IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

TINA R. NOONAN,

Plaintiff,

v. **CIVIL ACTION NO.: CV-2012-900167**

HGA, et al.,

Defendant.

PLAINTIFF TINA NOONAN'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the plaintiff Tina Noonan, by and through undersigned counsel, and submits this opposition to defendant Health Group of Alabama's ("HGA/OHG") motion for summary judgment. As grounds in opposition thereto, plaintiff states as follows:

INTRODUCTION

Tina Noonan is an occupational nurse who suffered a disabling work-related accident and injury. The injury and resulting disability is clearly compensable. Indeed, Alabama's Attorney General has previously concluded injuries caused by employer provided and encouraged vaccine programs are compensable. It is incredible this defendant, an entity dedicated to healthcare, would seek to deny medical and indemnity benefits to its injured employee.

The defendant hired Tina Noonan as an occupational nurse. This work exposed Noonan to blood and bodily fluids as a regular part of her employment. Since such exposures can result in tremendous costs to this defendant, it requires all its employees be tested for certain blood and bodily fluid borne diseases, including Hepatitis B. Moreover, when one of its employees tests deficient, defendant than "encourages" vaccination at its facility, administered by its staff, and at its cost. Here, Noonan underwent required testing which revealed a lack of immunity. Thereafter,

whether by "encouragement" or "requirement," defendant told Tina Noonan to undergo Hepatitis B vaccination (at defendant's facility) before beginning work on-site at a local plant.

Tina Noonan complied. Within days, she became largely paralyzed and deathly ill. She sought medical care. Initially, non-specialized physicians did not understand her condition. Without adequate skill or experience in treating her problems, they speculated as to causes. Noonan deteriorated rapidly to the point she required admission into defendant's Huntsville Hospital facility. While there, defendant's physicians discovered she suffered Guillain-Barre' Syndrome ("GBS"). The physicians examined Noonan's history and concluded the GBS was probably related to the Hepatitis B injection defendant administered as part of her employment.

Plaintiff, through her husband, promptly contacted her supervisor at HGA/OHG and reported both the diagnosis and its causation to the work-related injection. It is undisputed plaintiff reported both diagnosis and relationship to the work vaccination within 90 days of injection. Indeed, also within the 90 day period, Noonan's husband obtained directly from defendant the specific injection lot number and manufacturer. Then, still within 90 days of the injection, Noonan's mother reported to the Centers for Disease Control ("CDC") the causative injection, the vaccine lot number, the specific contact information for plaintiff's actual medical supervisor at HGA/OHG, and initiated an investigation. Under Federal guidelines, the CDC then contacts the providing medical facility (here plaintiff's employer) to initiate further investigation.

Plaintiff underwent lengthy hospitalizations at defendant's Huntsville Hospital facility in the initial months of her injury. During this time, she often was unable to function. Thereafter, she suffered periods of improvement and relapse. Today, her GBS is chronic and likely permanent. She remains wheelchair-bound and largely paralyzed. She requires assistive care for basic activities of daily living. Her injuries are clearly work-related and compensable. To hold

otherwise would close the door to the known risks our healthcare workers face on a daily basis in their employment.

SUMMARY OF UNDISPUTED MATERIAL FACTS

1. Tina Noonan was born August 2, 1963. She has an Associates Degree in nursing. (Dep. Noonan, p.9).

2. Tina Noonan received her nursing degree in 1995. (Dep. Noonan, p.10). Thereafter, she successfully worked in a number of nursing positions. These included work as a nurse in labor and delivery as well as occupational medicine. (Dep. Noonan, p.17-24).

3. Prior to defendant HGA/OHG, Tina Noonan worked fully and successfully as an occupational nurse at the local Delphi plant until its closure. She then worked as an occupational nurse at a local Sara Lee plant. (Dep. Noonan, pp.23-24).

4. While employed at Sara Lee, Tina Noonan saw a HGA/OHG ad seeking an occupational nurse for its facility at the local United Launch Alliance (ULA) plant. (Dep. Noonan, pp.37-38). Noonan applied for the position. (Dep. Noonan, p.38).

5. In April 2011, OHG called Tina Noonan, interviewed her by telephone, and offered her the position as an occupational nurse. (Dep. Clardy, pp.12-13). Tina Noonan accepted the offer on the same phone call. (Dep. Clardy, p.13).

6. Tina Noonan voluntarily left her position at Sara Lee to work for this defendant HGA/OHG. (Dep. Noonan, p.25).

7. Tina Noonan was fully able to perform her past employment as an occupational nurse. She has NOT made any prior workers' compensation claims. (Dep. Noonan, p.28). At the time

she went to work for this defendant, Noonan's only current medications were for common issues of cholesterol and blood pressure. (Dep. Noonan, pp.30-31).

8. Prior to her employment with this defendant, Tina Noonan had never suffered or been diagnosed with GBS.

9. Defendant HGA/OHG's workers, like Tina Noonan, are actually employed by Health Group of Alabama (HGA). Huntsville Hospital is majority owner (88%) and controller of HGA. (Dep. Clardy, p.7). Amanda Clardy, a regular employee of Huntsville Hospital, actually manages OHG's occupational nurses (including Noonan). (Dep. Clardy, p.7).

10. Defendant HGA/OHG required Tina Noonan (and other employees) to submit to a health screening as part of their employment. (Dep. Clardy, p.14). This mandatory job-required health screening included a drug test, TB test, and tests for immunities to certain blood and bodily fluid-borne occupational risks like Hepatitis. (Dep. Clardy, p.14).

