow up with the urologist, cardiologist, and psychiatrist. Dr. Brown has not seen Claimant since August, but Claimant was still substantially debilitated as a result of COVID-19 at that time and was in no condition to return to work.

Dr. Brown asked Claimant if he had any idea how he contracted COVID-19 and Claimant mentioned work, but that was the gist of the conversation. The conversation occurred

in the hospital on April 20, 2020 and it was just a quick conversation in passing, because Dr. Brown needed to minimize his contact with Claimant (as with all COVID-19 patients). Dr. Brown did not ask any follow up questions about how Claimant contracted it, because he just moved on to the medical issues at hand. Dr. Brown did not ask Claimant about his social contacts in the two weeks leading up to his admission on April 4th or his daily activities or where he goes, such as to a gym, restaurants, stores, or social events. Dr. Brown did not talk to Claimant about where or how he contracted COVID-19 after his discharge from the hospital or rehabilitation facility. He does not know anything about Claimant's contacts in terms of the number of people or how closely he was in contact with them at work or outside of work in the two or three weeks leading up to the hospital admission.

Dr. Brown reviewed the report from Dr. Alfred Bacon, who examined Claimant at the request of Perdue and the insurance company. He does not disagree with any of the comments that Dr. Bacon made in his report. Dr. Brown believes that Claimant's current condition with multiple system dysfunctions either emanates from or was aggravated by COVID-19. Claimant's diabetes and cardiac issues were aggravated by COVID-19 and he developed new problems, such as the renal issues, respiratory issues, weakness, and generalized malaise, which he never had before contracting COVID-19.

Dr. Brown has had occasion to treat or consult in connection with other COVID-19 cases. He is not aware of anyone conducting contact tracing in connection with Claimant's diagnosis or any other patients he has treated.

Dr. Brown concurs with Dr. Bacon's opinion that the most likely exposure and explanation for Claimant's COVID-19 diagnosis was from his workplace. Dr. Bacon noted that

“there is no doubt that in this environment he acquired COVID-19 disease,” referring to Claimant’s workplace.

Dr. Brown does not know much about Claimant’s contacts, Claimant’s wife’s or daughter’s contacts, or how Claimant was exposed to COVID-19. Even if Mrs. Fowler had contact with someone with COVID-19, she would have to have tested positive for it before she could have passed it on to Claimant. Dr. Brown had a conversation with Claimant in passing about his family, but does not recall him saying that his wife or daughter had COVID-19. Dr. Brown agreed that he is unable to say to a reasonable degree of medical probability that Claimant contracted COVID-19 at work without an in-depth conversation and without obtaining information where it is likely he came into contact with the disease. Dr. Brown never discussed with Claimant whether Claimant used the cafeteria at Perdue; their conversations were geared towards the medical issues and treatment.

Dr. Brown does not know when Claimant started wearing a mask on a regular basis at work or outside of work. Claimant was not wearing a mask during the March 16, 2020 examination, which was an in-person appointment. Dr. Brown’s office was still open and doing business as usual at that point. None of Dr. Brown’s office staff wore masks or protective devices and there were no special sanitation procedures beyond the usual cleaning after a patient leaves the room. Fifteen patients were seen in Dr. Brown’s office on March 16th and social distancing procedures were not in place. There are four staff members in Dr. Brown’s office, plus him.

On March 16, 2020, Dr. Brown ordered blood tests for Claimant to check on his diabetes and thyroid. Claimant obtained the blood tests on the same day at either LabCorp or the hospital.

Dr. Brown continued Claimant on medications, but he does not know whether Claimant picked up the medications at a pharmacy or had a mail-order pharmacy deliver the medications.

Dr. Brown does not know what Claimant does at Perdue; he just knows Claimant works there. He does not know anything about Claimant's work environment or how many people work in the area. He does not know how many people are in the Perdue cafeteria at the time of Claimant's lunch break or anything about the configuration of the cafeteria in March 2020. The emergency room records on April 4th indicate that Claimant's shortness of breath began a couple of days earlier, meaning around April 2nd, but Dr. Brown does not know whether or not Claimant sought any treatment or was tested for COVID-19 before the April 2nd timeframe.

