WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DENYCE IVERSON, *Applicant*

vs.

CVS PHARMACY INC; XL INSURANCE

AMERICA, INC, adjusted by

SEDGWICK CVS BREA, *Defendants*

Adjudication Number: ADJ14940193
Redding District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 3, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DENYCE IVERSON
LAW OFFICES OF SILES & FOSTER, P.C.
BRADFORD & BARTHEL

AS/mc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *mc*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1.	**Applicant's Occupation:**	**Shift Supervisor**
2.	**Applicant's Age:**	**28**
3.	**Date of Injury:**	**8/11/2019**
4.	**Parts of Body Claimed:**	**Guillain – Barre Syndrome, nervous system, fingers, hands, legs, fatigue, cellulitis, demyelinating neuropathy, depression anxiety, irritable bowel syndrome, neurogenic bladder, back, sleep Urinary dysfunction, sexual dysfunction, anorectal dysfunction, asthma, gastro-esophophageal reflex disease, acute inflammatory demyelinating polyradiculoneourpathy, urinary incontinence.**

II.

FACTS

On 8/11/2019, the applicant was at work for defendant as a shift supervisor. When she arrived at work that day, she was reminded by the pharmacist that a free flu shot was available, and the applicant at that time agreed to receive a flu shot that day during her shift. While at work, and pursuant to her decision, the defendant's pharmacist administered the Afluria Quad and Pneumovax 23 vaccines. These shots were administered at about 10 am that morning into the applicant's left arm, and during a paid break from work.

The next day, while at work, the applicant began experiencing pain in the left arm and chest, and noticed that her left arm was red. She also felt a burning sensation there.

When these symptoms progressed to a feeling of lightheadedness and dizziness, the defendant's pharmacist instructed the applicant to go to urgent care, which she did. Applicant has not returned to [for] defendant since that day.

Previous to this series of events, every year upper management set goals for each store for vaccinations (Summary of Testimony, page 10: 24-25). There was a positive consequence for meeting the vaccination target (SOT, page 10: 1-2). The pharmacy at each store was responsible for meeting the vaccination target, and had a tracker that monitored progress (SOT, page 9: 25; page 11: 24; page 12: 1-2). Employees were encouraged to get these vaccinations. The vaccinations were offered free of charge to employees. The defendant sought to motivate employees to get the shot by offering a five-dollar coupon from the employer once the vaccination had occurred (SOT, page 6: 11-15; page 10: 15-16). If the store met its vaccination target, the employees were further rewarded with a pizza party (SOT, page 10: 5-9). The store manager testified under oath at trial that the defendant would benefit from the employee vaccination program as it would help in avoiding sickness and make it easier for management to keep staffing levels at a proper point (Summary of Testimony, page 10: 13-14).

The defendant's employees, although encouraged to get a vaccination, suffered no negative consequence if they chose not to. This applied to both the applicant and the store manager. It was wholly voluntary as to whether an employee did or did not get the vax.

III.

DISCUSSION

Petitioner argues that to find compensability, it must be shown that vaccinations were either expressly or impliedly required by the employer, and that those vaccinations served as a benefit to the employer, and that neither are shown by the evidence in this case.

Petitioner correctly argues that in this case the vaccinations were voluntary, and the employees were free to get them, or not, as they wished.

Petitioner cites several cases which stand for the rule that if an employer requires an employee to get a vaccination, then any injury arising therefrom is compensable. However, there is no dispute about this principle as all parties agree that an injury under those circumstances would be compensable.

The real question revolves around whether the facts of this case show that this employer impliedly required the flu shot, and the parties seem to agree that under the case law, if the facts show that to be true, an injury would also be compensable. Both petitioner and this judge cited **Integrated Data Co. v. WCAB (Small) (2001) 66 CCC 642 (writ denied) and St. Agnes Medical Center v. WCAB (Cook) (1998) 63 CCC 220** in support of this principle.

In **Cook,** it was pointed out that "the injury occurred as a direct link to the employment in that the employer made all the arrangements except for the time the flu shot was actually given…" In reviewing the WCJ's decision in Cook, the WCAB noted that applicant's injury occurred during work hours, on or in proximity to the working premises, and in accordance with arrangements made and paid for by defendant for the employees. The Board further noted that the employer derived a benefit from the flu shot. The applicant in both Cook and in this case voluntarily took the flu shot, which was administered at work, during the applicant's work shift or on time the applicant was paid for. Thus, in Cook, as here in this case, there was a causal connection between the applicant's employment and the injection. This persuaded the board in Cook that the applicant was performing a service incidental to her employment and that obtaining the flu shot was a work-related event which proximately caused the injury.

In **Dept. of Mental Hygiene of the State of California v. WCAB (Porter) (1967)** 32 **CCC 415 (writ denied)**, the employee's supervisor circulated among the employees an article in a magazine on isometrics, claiming that men who worked at a desk should exercise. The applicant

read the article, and while attempting an isometric exercise described in the article injured his back. Injury was denied, and after trial, the WCJ found the injury was not compensable. On appeal, the WCAB determined that because the article circulated by the supervisor encouraged the exercise activity (even though he did not require it), the employer was seen to acquiesce in the activity, and thus knowledge was presumed. Nowhere did the board find that this wholly voluntary activity disqualified the injury from being compensable because it was voluntary.