11. The Occupational Safety and Health Administration (OSHA) requires healthcare entities to perform the above-referenced health testing as part of the employment of workers. (Dep. Clardy, p.15). While defendant's HR Director Clardy is unsure whether or not this defendant must comply with OSHA, she agrees it had elected to do so. (Dep. Clardy, p.15).

12. As an occupational nurse for defendant in a factory setting, Tina Noonan had an occupational risk of exposure to blood or bodily fluids carrying diseases like Hepatitis. (Dep Clardy, p.15). Defendant HGA/OHG recognized this risk to its workers. (Dep. Clardy, pp.16).

13. Defendant HGA/OHG understood nurse exposures to blood and bodily fluids are reportable work-related accidents. (Dep. Clardy, pp.47-48). When such an exposure occurs, defendant must complete a First Notice of Injury. (Dep. Clardy, p.47).

14. Defendant HGA/OHG has established procedures for its employees, like Tina Noonan, to minimize the risks of exposure to diseases transmitted through blood and bodily fluids. (Dep. Clardy, pp.25-26). The procedures protect defendant from incurring significant costs due to work-related illnesses from exposure. (Dep. Clardy, p.22).

15. Alabama's Attorney General has examined employer recommended and provided vaccination programs and ordered Alabama's Department of Industrial Relations to treat vaccine injuries as work-related injuries subject to Alabama's Workers' Compensation Act. (Opinion of Alabama's Attorney General).

16. After hiring Tina Noonan, the defendant scheduled her for its mandatory health screening and immunity testing. Defendant HGA/OHG performed the mandated Hepatitis B screening on Noonan at one of its facilities in Decatur. (Dep. Clardy, p.16). One of defendant's other nurses administered the testing, which included drawing blood. (Dep. Clardy, p.17).

17. Defendant HGA/OHG's mandatory testing indicated Tina Noonan was not immune to Hepatitis B. Additional vaccination was promptly scheduled due to the occupational risk. (Dep. Clardy, p.18).

18. Defendant HGA/OHG's representative testified it recommends employees tested as immune-deficient, receive booster vaccinations provided by the defendant. (Dep.Clardy, pp.21-22,27). While defendant's Human Resource Director was careful to state it cannot force medical injections on an employee, the booster "would be recommended." (Dep. Clardy, p.27). The vaccination booster shot protects HGA/OHG from substantial future costs of employees who become ill due to occupational exposures. (Dep. Clardy, p.22).

19. Tina Noonan received a call from defendant HGA/OHG informing her she was immune-deficient and instructing her she needed the booster prior to her first day in the ULA plant's medical station. (Dep. Noonan, pp.43-46).

20. Tina Noonan complied with defendant HGA/OHG's request. On April 21, 2011, Noonan reported to defendant's HGA/OHG's facility for a booster shot. (Dep. Noonan, p.32).

21. Defendant HGA/OHG provides, administers at its clinics, and pays for, the vaccination booster injections. (Dep. Clardy, p.22).

22. Tina Noonan reported to the ULA facility on April 25, 2011. (Dep. Noonan, p.40). Just a couple days afterwards, the Tennessee Valley was struck by major tornadoes. (Dep. Noonan, p.40). Although without power, Tina tried to continue working in the dark. (Dep. Noonan, p.41).

23. Tina Noonan worked approximately a week. By early May she was quickly becoming sick. (Dep. Noonan, p.41). Although progressively worsening, she tried to continue working. (Dep. Noonan, p.41). She lasted a couple more days. (Dep. Noonan, p.41). She became too ill to continue. (Dep. Noonan, p.57).

24. Defendant HGA/OHG promptly placed Tina on medical leave. Tina quickly became so severely ill she could not function or recall much of immediate events. (Dep. Noonan, p.57). Defendant's Amanda Clardy explained Noonan's illness "was a situation, you know, that escalated quickly…" (Dep. Clardy, p.40).

25. Initially, Tina Noonan began suffering a fever, body aches, and abnormal feelings. (Dep. Noonan, pp.59-61). Her symptoms quickly progressed. She began suffering terrible abdominal pain. (Dep. Noonan, pp.59-61). Noonan did not know what was wrong. Thinking she may just have a virus, she first went to a clinic in Moulton near her home. (Dep. Noonan, pp.60-61).

26. When Noonan did not improve, she saw an OHG doctor. (Dep. Noonan, p.62).[1] Like the Moulton Clinic, defendant's own OHG doctor simply told her she had a virus and to let it run its course. (Dep. Noonan, pp.62-62). However, Noonan still had not suffered symptoms from a stomach virus – she had not vomited or had diarrhea at this point. (Dep. Noonan, pp.62-63).

27. A couple days later, Noonan awoke in the middle of the night with her legs hurting. Her husband carried her to the local hospital in Moulton. (Dep. Noonan, pp.63-64). She then followed-up with a general physician, Dr. Gillespie. (Dep. Noonan, p.64).

28. Tina Noonan did not improve. Her symptoms continued to progress. She started suffering numbness, paralysis, and burning sensations. (Dep. Noonan, p.65). She also began falling. (Id.). She then went to defendant HGA/OHG's Huntsville Hospital facility. (Id.).

29. By the time she entered defendant's Huntsville Hospital, Noonan's condition had progressed to the point she could no longer walk. (Dep. Noonan, p.66).