Upon review of the records from Bayhealth Medical Center, the COVID-19 test was administered on March 29, 2020 in the emergency room upon Claimant's presentation with complaints of dry cough, fever of 100.7 to 100.9, chest tightness, and restlessness for two days associated with shortness of breath. The test was administered because of Claimant's early presentation of COVID-related symptoms. The note indicates that Claimant is "high risk for possible underlying COVID-19 infection given that he is still working at Perdue factory over the last two weeks." He was given return precautions, advised to maintain home isolation until the test results were obtained, and discharged home in stable condition. Claimant obtained the positive results earlier in the day on April 4th. Dr. Brown does not know anything about Claimant's activities outside of work between his appointment on March 16th and his COVID-19 test on March 29th.

Alfred E. Bacon, III, M.D., a board-certified internist specializing in infectious diseases, testified by deposition on behalf of Claimant. Dr. Bacon examined Claimant on September 29,

2020 and reviewed Claimant's medical records in conjunction with the examination. He believes it is likely that Claimant contracted COVID-19 due to an exposure at Perdue.

Claimant was not functioning well at the time of the examination, so Dr. Bacon took a history from Claimant and Mrs. Fowler with most of the information coming from Mrs. Fowler. Claimant was barely functioning in Dr. Bacon's office. He used a walker, sat in the chair, and could not get up on the examination table. He communicated with yes/no answers only and looked exhausted.

Mrs. Fowler explained that she and Claimant were isolating, but Dr. Bacon does not know the timeframe; he suspected it was shortly after the State of Emergency was declared around March 12th. They stated that they only went to the grocery store, denied any other contact, and did not have anyone in their family they were in contact with or any neighbors or persons nearby that they knew to have COVID-19. They commented that they did not go out, socialize, or eat dinner out, nor had they gone to gatherings or large events.

Dr. Bacon was aware of Claimant's work activities at Perdue prior to his diagnosis. Claimant worked in a box area, rather than on the line with chickens. He was in a room that was relatively spread out from co-workers, who were more than six feet away from Claimant's work environment. Claimant's breaks were taken in a group cafeteria with other individuals nearby. Claimant only started working at Perdue in January 2020, so he did not have any particular friends at work and he did not interact with other individuals at work on a personal level.

Based on the conversation with the Fowlers and the medical record review, Dr. Bacon derived a timeline for Claimant's symptom onset, diagnosis, and subsequent medical course. The illness onset was in the March 27th to 29th timeframe and he was tested for COVID-19 on March 29th, during his first visit to the emergency room. Claimant presented to the emergency

room in a way that suggested the possibility of a COVID-19 diagnosis. The COVID-19 test was sent to Quest Lab. As part of Claimant's discharge instructions from the emergency room, he was advised to maintain home isolation until the test results came back, which is the standard protocol. The emergency room note also indicates that Claimant is "high risk for possible underlying COVID-19 infection given that he is still working at Perdue factory over the last two weeks," but Dr. Bacon does not recall reading that in the notes.

Claimant was admitted to the hospital a few days later and had an extended stay in the hospital. Claimant has significant comorbid issues, but COVID-19 led him to severe respiratory distress requiring intubation and a long stay in the ICU. He also had acute renal failure likely due to multisystem dysfunction and he developed secondary pneumonia and a GI bleed. He was as sick as will be seen with COVID-19 and still survive. Claimant required prolonged intubation, prolonged recovery, and then was discharged to a rehabilitation facility in June.

When Dr. Bacon saw Claimant in late September 2020, Claimant's substantially debilitated state was attributable to the sequelae from COVID-19 combined with his severe comorbid conditions. Claimant also had underlying psychiatric dysfunction from the prolonged severe illness. Patients who are as sick as Claimant have almost a PTSD, post-ICU psychosis/psychiatric dysfunction. There is new data that COVID-19 has a lot of psychiatric manifestations possible, but COVID-19 is a vascular disease and strokes are being seen with it. The patient becomes markedly damaged by COVID-19 neurologically and, after a two-month ICU stay, the patient is going to be psychiatrically dysfunctional from a PTSD-type event. The patients look awful, cannot function, are scared of everything, and cannot become normal again.

Claimant was treating with a psychiatrist, gastroenterologist, urologist, cardiologist, endocrinologist, and primary care physician in connection with all of the post- COVID-19 issues.

The cardiologist and endocrinologist were already involved in his care for the preexisting conditions and Dr. Bacon could not say that having COVID-19 worsened the cardiac or diabetic issues.

People can have COVID-19, be completely asymptomatic, and be contagious while asymptomatic with COVID-19. A person can be contagious for a period of time before developing symptoms of COVID-19 and that time period is likely no more than seven to ten days, but no one knows for sure about the timeframe. It is possible to be contagious and test negative and then a subsequent test would be positive, and the person may have had COVID-19 for several days even prior to the first negative test. Testing typically underreports the true number of cases in a population.

Dr. Bacon opined that Claimant is unable to function in a work environment, because he could barely function in a home environment at the time of the examination. He has been unable to work since his hospitalization in early April 2020 for COVID-19.

Dr. Bacon issued a second report on October 1, 2020, expressing opinions about the origin of Claimant's COVID-19. Dr. Bacon believes that Claimant acquired COVID-19 in his work environment. There was no clear-cut exposure at home or outside of the home that was documented by Mrs. Fowler's comments. Claimant did not acquire COVID-19 in his work environment in the room where he worked, but likely in a group environment, cafeteria, break environment, or even walking in the door of the building with ten other people surrounding him without wearing masks.

Based on Claimant's and Mrs. Fowler's comments about his activities leading up to his disease state, Dr. Bacon believes Claimant likely acquired COVID-19 during his cafeteria exposure to other individuals. The cafeteria is a high-risk environment because people are in

close contact; speaking, chewing, eating, and spewing droplets throughout the air; no masks are worn while people are eating; and there is a minimum of a ten-percent risk in that environment. Fifteen minutes is described as close contact and many people sit in a work environment or cafeteria environment for thirty minutes, although someone can contract COVID-19 in less than fifteen-minutes of exposure to an infected person. It is all a question of timing and how close Claimant was to other individuals and lack of mitigating technique. All of Claimant's treatment for COVID-19 has been reasonable and necessary as a result of his diagnosis, which he contracted at work.

Dr. Bacon's opinions were based on the history Claimant and Mrs. Fowler provided to him with regard to social contacts inside and outside of the work environment. If the history provided was inaccurate or incomplete, it might impact his opinion. Although Mrs. Fowler told Dr. Bacon that they self-isolated leading up to Claimant's hospitalization, she did not state how long they self-isolated. Mrs. Fowler denied all other contacts, besides shopping, in the weeks leading up to Claimant's hospitalization.

Mrs. Fowler reported to Dr. Bacon that she contracted COVID-19 around the same time as Claimant, but she did not document when her symptoms started and she was never actually tested for it. Dr. Bacon discussed it with Mrs. Fowler, but very little was forthcoming about it. Her symptoms were much less severe than Claimant's symptoms. Mrs. Fowler reported that their nine-year-old daughter had no COVID-19 activity, but she did not provide the status of their son with Dr. Bacon.

Dr. Bacon did not ask Mrs. Fowler when they last dined outside of the home before contracting COVID-19. Mrs. Fowler did not indicate when they last had contact with neighbors

or individuals not living in the home. She did not indicate whether they used masks or other protective devices when they shopped.

There is an eight to twelve percent chance of contracting COVID-19 in a cafeteria environment when in contact with an infected person for more than fifteen-minutes. The percentage is no different than anywhere else where people are gathering to eat and drink, such as a restaurant or social gathering with one caveat that it deepens on what percentage of people in that room are positive for COVID-19. There are repeated exposures over time in a cafeteria at work versus a one-time event in a restaurant, but it only takes one exposure to contract it.

Claimant reported to Dr. Bacon that he was not aware of anyone at Perdue who had COVID-19. He did not tell Dr. Bacon how many times a day he visited the cafeteria at Perdue in mid to late March 2020. He made it clear that he had no friends at work because he was a new employee. Dr. Bacon does not know the nature or amount of conversation or droplet spread risk that was present in the Perdue cafeteria in mid to late March 2020.

