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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CUYAHOGA COUNTY

THOMAS J. ROLSEN,	)	CASE NO. CV 15-852946
	)	
Plaintiff	)	JUDGE PAMELA A. BARKER
	)	
v.	)	
	)	**OPINION AND JOURNAL ENTRY ON**
WALGREEN CO/WALGREENS, et al.,	)	**DEFENDANT'S MOTION FOR**
	)	**SUMMARY JUDGMENT**
Defendants	)	
	)	

This matter is before the Court on the Motion For Summary Judgment Of Defendant Walgreen Co./Walgreen ("Defendant's Motion") filed on October 28, 2015, Plaintiff Thomas J. Rolsen's Brief In Opposition To Defendant's Motion filed on March 28, 2016 ("Plaintiff's Brief"), and Defendant's Reply Brief filed on April 7, 2015 ("Defendant's Brief").

Civ. R. 56(C) provides in relevant part as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: '*** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most

strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT:

In the matter before this Court, it is not disputed that: 1) the Plaintiff Thomas Rolsen was employed by Defendant Walgreens as a store manager at the Brecksville location on August 22, 2013;[1] 2) on August 22, 2013 Plaintiff chose to obtain a pneumonia vaccine from the

[1] Plaintiff's Deposition at 4-5, 12.

Defendant's pharmacy;[2] 3) this vaccine was not required or mandatory as part of Plaintiff's employment;[3] 4) after receiving this vaccine, Plaintiff was unable to lift his right arm, and experienced swelling;[4] and 5) Plaintiff was diagnosed with cellulitis from this vaccine shot.[5]

Defendant argues that Plaintiff's claim to participate in the worker's compensation system must fail as a matter of law because he was not injured in the course of, or arising out of, his employment.[6] The mere fact that an injury occurred during employment or on an employer's property is not sufficient to establish entitlement benefits.[7] Defendant argues that the injury occurred when the Plaintiff, by his own personal choice, obtained a pneumonia vaccine. The fallout from the vaccine was not an injury "in the course of" or "arising out of" his employment as receiving this vaccine was not "a duty required by the employer".[8]

In his Brief in Opposition, Plaintiff argues that this injury occurred in the scope of his employment as he was on the clock, and taking advantage of the free vaccination offered by his employer.[9] Plaintiff focuses on the fact that Walgreens "encouraged" its employees to participate in the vaccine program and that Walgreens controlled the administration of the vaccines on its premises.[10] Plaintiff's contention is that as he was still "on duty" as the store manager at the time of his injury, this is sufficient to warrant his participation in the worker's compensation system.[11] Plaintiff essentially requests that this Court expand Ohio's worker's

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[2] Plaintiff's Deposition at 5-6, 54-55.
[3] Plaintiff's Deposition at 5-6.
[4] Plaintiff's Deposition at 23.
[5] Plaintiff's Deposition at 23-24, 35, 37-40, 42-44, 51, 54.
[6] *Jones v. Multicare Health & Educ. Servs.*, 2014-Ohio-3724, P7 (Ohio Ct. App., Cuyahoga County Aug. 28, 2014).
[7] *Tamarkin Co. v. Wheeler*, 81 Ohio App. 3d 232, 235, 610 N.E.2d 1042, 1043 (Ohio Ct. App., Summit County 1992).
[8] Defendant's Motion for Summary Judgment, pp. 4-5.
[9] Plaintiff's Brief in Opposition, p. 4.
[10] Plaintiff's Brief in Opposition, pp. 4-7.
[11] Plaintiff's Brief in Opposition, pp. 5-6.

compensation eligibility by adopting a "duty encouraged," rather than "duty required" standard.[12]

This Court is persuaded by Defendant's arguments, however, and finds that Judgment is appropriate in its favor. Specifically, Ohio law requires:

> To recover workers' compensation benefits,... the worker [must] demonstrate that an injury occurred both "in the course of" employment and that it "arises out of" that employment. *Ruckman v. Cubby Drilling*, Inc., 81 Ohio St.3d 117, 121, 1998 Ohio 455, 689 N.E.2d 917 (1998); see also R.C. 4123.01(C). "In the course of" refers to the time, place, and circumstances of the injury, and limits compensation to injuries received while the employee was engaged in a duty required by the employer. *Klamert v. City of Cleveland*, 186 Ohio App.3d 268, 2010-Ohio-443, 927 N.E.2d 618, ¶ 9 (8th Dist.), citing *Fisher v. Mayfield*, 49 Ohio St.3d 275, 551 N.E.2d 1271 (11th Dist.1990). "Arising out of" requires a causal connection between the injury and the employment. Id., citing *Bowden v. Cleveland Hts.-Univ. Hts. Schools*, 8th Dist. Cuyahoga No. 89414, 2007-Ohio-6804, ¶ 11. Both prongs must be satisfied in order to receive benefits. Id.

Jones v. Multicare Health & Educ. Servs., 2014-Ohio-3724, P7, 2014 Ohio App. LEXIS 3649, *3-4 (Ohio Ct. App., Cuyahoga County Aug. 28, 2014).

Applying Ohio law, granting Summary Judgment is appropriate as: Plaintiff was not under a "duty" to receive this vaccine; there is not a "causal connection" between his injury and his employment; and this injury was not in the "course of his employment" as a manager. Walgreens is a retailer whose business includes providing vaccines and health services to the public. Walgreens' encouragement and promotion of this vaccine was the same for both the public and its employees. As the parties agree, the Defendant was not **required** to receive this vaccine as a condition of his employment, and, as such, this was not a task in course and scope of a Walgreens store manager.

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[12] Plaintiff's Brief in Opposition, pp. 12-15, 20; citing to *E.I. DuPont de Nemours & Co. v. Faupel*, 859 A.2d 1042 (Del. Super. Ct. 2004).

Accordingly, the Court finds that there are no genuine issues of material fact and that the material facts presented demonstrate that as a matter of law, Defendant is entitled to judgment in its favor. Therefore, Defendant's Motion is **GRANTE**D. This matter is dismissed as well as to Defendant Bureau of Worker's Compensation by operation of law.

IT IS SO ORDERED.

Pamela A. Barker

Judge Pamela A. Barker