30. During her initial hospitalization, Noonan went back and forth between Huntsville Hospital and a local rehabilitation facility. (Dep. Noonan, pp.66-67). When she first went to rehabilitation, Noonan's condition had rapidly progressed to the point she was paralyzed from the shoulders down. (Dep. Noonan, p.67). Her condition had so deteriorated, Noonan suffered a pulmonary embolism in rehabilitation and had to be taken back to Huntsville Hospital. (Dep. Noonan, p.66). Noonan's initial care of hospitalization and rehabilitation lasted over 75 days. (Dep. Noonan, p.66). She remained hospitalized until August 2011. (Dep. Noonan, p.67).

---

[1] Incredibly, defendant claims a lack of notice and estoppel due concealment when the undisputed evidence actually reveals Tina Noonan sought treatment at the outset with one of her bosses at OHG's clinic. Then, when the OHG clinic doctor did not help, plaintiff sought hospitalization at the defendant's Huntsville Hospital facility.

31. Just a few days into her initial hospitalization at defendant's facility, an examining neurologist (Dr. Greer) performed a spinal tap leading to the diagnosis of GBS. (Dep. Noonan, p.68). Another Huntsville Hospital physician with a specialty in infectious diseases ruled out viral or bacterial infections as a cause. (Dep. Noonan, p.70).

32. The physicians informed Noonan and her family the Hepatitis B booster injection was the likely cause of her GBS. (Dep. Glasgow, p.15). According to Tina Noonan's husband, the hospital physicians gathered a detailed history as to many issues including food consumption, insect bites, animal exposures, and other exposures. (Dep. Glasgow, pp.14-15). The physicians then conducted numerous tests. (Dep. Glasgow, pp.14-15)[2] According to Tina's husband:

> Q. Did the doctors [at defendant's Huntsville Hospital] ever pinpoint what they thought caused the Guillain-Barre' Syndrome?
> A. Yes. They came back and told me that they believed the vaccination caused it.

(Dep. Glasgow, p.15)

33. During Tina Noonan's first 10 days in defendant's Huntsville Hospital facility, she had her husband call her supervisor at HGA/OHG to notify them she had GBS from the Hepatitis B booster injection. (Dep. Noonan, pp.79-82). Tina had her husband make the phone call because she could no longer even hold the phone. (Dep. Noonan, p.79).[3]

34. Tina Noonan's husband promptly called her supervisors at HGA/OHG to inform them she suffered GBS related to the Hepatitis B booster injection. (Dep. Glasgow, pp.18-21). Upon

---

[2] This is a proper differential diagnosis and is the scientifically valid method of reaching a complex diagnosis. Indeed, pure speculation like that in which defendant's Dr. Gauthier now engages, is scientifically invalid and unreliable.

[3] Tina Noonan provided notice within 90 days of injection. That fact is absolutely without any legitimate dispute.

informing defendant of Noonan's condition and cause, her husband Spencer Glasgow requested HGA/OHG also provide him the lot number of the vaccine. (Dep. Glasgow, pp.19-20). The HGA/OHG person responded she would obtain the information and call him back. (Dep. Glasgow, pp.20-21). The HGA/OHG supervisor then obtained the vaccine information and provided it to Mr. Glasgow. (Dep. Noonan, pp.20-21). Defendant CONCEDES it received notification within 90 days of the injection as to Tina Noonan's GBS diagnosis and its probable causation to the work vaccine injection.[4] (See, Defendant's Brief).

35. After receiving the lot information for the vaccine, Tina Noonan's husband provided it to her mother. Her mother, Brenda Jarke, then reported the causative vaccine to the CDC. Jarke completed a form for the CDC (within 90 days of injection) informing the CDC of the vaccine, injury, lot number, and the identity of HGA/OHG's representative responsible for the injection. (Affidavit of Brenda Jarke).

36. According to Tina Noonan's husband, he continued to converse with supervision at HGA/OHG (on an almost daily basis) to apprise them of Tina's condition and progress. Glasgow testified these discussions involved Tina Noonan's continued employment, work position, and workers' compensation. (Dep. Glasgow, p.21).

37. According to defendant's representative, the CDC provides a form with every vaccination for the administering medical facility to report any adverse reactions. (Dep. Clardy, pp.45-46). Despite legal requirements and admittedly receiving notice of a causative relationship, defendant NEVER completed the adverse reaction report. (Dep. Clardy, pp.45-46).

---

[4] Testimony indicates the notification phone call was within days of hospital admittance. Moreover, the later CDC forms (which required information obtained from HGA/OHG) were also completed and submitted within 90 days.

38. Although defendant admittedly received notice of the diagnosis and relationship to the booster injection, it never completed an accident report.(Dep. Clardy, pp.45-46).

39. After her August 2011 hospital discharge, Noonan continued physical therapy in an effort to rehabilitate herself. (Dep. Noonan, p.70). She also continued home therapy to regain some function. (Dep. Noonan, p.78). Noonan experienced periods of waxing and waning function.

40. In February 2012, Tina Noonan awoke one morning with no strength. She has been unable to walk since that time. (Dep. Noonan, pp.70-71).

41. Since February 2012, Tina Noonan has undergone IV infusions. (Dep. Noonan, p.74). A few months later, a medical port was surgically implanted for continued infusions. (Dep.Noonan, p.75). Noonan has required care at the Mayo Clinic. (Dep. Noonan, p.85). Presently, she must travel to Vanderbilt every few months. (Dep. Noonan, p.90). At Vanderbilt, she has undergone plasmapheresis several times. (Dep. Noonan, pp.90-91).