At the examination, Mrs. Fowler checked the calendar on her phone for dates and reported that Claimant became acutely ill on March 22, 2020. Claimant stopped working around March 27 to 29 timeframe. The medical records indicate that Claimant became ill around March 27 to 29 with COVID-19 testing performed on March 29th, which is different from what Mrs. Fowler reported.

Dr. Bacon is not aware of anything unique about poultry processing plants or, in particular, Claimant's job in the box area, that is unique and would give an increased chance of him having COVID-19. Chicken processing does not grow the virus or increase the likelihood of contracting COVID-19 because of the nature of the business. Claimant's chance of contracting COVID-19 at the Perdue cafeteria is no different than him contracting it at any other business,

such as Home Depot or Lowe's or anywhere else where people gather to eat and drink, whether in a workplace or in the world itself. It all depends on the volume, numbers, and concentration of humans, so it would be no different at Perdue except for those factors. There is nothing unique to the poultry industry that makes it more prevalent or less prevalent. It only takes one person with the disease in close proximity to you while eating or drinking to get to the eight to ten percent rate of contracting the disease. There is a low risk of contracting COVID-19 by going to the grocery store and a high risk in any work environment with a high density of humans with an incidence in number of COVID-19 cases. The average time to develop the disease is about five and a half days post-exposure. Globally speaking, there is no difference between the Perdue cafeteria and exposure elsewhere, such as in a restaurant, college dorm or cafeteria, social event, bar, or another work environment.

Early on during the COVID-19 pandemic, there was variability in mask recommendations and actual mask-wearing. The mask mandates were imposed by mid-May at the latest.

Claimant, fifty-five years old, testified about his job duties and illness. Claimant worked at Perdue from January 2020 until he contracted COVID-19 in late March 2020. He never had COVID-19 screening at Perdue and was never instructed to wear a mask. He was never given a COVID-19 test at Perdue.

Claimant worked in the box room sending boxes down the conveyor on the night shift from 5:50 p.m. until the work was done. He earned substantial overtime. The box room is a very large area with box machines and only six employees worked in there at a time. Claimant had no problem distancing from his coworkers during the shift, because he worked more than six

feet away from other people. Other than when Claimant was on his thirty-minute lunch break, he was in the box room for his shift.

When Claimant was on his thirty-minute meal break, he went to the lunchroom at Perdue on a daily basis. There were approximately two hundred people in the lunchroom when Claimant was there. There are long tables with chairs on both sides of the tables, so there were other people sitting at Claimant's table during breaks and they sat close to each other with shoulders touching. On really long shifts with a lot of overtime, Claimant got two breaks and spent the time in the lunchroom with a lot of other people there too. He did not have any friends at Perdue because he was a new employee, so he did not eat lunch with any particular person. He stayed to himself and did not talk to other people. Claimant did not participate in conversations with others, because many of the other employees speak a different language and they spoke to each other rather than to him.

Claimant was not required to take his breaks in the cafeteria. He could take his break in his car, outside, or go somewhere else for break. He packed his own lunch so he did not have to wait in line for the cashier in the cafeteria. He did not go out to the smoking area. He drove to work every day and did not stop on the way. On a typical day even before the COVID-19 pandemic, Claimant went from home to work to home again to sleep. He did not have any hobbies.

Claimant contracted COVID-19 in late March 2020. Prior to the onset of symptoms on March 27th, when Claimant was not working, he did not go to the movies, restaurants, or shopping. He does not remember the Governor's Order to stay home in March 2020. Prior to getting sick, Claimant did not socialize with friends, go to big events, or go out to eat. He did not go grocery shopping before his illness, because his wife shopped. In the weeks before his

diagnosis, Claimant did not go to Walmart or Royal Farms; he stopped for gas at Royal Farms at the end of the week for the next week, but he did not stop for coffee.

Claimant does not know anyone diagnosed with COVID-19 before him. He does not know anyone else in the box room or at Perdue who was diagnosed with COVID-19.

Claimant does not recall going to the emergency room. He did not even know he was in the hospital. His memory of the illness is not good now.

