

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 055539-96

Carolyn R. Hicks
Boston Medical Center
Boston Medical Center

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, Wilson and Carroll)

APPEARANCES

Herbert D. Lewis, Esq., for the employee
Richard P. Maloney, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The employee appeals from a recommittal decision addressing the issue of whether a flu shot given to the employee by the employer hospital, which caused optic neuritis (blindness), arose out of the employment. The administrative judge who originally decided the case awarded benefits, but made no findings on the facts surrounding the administration of the flu shot, other than its having been offered by the hospital to its employees and the general public. Hicks v. Boston Medical Ctr., 15 Mass. Workers' Comp. Rep. 1, 3 (2001).¹ As that judge ended her service with the department prior to the recommittal, the case was heard de novo before a different administrative judge. At the hearing, the employee testified to the circumstances of her receiving the flu shot. The judge concluded that the flu shot did not benefit the employer hospital, and therefore denied and dismissed the employee's claim. We reverse the decision, and reinstate the originally awarded benefits.

The judge's pertinent findings are as follows:

¹ We rejected the self-insurer's argument that the employee was barred from compensation by virtue of her receiving the flu shot during her lunch hour. Hicks, supra at 4-5. We therefore need not discuss that factor in this decision.

[The employee] worked as an EKG technician in the Heart Station. She was one of five EKG technicians in the Heart Station. There was plenty of coverage should one of the EKG technicians be out sick or on vacation. In addition to the five EKG technicians, there were numerous nurses, medical interns, residents and doctors who could administer the tests.

BMC requires its employees to get hepatitis shots and TB screening tests. They also offer to their employees other inoculations including yearly flu shots. The employee has gotten yearly flu shots as recommended by her primary care doctor, for many years, dating back to the period prior to her employment at BMC. The employee has several medical conditions including asthma, and high blood pressure, and has had a pacemaker installed. Her doctor recommended the shots because of her several medical conditions. Had BMC not provided the flu shot, the employee likely would have obtained one elsewhere.

In October, 1996, BMC put out fliers and radio ads to encourage people to come to BMC for free flu shots. These shots were offered to the general public, not just BMC employees. No pressure was applied to employees to encourage or force them to receive the shots. It was not a condition of continued employment, nor would any positive or negative actions be taken by BMC as a result of any decision to obtain or refuse a flu shot. The flu shot was purely voluntary. In the Heart Station, where the employee worked, no pressure was applied. Two of the five employees in that area refused the shot.

On October 15, 1996, at the employee's usual lunchtime, she left her fifth floor workstation and took an elevator to the first floor lobby. Once there she obtained a flu shot which was administered by an employee of the hospital.

(Dec. 819-820.) The judge determined that the employer did not benefit from the employee's having received the employer-sponsored flu shot. Cf. Lampkin v. Harzfeld's, 407 S.W.2d 894 (Mo. 1966), cited in L. Locke, *Workmen's Compensation*, § 242 (2d ed. 1981), and Hicks, supra.

The employer did not benefit from the inoculation by preventing the illness and thus disability of an indispensable or difficult-to-replace employee. While there is nothing in the record to suggest that the employee was anything but a valued worker for BMC, she was rather easy to replace if she became ill or took vacation.

(Dec. 822.) The judge therefore concluded that the employee's flu shot induced blindness did not arise out of the employment. (Dec. 823.)

We disagree with that conclusion on the facts of this case, and conclude that as a matter of law, the employee has proved an employer benefit derived from the flu shot. See Monette v. Manatee Memorial Hosp., 579 So.2d 195 (Fla. App. 1 Dist.1991).² In Monette, the court found an injury that resulted from the hospital/employer-sponsored flu shot was compensable under its workers' compensation law. Id. at 197. As in the present case, the employer sent a notice of the availability of voluntary flu shots to be administered for hospital personnel.³ Id. at 195-196. (Dec. 820; July 24, 2001 Tr. 9.) In both cases, the shots were administered during normal work hours by hospital employees in the hospital facility. Monette, supra at 197. (Id.; July 24, 2001 Tr. 11-14.) In Monette, the employee was in housekeeping, with no direct involvement in patient cases. Id. at 195. The present case, on the other hand, involves an employee who had constant direct contact with heart patients as an EKG technician. (Dec. 819; July 24, 2001 Tr. 15-17.) Thus, the reasoning of the Monette court in reaching its conclusion is all the more pertinent here:

[B]y virtue of her employment in a hospital setting, claimant recognized her responsibility to protect patients from exposure to flu, and availed herself of the opportunity to avoid contracting flu. Id. at 197.

We consider that Ms. Hicks' employment as an EKG technician with direct contact with high-risk patients – those with heart problems (Id.; October 19, 1998 Tr. 58) – included her receipt of the flu shot as an incident of that employment. See Caswell's Case, supra at 502. Because that incident of employment was also a clear benefit to the employer hospital by virtue of the avoidance of contagion caused by hospital employees,

² There is no Massachusetts case law, which presents the same fact pattern.

³ We do not see that the hospital's offer of flu shots to the general public in the present case as a distinguishing factor barring compensability, as "decisions place injuries attributable to specific events at work within the business risks covered by the act, even when employment does not expose employees to an unusual risk greater than that experienced by the general public." Zerofski's Case, 385 Mass. 590, 595, n. 2 (1982), citing Caswell's Case, 305 Mass. 500, 502 (1940)(injury at work during hurricane compensable).

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we conclude that the employee's claim is compensable.⁴ See Dorland's Illustrated Medical Dictionary, at 836 (27th ed.1985)(influenza defined as "an acute viral infection involving the respiratory tract, occurring in isolated cases, in epidemics, or in pandemics striking many continents simultaneously or in sequence").

We reverse the judge's denial of benefits and reinstate the benefits awarded in the prior hearing decision.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: November 19, 2002

Martine Carroll
Administrative Law Judge

⁴ While the court in Monette emphasized that employee's testimony regarding her intent to protect patients in the hospital from exposure to the flu, id. at 195, 197, we cannot see any basis for distinguishing its holding on the basis that there was no such testimony in the present case. How the employee's state of mind could be the determinative factor in assessing the employer's benefit – as a matter of law, logic and, most of all, common sense – eludes us.