42. Tina Noonan's ongoing care has also involved steroid treatments and anti-rejection drugs. (Dep. Noonan, p.91).

43. Currently, Tina Noonan has limited feeling in her legs but cannot move them. (Dep. Noonan, p.96). She must have someone with her at all times to perform necessary activities of daily living. (Dep. Noonan, p.97). She is largely paralyzed.

DISCUSSION

I. PLAINTIFF TINA NOONAN SUFFERED INJURIES CLEARLY ARISING OUT OF HER EMPLOYMENT WITH DEFENDANT HGA/OHG

Defendant HGA/OHG questions legal causation. Yet, the crux of legal causation is whether the employment was a cause or source of the accident. *See, McDuffie v. Medical Center Enterprises*, 110 So.2d 857, 863 (Ala. 2012); *Gold Kist, Inc. v. Jones*, 537 So.2d 39

(Ala.Civ.App. 1988). Here, the link between Tina Noonan's injury and her employment with this defendant is clear and undeniable.

In the recent decision of *Ex parte Patton*, 77 So.3d 591 (Ala. 2011), our Supreme Court correctly framed the analysis of the "arising out of and in the course of" standard. Although long, the full quote is appropriate to explain the issues:

> Under §§ 25–5–51 and 25–5–77(a), Ala.Code 1975, taken together, an employer must pay compensation for, and provide medical benefits as to, its employee's injury that is caused by 'an accident arising out of and in the course of [his or her] employment' without regard to the negligence of the employer or the employee. There is no dispute that the employee's accident occurred 'in the course of' her employment, i.e., within the period of employment at a place where the employee would reasonably be and while she was reasonably fulfilling employment duties or engaged in doing something incident to it. **Rather, the issue presented is whether the employee's accident arose out of her employment, i.e., whether there was 'a causal relationship between the injury and the employment**.' Dunlop Tire & Rubber Co. v. Pettus, 623 So.2d 313, 314 (Ala.Civ.App. 1993).
>
> "The principal 'fault line' that has been revealed by the application of the 'arising out of' requirement by Alabama courts is the distinction between accidents that are at least partially attributable to an affirmative employment contribution and those that are attributable solely to what are called 'idiopathic' factors, a term that 'refers to an employee's preexisting physical weakness or disease' that is ' "peculiar to the individual" ' employee. Ex parte Patterson, 561 So.2d 236, 238 n. 2 (Ala.1990). Thus, a fall may, under the appropriate circumstances, properly be deemed an accident arising out of employment.... In contrast, a fall may, under the appropriate circumstances tending to show an idiopathic factor, not be an accident arising out of employment....

Id. at 593 (quoting with approval The Court of Civil Appeals in the underlying case, *Brown v. Patton*, 77 So.3d 587 (Ala.Civ.App. 2009)). Here, defendant concedes it does not seek summary judgment as to the "in the course of" element. Rather, defendant's motion only questions the

"arising out of" element. That element is a question of proximate cause, i.e., did the OHG job "at least partially" contribute to the alleged injury. Here, the answer is unequivocally yes.

The facts are largely undisputed. The defendant absolutely required Tina Noonan to undergo immunity screening for Hepatitis B as part of her employment. The defendant not only required testing, it administered and paid for the procedure at its facility. Then, when Noonan tested deficient, the defendant purchased and supplied vaccine, paid all costs, scheduled a time for inoculation, and performed the inoculation at its facility using its staff.

The evidence is further undisputed defendant's medical employees, like Tina Noonan, are exposed to blood and bodily fluids as part of their normal job activities. These exposures create risks of work-related injury, including infection by Hepatitis B. The occupational risk of exposure is a part of this job and ANY exposure is treated as a work-related accident. Such exposures, when producing disease, cost defendant in many ways – lost man hours, staffing problems, coverage costs due reporting, lost reputation in the medical community, medical care costs, and indemnity benefits for disability. The testing and inoculation of its employees provides a substantial commercial benefit to defendant. That's why defendant instituted a vaccine program, covered all costs, and provided the actual testing and inoculation.

The only real factual dispute here is the LEVEL of persuasion applied by defendant to employees at risk for costing it money. And, while that dispute may be real, it is not relevant to the decision of compensability. While office/clerical employees present low risk of exposure-related illnesses, skilled nurses like Noonan present great risk to defendant. Regardless of factual dispute, the level of persuasion here makes no difference to the legal issue of compensability.

Defendant insists that while it absolutely requires testing, it only encourages STRONGLY the inoculation of employees. Defendant says it did not mandate Tina Noonan's

inoculation. While not dispositive to the issue of legal causation, the facts concerning defendant's level of persuasion/compulsion are disputed. Unquestionably, anyone with a boss knows what is meant when the boss STRONGLY encourages a specific action in the workplace.

Nevertheless, Tina Noonan recalls events differently than HGA/OHG. She recalls being called, told her immunity was low, and informed she needed to schedule the booster injection before interacting with defendant's patients. Strongly encouraged or implicitly required -- it does not matter. What matters is defendant's promotion and management of the program as an activity benefitting it. Those affirmative facts clearly provide legal causation.

Unlike *Mercy Logging, LLC v. Odom*, 104 So.3d 908, 915 (Ala.Civ.App. 2012), cited by defendant, the injection given Tina Noonan was no horseplay incident or deviation from the benefit of her employer. In *Mercy Logging*, the employees who decided to catch a snake in the middle of the road for fun while off work and not performing any job-related task, were providing absolutely no benefit to their employer. That is why the Court held a snake bite injury in the middle of the road while playing to not be compensable. Quite clearly, a snake in the woods during logging activities poses an occupational risk while a snake on the roadway long after work does not. Quite clearly, attempting to kill a snake in the woods during logging to prevent even greater exposures to a logging crew presents a legitimate activity arising out of employment while attempting to catch a snake for fun on the highway after work does not. That was the point our appellate court made. It's a classic proximate cause analysis. While lost on this defendant, it is not lost on plaintiff who clearly suffered harm while trying to serve her employer.

Mercy Logging is wholly inapplicable to the present situation. Here, Tina Noonan acted at her employer's request (whether "compelled" or "strongly encouraged") to undergo an injection greatly benefitting defendant's business. Tina Noonan, whether voluntarily or under

compulsion, exposed herself to a specific occupational risk that did not present itself outside her employment. Unlike the off-work employees in *Mercy Logging*, Tina Noonan did not simply decide to get an injection for fun with no beneficial purpose to her employer. It is outrageous for OHG to compare its conscientious nurse Noonan to an employee playing in the middle of the road with snakes after hours for no legitimate reason.

Defendant's comparison is despicable. It is incredible the defendant would ask its employee to undergo an injection and then turn its back on the same employee – claiming the injection was not related to her job. It is even more incredible this defendant argues Tina Noonan should be penalized for choosing to submit to her employer's request and suffering an injury when some other employee may have chosen not to serve the employer beneficially.[5] Yet, that is to be expected from an entity that far too often turns away injured workers without care.

Our communities depend upon healthcare workers. Protection from blood and bodily fluid infections are necessary and vital parts of their work. Those acts are also vital to defendant's continuity as a healthcare provider. That is why OSHA mandates testing of related healthcare workers and then mandates a program that, at the least, strongly encourages vaccination by the employing health care company at its cost.

The defendant asks this Court to ignore an important aspect of plaintiff's work. Yet, to ignore important parts of an employee's work simply because they are not explicitly and unequivocally ordered, would turn workers' compensation and employee benefits on its head.

---

[5] The undersigned only mentions this as apparently defendant HGA/OHG now argues Mrs. Noonan should not receive compensation for making the wrong choice to benefit her employer when other employees may have refused the "encouragement." Of course, defendant's current argument would be a terrible message to send to employees who want to serve their employer's needs.

While defendant's actions of testing Noonan's immunities, buying vaccines for her, "encouraging" her to take the vaccine, administering the injection, scheduling it before any risky exposures, and providing the facility for the procedure, are all *indicia* of an absolute connection to her work, it is not necessary for this Court to rely on the parties to this case for answers. Alabama's prior Attorney General William Pryor (now a Judge on the 11th Circuit Court of Appeals) has already analyzed the issue, answered the question, and instructed Alabama's Department of Industrial Relations to find healthcare injection injuries compensable.

In an earlier opinion, Pryor answered questions from the Department of Industrial Relations concerning smallpox vaccinations of healthcare workers. Just like Hepatitis B, our Federal Government developed a plan to eradicate smallpox in healthcare workers. Just like Hepatitis B, our Federal Government's plan mandated healthcare companies test certain workers for immunity. Just like Hepatitis B, our Federal Government's plan required healthcare companies to strongly encourage employee vaccination if the test showed deficiencies. Just like Hepatitis B, the healthcare companies were to purchase, obtain, provide, administer, and manage the inoculation process themselves. With both smallpox and Hepatitis B, it is absolutely incredible we would tell any healthcare worker a resulting injury was not work-related. Judge Pryor realized the common sense nexus between the injection and work giving rise to legal causation. Pryor also realized the devastating potential to communities if healthcare entities could injure their workers with impunity. Pryor clearly understood the message this defendant HGA/OHG wants to now send – that it wrongly expects its workers to take precautions in order to save it costs but does not care when those same workers suffer injuries in the process.

Judge Pryor's opinion provides a well-reasoned (and now long-accepted) analysis. Rather than repeat the opinion verbatim, it is attached as an exhibit. The undersigned encourages its

continued acceptance. In the opinion, Judge Pryor articulates the "arising out of" issue now contested by defendant.

In the recent *McDuffie, supra*, decision, our appellate court also held:

> Relevant to the determination whether the accident was incident to or related to McDuffie's employment is the nature of the activity; whether MCE [employer] managed, directed, or encouraged the activity; or whether it would benefit MCE.

Id. at 864. Here, the answer to all questions raised in *McDuffie* is a resounding yes. This defendant undertook an activity, testing and inoculation, clearly related to Noonan's work as one of its occupational nurses. And, HGA/OHG managed, directed and "encouraged" the activity just as listed in *McDuffie*. The activity, an injection given Noonan at HGA/OHG's expense at HGA/OHG's facility by HGA/OHG's employee to prevent injuries costly to HGA/OHG, was clearly related to her employment. Legal causation is well established. To imagine otherwise, puts healthcare workers at risk for a simple action taken to benefit their employers.

Defendant's semantic argument over "voluntary" turns workers' compensation on its head. Alabama law makes no such distinction. The employee hurt when he "voluntarily" took the stairs instead of elevator would be denied coverage. The employee hurt when he "voluntarily" helped another co-worker with an important work-related task, but not one within the injured employee's specific written job requirement, would be denied coverage. The employee hurt when he "voluntarily" worked after hours would be denied coverage. Indeed, work is often collaborative but every employee who dared help another employee when he/she did not absolutely have to do so, would be left without coverage. Any employee who did anything beyond his exacting written job description for his employer's benefit would be denied coverage. The undersigned has tried numerous cases involving employees who helped their employer even

when not under threat of termination or compulsion. These employees acted for their employer's benefit even though nobody compelled them to do so. Our Courts have long held compulsion is not a requirement for benefits.

The requirement an injury "arise out of" employment (defendant does NOT seek summary judgment on the "in the course of" prong although the undersigned stands ready to brief the issue) involves both legal and medical causation. Plaintiff addresses medical causation in the subsequent section of this response. Here, plaintiff only addresses the "legal causation" requirement. Again, legal causation "is basically a question of whether there is a causal relationship between the claimant's performance of his or her duties as an employee and the complained-of injury." *Ex parte Trinity Industries, Inc.,* 680 So.2d 262, 267 (Ala. 2007).

Most cases, like this one, involve a single act from which the harm flowed. Those cases are simple. The issue is whether the employment was the proximate cause. And, it was here. Yet, legal causation here remains simple even if this injury is termed a "non-accidental" one. In such cases, the injured worker "need only establish that the performance of his or her duties as an employee exposed him or her to a danger or risk materially in excess of that to which people are normally exposed in their everyday lives." *Id.* at 267. That is clearly the case with Tina Noonan. As an occupational nurse, she is exposed to the material risk of disease from blood and bodily fluid contact. Normal people do not suffer such a daily exposure. To combat the likely disabling impact of such diseases, healthcare companies instituted vaccination programs. And, indisputably, the rigorous vaccinations for communicable diseases are also activities and exposures in excess of what normal people endure. After all, normal adults do not regularly undergo unnecessary injections. Many people live their entire adult lives without a battery of immunity tests or additional booster injections for conditions where their risk is minimal or non-

existent. A viral booster injection for work exposes Tina Noonan to a much greater risk than normal people who rarely, if ever, require immunizations as adults. This defendant should not be allowed to expose its worker to a material risk and turn its back when an injury occurs. Our courts have been clear the legal causation standard in the non-accidental injury context was merely intended to prevent recoveries where a natural and non-work-related cause existed for the disability and the employee was merely "lucky enough to have the disabling event resulting from that natural cause occur at the place of employment or just after the employee has left the place of employment." *Id.* This is why in cases of heart attack, stroke, etc., the court examines the exposure at work to determine if it was greater than normal life. In the case at bar, involving a direct exposure due solely to work, it clearly was.

Our appellate decisions are replete with cases holding injuries compensable where the employee's action was encouraged by the employer or performed to benefit the employer. If desired, the undersigned will gladly brief the issue in further detail. However, it should not be necessary. This defendant's contemptible action of turning its back on an employee performing an activity for its benefit, is contrary to the purposes of our Act. And, defendant's comparison of Tina Noonan's activities to incidents of horseplay or personal activities (like chasing snakes in the middle of the road) providing no benefit to the employer, should be rejected summarily. The actual sacrifices made by nurses to help their healthcare employers must not be ignored.

II. PLAINTIFF TINA NOONAN PROVIDED CLEAR MEDICAL CAUSATION OF HER WORK-RELATED INJURIES

Incredibly, defendant HGA/OHG challenges medical causation in this case. In its brief, defendant notes "medical causation must be established, i.e., that the accident caused the injury

for which recovery is sought." (Defendant's Brief, pp.12-13, citing *Ex parte Moncrief*, 627 So.2d 385, 388 (Ala. 1993)).

After stating this proposition of law, defendant HGA/OHG then writes another three pages of boilerplate before reaching its true argument. That is, defendant provides the affidavit of James Gauthier who testifies Plaintiff's condition is not medically related to the booster injection. The crux of defendant's argument is plaintiff has no substantial evidence of medical causation. Yet, that argument by defendant is completely erroneous.

The undersigned is not surprised OHG's medical director Gauthier would attest to a lack of medical causation. Set aside the fact Gauthier is Tina Noonan's ultimate boss at HGA/OHG, a position giving him an inherent bias on behalf of his company. Set aside the fact Gauthier has a long history (known to many workers' compensation claimants who desperately needed care) of opinions disputing causation on issues for which he lacks real knowledge or experience. In the years the undersigned has practiced workers' compensation, he has suffered Gauthier's opinions as to metal toxicity, pulmonary injuries, brain injuries, financial motives, spinal surgeries, and many other issues for which Gauthier's experience was utterly lacking. In that vein, the undersigned looks forward to asking Gauthier how many GBS/CIPD patients he treats or studies on a regular basis. Yet, the simple fact he is defendant's expert does not warrant summary judgment.

While a rigorous examination of Dr. Gauthier's opinions should be interesting and, perhaps subject to Alabama's new *Daubert* standards, it is unnecessary at this juncture to delve further into the issue. Plaintiff does have substantial medical evidence of causation and intends to present that evidence at trial.

Here, Tina Noonan has been treated by doctors who, unlike Gauthier, actually treat this condition. Those doctors diagnosed her and informed her of the probable connection to the injection so that she (through her husband) could contact HGA/OHG and obtain the vaccination lot number. And, the undersigned has also had Tina Noonan's care evaluated by a preeminent medical specialist who actually does research, teach, and treat patients in this very field.