Mrs. Fowler had COVID-19, but Claimant does not know when she had it. He does not know if she had it before or after March 29th, but she did not have symptoms before March 29th. Claimant does not know if his son was diagnosed with COVID-19. Claimant lives with his wife and daughter, who is in elementary school. His daughter was not diagnosed with COVID-19. Claimant's son lives in Dover and has a baby. Claimant did not spend time with his son or grandchild in March 2020. Claimant's daughter attended school in March 2020 until the schools were closed. He does not know if there was an outbreak of COVID-19 at her school. He does not know when he started self-isolating.

Claimant does not remember his wife telling Dr. Bacon when he started getting sick. He is not sure why the Petition to Determine Compensation Due indicates March 22, 2020 as the onset date of his illness. Claimant does not recall seeing Dr. Brown on March 16th for his diabetes check-up.

Before working at Perdue, Claimant worked at Walmart for twelve years. He did not have any friends outside of work in March 2020. He is originally from Philadelphia and then moved to Dover. When Claimant contracted COVID-19, he did not even know there was a virus going around.

Felicia Fowler, Claimant's wife, testified on behalf of Claimant. Mrs. Fowler lives with Claimant and their nine-year-old daughter. Mrs. Fowler is not employed and was not employed in March 2020. Their daughter was in school in March 2020, until the schools closed on March 13, 2020.

Mrs. Fowler was aware of the State of Emergency declared in March 2020 due to the COVID-19 Pandemic. The family followed the stay-at-home order and she was the only person in the family who grocery shopped. They had no physical or social interactions other than Claimant going to work, because his job was deemed to be essential. Claimant worked really long hours from 6:00 p.m. until between 3:00 a.m. and 6:00 a.m.

Mrs. Fowler got the date of onset of Claimant's symptoms wrong when she told Dr. Bacon it was on March 22nd. She looked at the calendar on her phone and came up with March 22nd, but was wrong; she did not look at any documentation for the date. Mrs. Fowler agreed with the medical records indicating that Claimant first went to the emergency room on March 29th and provided a history of symptoms for two days. The Petition lists March 22nd as the onset date, but Mrs. Fowler had the date wrong because she has been through a lot with Claimant's illness. When she found the documentation from the hospitalization, she realized that March 22nd was wrong.

Claimant had chest pains on March 29th and that is the day he told Mrs. Fowler that he had symptoms, but she did not ask him when his symptoms started. Claimant was given a COVID-19 test at the emergency room and was told to self-isolate, so that was the day the family started self-isolating; they did not isolate beforehand.

Claimant was notified of the positive COVID-19 test results on April 3, 2020. His symptoms were much worse on April 4th, so he went to the hospital via ambulance. Mrs. Fowler

never got tested for COVID-19, but she had symptoms starting about one week after Claimant was admitted to the hospital. She did not need medical treatment and she self-isolated. Their daughter never had any COVID-19 symptoms and was never tested. Mrs. Fowler has heard that young people can have COVID-19 without having any symptoms. Mrs. Fowler's only exposure to COVID-19 was from Claimant. Their adult son, who does not live with them, tested positive for COVID-19 in May 2020 and he does not work at Perdue.

Before the State of Emergency was declared in March 2020, Mrs. Fowler's daily activities included staying home cooking and cleaning while their daughter was at school. Until schools were closed, their daughter went to Towne Point Elementary School by school bus. She also went to Bible Study once a week through her school and she went to the YMCA once a week for swimming. When Claimant came home from work between 3:00 a.m. and 6:00 a.m., he would eat and go to bed until it was close to time to go back to work. His only day off each week was on Sundays, so he slept most of the day.

In the response to the Request for Production, Mrs. Fowler indicated that Claimant just slept and went to work in the weeks leading up to March 29, 2020. He went to Walmart one time on March 1st to get a gift for their daughter's birthday and he would get gas at Royal Farms. Claimant's routine was to work and eat lunch in the cafeteria. He would usually take his lunch, but he purchased it sometimes. Mrs. Fowler could not say how often Claimant bought lunch at Perdue. Claimant worked a lot of overtime, which was mandatory.

