## EXAMINERS' ANALYSIS OF QUESTION NO. 2

Speaking generally, this workers' compensation question primarily tests: (1) whether the examinee can correctly advise Angie she can legitimately pursue and receive both a workers' compensation recovery and a civil tort recovery for her injury; and, (2) whether the examinee knows there is a statutory presumption that holds, although an injury occurs before the employee's starting time, the injury can still be considered "in the course of his or her employment." MCL 418.301(3)

1. More specifically with respect to the first question, even if an injury arises out of and in the course of employment for workers' compensation purposes, the employee can also pursue a third party tortfeasor for damages giving rise to the injury. The Worker's Disability Compensation Act provides in pertinent part: "Where the injury for which compensation is payable . . . was caused under circumstances creating legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee . . . may also proceed to enforce the liability of the third party for damages in accordance with this section." MCL 418.827(1). Here, XYZ, an independent contractor, is not Angie's employer. Therefore, it does not enjoy the exclusive remedy protection afforded employers in the workers' compensation statute. MCL 418.131(1) ("The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease.") Nor is XYZ's crew "in the same employ" as Angie, so as to prevent application of MCL 418.827(1).

Therefore, Angie can pursue and obtain both a workers' compensation remedy for her injury and still file and receive a third party civil recovery against XYZ for the injury. Partial credit may be given if the examinee explicitly infers that XYZ is not an independent contractor and shares ABC's exclusive remedy protection.

The examinee should also note a double recovery for the injury can be avoided by MCL 418.827(5). This provision of the workers' compensation statute creates a lien on a third party

recovery saying in pertinent part: "Any recovery against the third party . . . after deducting expenses of recovery, shall first reimburse the employer or carrier" for workers' compensation benefits paid and any unused balance from the third party recovery creates an advance payment by the employer against future workers' compensation benefits. (Application of this lien means the collateral source rule of MCL 600.6303 would not apply to reduce the third party recovery by workers' compensation benefits.)

2. With respect to the second question, the relevant statute says workers' compensation is available for injuries "arising out of and in the course of employment." MCL 418.301(1). The workers' compensation statute contains a statutory presumption that injuries such as Angie's "arise in the course of" employment. MCL 418.301(3) says: "An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment." Angie was on the premises where her work was to be performed - she was at her work area. She was there within a "reasonable time before . . . her working hours" - ten minutes is a reasonable time. Compare, *Ladner v Vander Band,* 376 Mich 321, 325 (1965) (25 minutes); *Queen v General Motors,* 38 Mich App 630, 634 (1972) (27 minutes). Therefore, she is presumed to be in the course of her employment, although not yet "on the clock" and getting paid. There is no countervailing evidence to defeat the presumption. The "arising out of" portion of the requirement requires consideration of whether the injury relates to an employment risk. *Hill v Faircloth Manufacturing Co,* 245 Mich App 710, 719 (2001). Here, slipping in one's work area is a risk of employment.

Therefore, Angie has a viable workers' compensation remedy and should prevail.