A copy of the curriculum vitae and report of Dr. Thomas Morgan are attached to Plaintiff's submissions. Dr. Morgan reviewed extensive information and actually performed a differential diagnosis in order to reach his medical conclusion the Hepatitis B injection by HGA/OHG caused Tina Noonan's condition. Unlike Gauthier, Dr. Morgan actually understands a differential diagnosis. That is the proper procedure to determine medical causation, i.e., listing, discussing, and eliminating all possible causes to reach the actual cause. It is the procedure performed by real clinicians who do more than simply refer injured individuals out for real care like Gauthier. And, Dr. Morgan's report clearly provides substantial evidence of medical causation warranting a trial of this case on the merits.

III. TINA NOONAN PROVIDED NOTICE OF HER ACCIDENT AND INJURY AS REQUIRED BY ALABAMA'S WORKERS' COMPENSATION ACT

Defendant HGA/OHG contends Tina Noonan failed to provide required notice of her work-related injury. Yet, the facts and law clearly do not support defendant's contention.

What constitutes adequate oral notice under Alabama's Act? Alabama law is well-settled. As our Court noted in *Russell Coal Co. v. Williams*, 550 So.2d 1007, 1012 (Ala.Civ.App. 1989), "[i]f, however, the employer has some information connecting work activity with an injury, it may be put on reasonable notice to investigate further." The key inquiry is whether or not the

employer has information connecting the claimed injury to an alleged work activity. Here, defendant HGA/OHG clearly did. The notice provision of our Act is satisfied.

In its brief, defendant concedes the employee must only provide actual notice of an accident or injury with 90 days of the incident. (HGA/OHG Brief, p.9). In the case at bar, notice was clearly provided within such time. And, defendant does not factually dispute that within the 90 day period (1) plaintiff provided her diagnosis; and, (2) plaintiff informed defendant of the relationship between the injury and causative work activity, i.e., the actual booster injection.

The purpose of Alabama's notice provision is two-fold. First, notice enables the employer to provide immediate medical diagnosis and treatment. Second, notice facilitates the earliest possible investigation of the facts. *See, Thomas v. Gold Kist, Inc.*, 628 So.2D 864 (Ala.Civ.App. 1993). Here, it is important to note Noonan received care as an impatient in defendant's Huntsville Hospital facility beginning within a couple weeks of her injection.[6] Moreover, Noonan's husband called and specifically informed her supervisor immediately upon receiving the diagnosis of GBS due the injection from this defendant's doctors. And, her husband informed the supervisor of both the diagnosis and its likely injection cause. Defendant concedes this notice was within 90 days of the actual injection.

As Defendant HGA/OHG concedes "The Defendant acknowledges that Plaintiff's husband, Spencer Glasgow, claims to have advised the Defendant that the Plaintiff's physicians had allegedly concluded that the April 21, 2011 vaccination caused the Plaintiff's GBS."

---

[6] Within days of the injection, Noonan sought care at defendant's OHG clinic. Then, Noonan was quickly hospitalized at defendant's Huntsville Hospital facility. Our Courts have long held notice to defendant's doctors (and these were all defendant's doctors) is sufficient notice. However, it is not necessary to address this additional notice as plaintiff clearly notified her supervisor of the injury and its work-related cause.

(Defendant's Brief, p.21). Never mind the obvious fact these physicians were also part of the Defendant HGA, which manages both OHG and Huntsville Hospital.

Despite a clear statement that a specific act (the injection) caused specific injury (Noonan's GBS), defendant HGA/OHG still argues notice is not sufficient. Instead, defendant cites *United Auto Workers Local 1155 v. Fortenberry*, 926 So.2d 356 (Ala. Civ. App. 2005) to support its argument. Unfortunately, the defendant mis-cites *Fortenberry*.

In *Fortenberrry*, the employee suffered a stroke. The employer disputed notice. At trial, the employee testified he had no knowledge of notice or when it occurred. *Id.* at 358. In other words, while the employer may have known of the stroke itself with 90 days, there was no notice of any claimed link to the employment within that time. *Fortenberry* is inapplicable here where even the defendant concedes it received notice of the causal link between the alleged injury and an exact work-related activity. *Fortenberry* and the present case are very different. Alabama cases interpreting our Act consistently hold notice of the medical condition with an allegation of a relationship to a work activity is more than sufficient. Here, Tina Noonan provided notice.

IV. TINA NOONAN SUFFERED A WORK-RELATED INJURY AND IS NOT ESTOPPED FROM SEEKING WORKERS' COMPENSATION BENEFITS

Tina Noonan performed a task requested by her employer for the benefit of its business – an injection provided by defendant to lower its potential costs. Tina Noonan then suffered an injury from that injection which resulted in chronic paralysis. Causation is supported by substantial evidence from a practicing neurologist. Finally, Tina Noonan (through her husband) notified defendant of the injury and its specific work-related cause due the injection. Defendant factually concedes it had notice within 90 days. Moreover, Noonan's husband also testified he discussed obtaining benefits, including workers' compensation benefits, with the employer. And,

plaintiff actually sought primary care at this defendant's OHG and Huntsville Hospital medical facilities with this defendant's doctors. Yet, defendant now argues estoppel?

Incredibly, defendant HGA/OHG claims plaintiff should be estopped from seeking appropriate workers' compensation benefits. And, defendant offers just one case, *Mid-South Electric Co. v. Jones*, 848 So.2d 998 (Ala.Civ.App. 2002) in support of its estoppel argument. Glaringly, defendant fails to cite fully that case. Defendant's omission of information is crucial, and fatal, to its contention.