Ronald Dukes, the Safety and Security Manager at Perdue for twenty years, testified on behalf of Perdue. Claimant was hired at Perdue in January 2020 and last worked on March 27, 2020. The Petition lists the onset of illness as March 22nd, which was a Sunday, but Claimant did not work that day.

Claimant worked in the box room at Perdue in March 2020 and his job duties included keeping the conveyor full of boxes. The box room is L-shaped and is approximately eighty-feet long and fifty-feet wide. It is a dry area that contains packaging materials, cardboard, and lids. There were four or five other employees working on Claimant's shift.

When the State of Emergency was issued, Mr. Dukes was involved with implementing the COVID-19 Protocols at Perdue and creating the COVID-19 Mitigation Timeline presented to the Board. In early March 2020, everyone was talking about COVID-19 and Perdue followed the CDC Guidelines. Perdue started getting more involved with plans on March 11th or March 12th. On March 12th, enhanced housekeeping service protocols were implemented with the janitorial company, who added employees to clean high touch surfaces every two hours. By March 17th, a "Call to Action" form was developed and posted in the plant on the Safety Bulletin Board, which became a COVID-19 Board and it listed instructions such as to wash hands, do not touch face, and to keep distance from sick people.

Claimant got a thirty-minute break every day and a second break if he was working a lot of overtime. He worked in the box room when he was not on a break. There is no problem social distancing in the box room. When on breaks, employees can do what they want and go where they want, but they cannot stay in the work area. They can go off premises, outside, or to the cafeteria. Other than on break times, employees have to stay in their own work areas.

March 24th is the earliest date that Mr. Dukes knows about on which employees were tested for COVID-19 based on what employees told him. March 28th is the earliest test date for a Perdue employee testing positive and Claimant was tested the next day.

Claimant and/or Mrs. Fowler told Dr. Bacon that the plant was closed on March 20th, but that was inaccurate. The closure occurred on March 30th, just after the first positive COVID-19

test from an employee was reported to Perdue. Mr. Dukes met with health officials and they were impressed with what Perdue had already done and they took what they learned at Perdue to share with the industry. Perdue released a video on March 21st to thank everyone for what they were doing to keep the plant safe and issued a letter to employees regarding travel protocols if they traveled outside of the United States.

On March 24th, Perdue began staggering start times and break times and also removed chairs and staggered tables in the cafeteria. By the time Claimant started work on March 24th, the spacing in the cafeteria was in place. Before March 24th, the employees were much closer together than six feet in the cafeteria. On March 25th, Perdue began daily cleaning and sanitizing of the employee areas with a fogging machine and before March 25th, those areas had the high touch surfaces cleaned every two hours. Temperature checks and employee screenings were implemented on April 1st. On April 26th, dividers were installed in the cafeteria. COVID-19 testing at Perdue did not start until after Claimant's diagnosis.

On the nightshift from March 28 through April 8, 2020, there were twenty-four employees who tested positive for COVID-19, but there were none before March 28th. There are more than 1,400 employees at the Milford Perdue plant and approximately 650 of them work on the nightshift.

While testifying, Mr. Dukes acknowledged that he saw on the spreadsheet that the first employee was sent home from work on March 18th from the Wellness Center for being symptomatic for COVID-19. The employee ended up with a positive COVID-19 test and was out of work for some time; the test was administered on March 26th and Perdue was notified of the results on March 31st. There were twenty-seven employees taken out of work by March 30th. The plant closed on March 30th for deep cleaning. There were more than two employees who

tested positive for COVID-19 by March 30th, but Claimant was not one of those two, but Mr. Dukes now knows that Claimant was positive for COVID-19 by that time. Between March 18th and April 15th, 124 employees were taken out of work and all of them later tested positive for COVID-19, but Perdue was not aware of the first positive COVID-19 test until March 28th. Claimant was the only COVID-19 positive employee in the box room on the night shift.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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. There is no dispute that Claimant contracted COVID-19 and had a serious course with the illness with lasting effects. Perdue argues that Claimant did not prove that his illness is related to exposure at work since COVID-19 is a worldwide pandemic, he could have been exposed to it anywhere, and COVID-19 is not an occupational disease. For the following reasons, the Board finds that this case is incredibly fact-intensive and Claimant has not met his burden of proof.