Citing **Porte*r*** with approval, the board in **Integrated Data Co. v. WCAB (Small) (2001) 66 CCC 642** found that an employee is deemed to be within the course of employment when he or she is performing an activity on the employer's premises during work hours that the employer expressly or impliedly has permitted and is reasonably contemplated by the employment. When the employer acquiesces in the employee's actions, it will be found that the employee was in the course of employment on the basis that the employer has impliedly authorized the action. In the Small matter, the employee had an adverse reaction to a flu shot she received during her lunch hour at an employer sponsored event on the employer's premises, and which the employer had specifically informed the employees would be available to them at this event.

Contrary to petitioner's assertions, the facts of these cases establish that the employer need only impliedly authorize the vaccinations to make them compensable. The fact patterns in these cases track almost exactly with the facts of our case.

Said another way, the line drawn between a compensable injury arising out of a vaccination at work and an injury that is not compensable is drawn not on whether the employer required the vax, but rather whether the employer impliedly permitted the vax, and that act was reasonably contemplated by the employment. Here, as in the cases cited above, the employer strongly encouraged its employees to get the flu vax at work, on paid company time, from the company pharmacist, at no cost to the employee, and with certain incentives to further encourage this act.

The facts here, as well as the law, clearly establish that the applicant's injury from her flu vaccination is compensable.

Petitioner further argues that to be a compensable injury, a benefit must be shown to the employer, but that here, although there was a benefit, it was minimal, and not enough to support liability. The **Cook** case cited above also notes that a benefit to the employer from the act – in both Cook and our case a flu shot – needs to be shown.

However, the case law only establishes that some benefit needs to be shown. It does not establish that a certain amount or quantum of benefit is required, only that some benefit is established.

Here, witness Brian Hallen testified at trial that having everybody vaccinated would help in avoiding sickness and keep the staffing levels at a proper level (SOT, page 10: 13-14). In **Holmes v. First Group of America, 2018 Ca. Wrk. Comp. P.D. Lexis 68**, there is language that supports the position that avoiding illness among employees is in fact a sufficient benefit.

Specifically, the board in **Holmes** stated, "For example, an employer likely benefits from the employee receiving a flu shot as it increases the overall productivity of the workforce." This tracks exactly the testimony provided at trial by Mr. Hallen. In **Cook**, supra, the board held hat getting flu shots provided an obvious benefit to the employer because working in a hospital exposes employees to diseases like the flu, and having employees miss time from work due to the flu and having them spread the flu to patients is an obvious detriment.

Further relevant testimony was provided by the applicant, who testified at trial that at the store where she worked, she frequently dealt with customers coming into the store looking for special medication from the in-store pharmacist, many of whom were already sick. She felt that she probably at some time caught a cold from working with customers at this store (SOT, page 9: 4-7). This is similar to the facts in Cook, supra, regarding exposure from patients/customers, and the detriment of passing on the flu to those same patients/customers, or to co-workers.

Another benefit to the defendant from these vaccinations was to help the store reach their vaccination goal. The employer witness, Mr. Hallen, testified clearly at trial that the store did have a vaccination target, and that the employees knew there was a target. In fact, the store pharmacy had a tracker that tallied the number of people getting vaccinations per store. Mr. Hallen agreed that vaccinated employees would certainly help with meeting each store's goal (SOT, page 11: 24-25, page 12: 1-2).

Contrary to petitioner's arguments, the case law and the facts support the position that nothing more than a benefit of some kind need be shown. Further, this same case law and facts show that much more than a minimal benefit was enjoyed by the defendant in our case by encouraging the employees such as the applicant to agree to a flu vaccine.

Putting all this in context is the vigorousness that the defendant displayed in pushing the employees to get the flu vaccine. As noted in the facts recited above, the employees were strongly

encouraged to get the flu vaccine. They could get it at no cost, on paid company time, administered by the company pharmacist. They received rewards in the form of a coupon, and/or a pizza party, and the applicant in fact testified that she was motivated to get the shot by the desire to have such a party. The applicant recalled in her testimony that other employees and management frequently questioned her to see if she had gotten her vaccination (SOT, page 7: 1-5), and the day the applicant got the flu shot, she was reminded by defendant's pharmacist when she came in that she had not gotten it yet, and who noted the availability of the flu shot that day (SOT, page 5: 16-20). Therefore, it is a reasonable presumption that in fact the defendant by these actions also perceived a more than minimal benefit from having vaccinated employees.

We have already seen that in our case there are clear benefits to the employer in flu vaccinations, both in healthier employees, better attendance, less management time expended in addressing the problems caused by sick employees, fewer transmissions from employees to the public, as well as in helping to meet the employer's vaccination target for the store. In addition, by encouraging employee vaccinations, the store was better able to meet its vaccination targets.

As to the case law, it does not stand for the need for an employer requirement for vaccinations in order for an injury deriving therefrom to be compensable, but rather that such a thing is compensable when the employer expressly or impliedly has permitted the action, and such action is reasonably contemplated by the employment. Contrary to defendant's arguments, there is no need for the employer to require the action for it to be compensable.

Therefore, the evidence and the law clearly establish that the employer here, by its actions, both expressly and impliedly permitted and encouraged the flu shot, and this flu shot is therefore an act reasonably contemplated by the employment. Further, there are several clear benefits to the employer, and these are sufficient, as defined in the above-mentioned cases, to justify finding a causal connection between the employment and the flu shot sufficient to define it as arising out of and in the course of employment – a compensable injury even if voluntary.

IV.
RECOMMENDATION

For the reasons discussed above, it is respectfully recommended that the petition for reconsideration be denied in its entirety.

DATE: 6/1/23

Curt Swanson
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE