EXAMINERS' ANALYSIS OF QUESTION NO. 3

For an injury to come within the workers' compensation statute, the injury must be an injury "arising out of and in the course of employment," which is the Michigan's Worker's Disability Compensation Act's coverage formula. MCL 418.301(1). While the bifurcated inquiries into "arising out of" and "in the course of" can overlap, in general, the "arising out of" inquiry focuses on the risk triggering the injury and the "in the course of" inquiry looks to the time and location of the injury. *Thomason v Contour Fabricators, Inc*, 469 Mich 960 (2003); *Hills v Blair*, 182 Mich 20, 26-28 (1914); *Hill v Faircloth Mfg Co*, 245 Mich App 710, 719-720 (2001). There are exclusions from coverage, however, with one exclusion being the "social or recreational" activity exception in MCL 418.301(3).

1) Jeb's Argument:

Jeb's best argument is his injury satisfies the "arising out of and in the course of . . ." requirements. The injury satisfies the arising "out of" employment requirement because it resulted from a risk related to his work. Jeb was directed to be at the conference by his employer, dutifully attended and engaged in it, and, at most, slightly deviated while returning to his hotel room to briefly indulge in harmless activity. While he was not doing work at the precise time of his injury, Michigan law recognizes employees can be expected to slightly deviate from work or even engage in "horseplay" at work. *Crilly v Ballou*, 353 Mich 303, 314 (1958) ("An employee is not an automation and . . . he will to some extent deviate from the uninterrupted performance of his work.") overruled in part on other grounds by *Brackett v Focus Hope Inc.*, 482 Mich 269, 279 (2008). Jeb could, therefore, be expected to slightly deviate from the work related aspects of the conference. *Crilly* at 279; see also *Thomas v Certified Refrigeration, Inc*, 392 Mich 623, 637 (1974); see also *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 142 (1977). His slight deviation was neither explicitly forbidden by his employer nor unforeseeable. He drank only one beer; there was no indication he was inebriated; and, he had been in the bar for only a brief period of time. Contrast *Bush Parmenter, Forsythe, Rude & Dethmers,* 413 Mich 444, 459-460 (1982). Furthermore, Jeb may have expected other attendees to be in the bar or to soon join him there, which was part of the networking expected of him.

The injury also satisfies the "in the course of employment" requirement because the time and location of his usual work obligations were expanded by his employer's demand that he and his fellow loan officers attend the conference for the employer's benefit. See *Allison v Pepsi-Cola Bottling Co,* 183 Mich App 101, 111-112 (1990). Michigan law recognizes the workers' compensation statute covers employees engaged in such off-premise "special missions" or business related travel. *Bush, supra* at 452*; Owen v Chrysler Corp*, 143 Mich App 182, 185 (1985): *Ream v LE Myers Co,* 72 Mich App 238, 243 (1976). Jeb should be covered for the entire round trip to and from such a business conference and certainly when injured in the hotel his employer was paying for. *Ream, supra* at 242-243.

This is not a case where an employer merely encouraged an employee to attend a conference. Contrast *Camburn v Northwest Sch Dist*, 459 Mich 471, 477-478 (1999). Jeb was essentially compelled to attend. And, this is not a case of a traveling employee who was highly inebriated, did no work the day of injury, was away from his hotel for hours, and engaged in risky behavior when drunk. Contrast *Eversman v Concrete Cutting & Breaking,* 463 Mich 86, 96 (2000*)*. Jeb briefly stopped for one drink while in the hotel where the conference was held.

Finally, the "social or recreational" exclusion from compensation in MCL 418.301(3), quoted below, should not apply because Jeb is not relying on the presumption in 301(3). See Justice Cavanagh's concurring opinion in *Eversman, supra* at 99-100. He is instead arguing he was on a "special mission." In any event, given that 301(3) asks what was the "major purpose" of the employee's activity, the focus must be on the overall purpose of the trip not just on what Jeb was engaged in at the precise time of injury. The major purpose of Jeb's trip was to serve his employer's business interest. Compare *Angel v Jahm, Inc,* 232 Mich App 340, 344 (1998).

2) The Bank's Argument:

The employer's best argument is that MCL 418.301(3) applies and its exclusion from compensation precludes coverage of Jeb's injury. MCL 418.301(3) provides in pertinent part:

> An employee going to or coming 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. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act.

This exclusion applies broadly to all injuries, beyond claims relying on the presumption in the first sentence. *Nock v M&G Convoy (On Remand)*, 204 Mich App 116, 120-121 (1994); see also *Eversman, supra*. The correct focus is on the "major purpose" of the employee's activity "at the time of the accident" as opposed to the overall purpose of his trip. *Id*. "At the time of the accident" Jeb's major purpose, indeed only purpose, was having a beer (with no other conference attendees) and talking football. *Eversman, supra* at 96. Having a beer and talking football in a bar is a social activity.

Even aside from 301(3)'s exclusion, under the "arising out of" requirement, it was not a risk of employment that Jeb would be drinking and chatting about football in a bar. There was no business purpose to Jeb being in the bar. The fact he was probably not inebriated and not in the bar for a long time is irrelevant. What is relevant is there was no benefit to the bank in Jeb going to the bar. He was not networking given there were no other conference attendees in the bar. The conference's business ended that day when the attendees' dinner concluded. Additionally, there is no indication that the bank reimbursed him for drinks purchased at the hotel bar.

3) Likely Litigation Result:

Outcomes in these types of cases generally present close calls and are very fact driven. Litigation of the issue here would most likely result in a denial of benefits on the strength of 301(3)'s "social or recreational" exclusion. The courts have not limited the exclusion in the manner Jeb advocates. Rather, the indication is the "social or recreational" exclusion applies broadly. The focus is on the major purpose of the employee's activity at the time of accident, not the overall purpose of the trip. But for 301(3)'s exclusion, Jeb would probably prevail, given the degree to which the bank insisted on attendance. The examinee's prediction of the outcome of the litigation of this issue is less important than the quality of the arguments made for and against Jeb.