The Board does not find Claimant's testimony to be credible. He alleges having problems remembering things, but was able to remember how many people worked in his area in the box room and that he only sleeps and works and does nothing else at all. He testified that he always packed his lunch, but the testimony was later contradicted when he and Mrs. Fowler indicated that he purchased his lunch in the cafeteria sometimes. He testified that he never went to Walmart, but Mrs. Fowler testified that Claimant went to Walmart on March 1st to get a birthday present for their daughter, so the Board believes Claimant went to Walmart or other stores more often than Claimant suggests and it is possible he was exposed to COVID-19 at Walmart. Claimant testified that he did not even know about the pandemic before his diagnosis; however, Perdue already started making changes to protect its employees and his daughter's

school closed before Claimant became ill, so the Board finds that Claimant had to have known about the pandemic before he contracted it.

Claimant and Mrs. Fowler testified that he went to Royal Farms at least weekly. There was no testimony indicating that Claimant wore gloves at the gas pumps or washed his hands immediately after touching the gas pump, so it is just as possible that Claimant contracted COVID-19 from an exposure at Royal Farms as at Perdue. Claimant and Mrs. Fowler never told Dr. Bacon about Claimant going to Royal Farms when listing his social contacts, so the Board does not know what other social contacts Claimant failed to report to Dr. Bacon. There was also no testimony about Claimant wearing a mask at work or outside of work at any point and the mask mandate did not go into effect until May 2020.

Mrs. Fowler told Dr. Bacon that Claimant's symptoms started on March 22nd, but the medical records indicate that Claimant reported to the emergency room on March 29th that he started feeling symptomatic on March 27th. Dr. Bacon was under the impression that Mrs. Fowler was checking documentation on her phone when she provided March 22nd as the onset date and he relied on that information in forming his opinion.

Also, Claimant and Mrs. Fowler testified and told Dr. Bacon that they self-isolated in the weeks prior to Claimant's diagnosis. However, later in the hearing, Mrs. Fowler testified that they started self-isolating after Claimant's first visit to the emergency room on March 29th, so apparently, they were not self-isolating until March 29th. The Board finds the history provided to Dr. Bacon was not accurate or reliable regarding their self-isolation period and Dr. Bacon did not ask them when they last dined outside of the home or last had contact with anyone outside of the home, so he did not have complete or accurate information on which to opine regarding the source of Claimant's exposure to COVID-19.

Claimant went to Dr. Brown's office for a check-up and to a laboratory for a blood test on March 16th, before COVID-19 safety protocols were in place for patients or staff. Also, Claimant's daughter was attending elementary school until the schools closed on March 13th. None of this information was disclosed to Dr. Bacon, which could have impacted his opinions regarding causation. Dr. Brown was not aware of Claimant's work environment or social contacts leading up to the diagnosis of COVID-19 and Dr. Brown simply accepted Dr. Bacon's opinions. Dr. Bacon testified that someone can have COVID-19 and be completely asymptomatic, but still be contagious, so no one really knows whether or not Claimant's daughter falls into this category.

The first positive COVID-19 test result was reported to Perdue on March 28th and although a very small number of COVID-19 tests were administered prior to Perdue receiving the first positive test result, none of the positive tests were for employees in the box room on the night shift, which is where and when Claimant worked. There was no evidence that anyone who tested positive was even in the cafeteria at Perdue at the same time with Claimant or within six-feet of him; such information would have been important for the physicians in forming their opinions as to whether Claimant might have contracted COVID-19 at work.