Defendant only partially cites *Mid-South Electric*. Defendant's cited quote (HGA/OHG brief, p.24) stops short of the key information. Rather, our appellate court continues "[t]he employee's deliberate decision to conceal the fact that she suffered a work-related injury defeats these purposes because the employer did not have the opportunity to investigate the employee's injury and did not have the opportunity to monitor or manage the employee's medical treatment." *Id.* at 1000. In *Mid-South Electric*, the employee actually told her treating physician "that she had injured her back at home" rather than work. *Id.* That employee purposely lied to her doctors to prevent her employer from providing medical care. That is not the case with Tina Noonan. And, her claims are absolutely not estopped.

Tina Noonan began suffering severe problems following her booster vaccination injection by the Defendant. Defendant's own corporate representative testified Noonan's condition deteriorated quickly. At first, Noonan did not know what was wrong. Neither would anyone else in her position. She quickly became deathly ill and paralyzed. Initial clinic doctors, including defendant's own doctor who saw her, did not know what was wrong. That's because this injury required specialists. And, plaintiff proceeded to see those specialists in defendant's own hospital.

Nothing in these facts evidences any act of deliberate concealment. Rather, Noonan's conduct evidences a genuine openness to information sharing, treatment, and rehabilitation.

It is undisputed as soon as Noonan received a GBS diagnosis with the probable cause being the Hepatits B injection, she had her husband call and inform her supervisor. Indeed, plaintiff was barely conscious due to her condition and could not even physically hold the phone. Yet, she had her husband call. That notification is undisputed. Plaintiff's husband testified he discussed workers' compensation and other benefits with defendant. Moreover, plaintiff's husband obtained the vaccine lot number so he could initiate an investigation with the CDC.

Plaintiff's husband showed more concern for human safety than HGA/OHG ever showed. Incredibly, this defendant is a healthcare provider charged with keeping people well. Yet, it did not even bother to complete its own adverse reaction report despite admitted notice and a clear obligation to do so. The only deliberate effort to conceal here was from defendant which (1) had notice of a serious injury likely due its vaccine, (2) had full medical information due the constant updates provided from plaintiff's family and (3) had its own doctors providing medical care. Yet, defendant did not participate in the investigation.

While the defendant cites *Mid-South Electric* (and erroneously quotes the case), it omits to cite *BE&K Const. Co. v. Reeves*, 898 So.2d 738 (Ala.Civ.App. 2004). The *BE&K* case further discussed and distinguished *Mid-South Electric*. As the Court noted in *BE&K*:

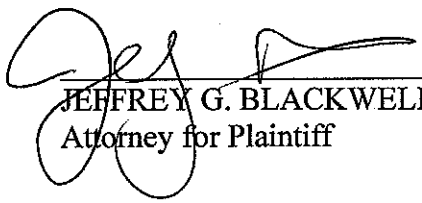
> Unlike the employee in *Mid-South*, there is no evidence in the record before us that Reeves deliberately concealed his work-related injury in an effort to seek treatment from doctors of his own choosing. Reeves timely reported his injury to his supervisor. Although he filed his claims for medical treatment under his personal health insurance, the trial court could have determined on the basis of Reeves's testimony that Reeves did not do so with the intent to forgo workers' compensation benefits only to later decide to file for those compensation benefits.

Id. at 748. In the case at bar, there is zero evidence Tina Noonan ever concealed anything, deliberately or otherwise. She reported the injury and cause promptly upon being informed by the physicians. Moreover, she immediately initiated an investigation into the vaccine with the CDC by obtaining the information from this defendant.

Tina Noonan never sought any advantage and never sought to hide anything. She even received her care at defendant's Huntsville Hospital facility. How quickly this defendant omits another important fact – during the course of her hospitalization her family provided constant medical updates to defendant. Tina Noonan is entitled to workers' compensation benefits. This particular defendant should not turn its back on its own injured employee.

WHEREFORE, PREMISES CONSIDERED, plaintiff respectfully requests this Honorable Court deny defendant's motion for summary judgment and, instead, enter summary judgment on behalf of plaintiff finding this injury compensable under Alabama's Workers' Compensation Act.

Respectfully Submitted,



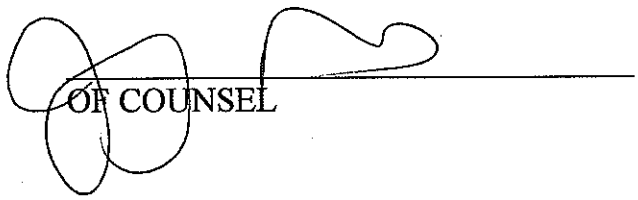
JEFFREY G. BLACKWELL (BLA070)
Attorney for Plaintiff

OF COUNSEL:
Hornsby, Watson, Hornsby & Blackwell
1110 Gleneagles Drive
Huntsville, Alabama 35801
Phone: (256) 650-5500
Facsimile: (256) 650-5504
jblackwell@hornsbywatson.com

CERTIFICATE OF SERVICE

I hereby certify that on 23rd day of March, 2015, I electronically filed the foregoing with the Clerk of the Court using the Alafile system which will send notification of such filing to:

Fredrick Fohrell
Katie G. Mooty
Wilmer and Lee, P.A.
P.O. Box 2168
Huntsville, Alabama 35804-2168



OF COUNSEL