Dr. Brown agreed that he was unable to say to a reasonable degree of medical probability that Claimant contracted COVID-19 at work at Perdue without an in-depth conversation and without obtaining information regarding where it is likely he came into contact with the virus. Dr. Brown never discussed with Claimant whether Claimant used the cafeteria at Perdue or about his other contacts at Perdue, because their conversations were geared towards the medical issues and treatment. Dr. Brown does not know when Claimant started wearing a mask on a regular basis at work or outside of work. Claimant was not wearing a mask during his check-up on

March 16th and Dr. Brown's office was open and functioning normally at that point with none of his staff wearing masks or protective equipment and there were no special sanitation procedures beyond the usual cleaning between patients. There were fifteen patients seen in Dr. Brown's office on March 16th and social distancing procedures were not in place. Claimant also went to the lab to get blood drawn on March 16th and he might have gone to the pharmacy to pick up medications on that day or soon thereafter. Dr. Brown does not know what Claimant does at Perdue or anything about Claimant's work environment. He does not know how many people work in Claimant's area or go to the Perdue cafeteria while Claimant is on lunch break or about the configuration of the cafeteria. Dr. Brown does not know anything about Claimant's activities outside of work between March 16th and the COVID-19 test on March 29th. The Board finds that without knowing the details of Claimant's work and personal contacts, Dr. Brown is unable to provide a reliable opinion regarding where Claimant contracted COVID-19.

Dr. Bacon explained that someone can be asymptomatic, yet be positive for COVID-19 and be contagious, so Claimant's daughter could have had COVID-19 without anyone knowing it and could have passed it on to Claimant. It is a question of timing, how close Claimant was to other individuals who were contagious, and lack of mitigating technique. Dr. Bacon's opinions were based on the history Claimant and Mrs. Fowler provided to him with regard to social contacts inside and outside of work, so if the history was inaccurate or incomplete, it might impact his opinion regarding the source of Claimant's COVID-19 exposure. Although Mrs. Fowler told Dr. Bacon that they self-isolated in the weeks leading up to Claimant's hospitalization, she did not state how long they self-isolated and she denied all other contacts besides shopping in the weeks leading up to Claimant's hospitalization. However, the Board finds that the history provided to Dr. Bacon was inaccurate, because Mrs. Fowler testified that

they actually started self-isolating after Claimant returned from the emergency room on March 29th after being instructed to do so after being administered the COVID-19 test. As stated above, Claimant and his family had numerous contacts outside of Perdue in the weeks leading up to his diagnosis and, therefore, the Board finds that Claimant has not met his burden of proving that it is more likely than not that he was exposed to COVID-19 at Perdue.

There are a tremendous number of places where a person can contract COVID-19 and essential businesses have remained open since the beginning of this worldwide pandemic. At a bare minimum, Claimant went to Royal Farms, Walmart, Dr. Brown's office, a laboratory, and work during in the weeks leading up to his diagnosis and he could have caught COVID-19 in any of those places. Furthermore, Claimant's daughter was attending school and afterschool activities, as well as riding the school bus, on a daily basis until the State of Emergency was imposed on March 13th, so she could have contracted COVID-19 and been asymptomatic, but still passed it on to Claimant. Although these are all unknown factors and possibilities, those possibilities are just as likely places and circumstances that could have exposed Claimant to the virus; the point is that no one can say for sure where Claimant contracted it and Drs. Brown and Bacon did not have all of the information regarding Claimant's social contacts and exposure risks to issue reliable opinions on where Claimant contracted it. Claimant's argument rests on the fact that he worked at Perdue and went to the cafeteria, so he could have been exposed at work; however, more than 12 million Americans have contracted COVID-19 since March 2020 from various sources. This virus is prevalent throughout the United States and the world, so the Board believes that Claimant could have contracted the virus in many ways and many places. The Board does not believe that it is more likely than not that Claimant contracted COVID-19 at Perdue based on the evidence presented. 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.

Based on the foregoing, the Board finds that Claimant has not met his burden of proof. The Board finds that Claimant could have been exposed to COVID-19 in numerous ways and did not prove that it is more likely than not that he contracted it at Perdue.

STATEMENT OF THE DETERMINATION

Based on the foregoing, Claimant's Petition to Determine Compensation Due is DENIED as to compensability of his development of COVID-19.

IT IS SO ORDERED THIS 31st DAY OF DECEMBER 2020.

INDUSTRIAL ACCIDENT BOARD

/s/ Mary Dantzler

/s/ Gregory Fuller, Sr.

I hereby certify that the above is a true and correct decision of the Industrial Accident Board.


Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff

11/4/21
CMW