ANSWER TO QUESTION NO. 6

Question 1: Henry's injury would very likely be considered an injury compensable under Michigan's workers' compensation statute, even though the discussion and argument leading to the injury related to sports and not work.

To be compensable under Michigan law, an injury must be one "arising out of and in the course of employment." MCL 418.301(1) [first sentence]. The mere occurrence of Henry's injury at the workplace does not, in and of itself, make the injury compensable because the injury must also be traceable to an employment risk. *Hill v Faircloth Mfg Co,* 245 Mich App 710, 717-719 (2001), *lv gtd,* 465 Mich 949, *lv vacated,* 466 Mich 893 (2002); see also, *Thomason v Contour Fabricators, Inc,* 469 Mich 960 (2003); *Ruthruff v Tower Holding Corp (On Reconsideration),* 261 Mich App 613, 618 (2004).

Risks of employment can include "horseplay" and disagreements at the workplace, even if they relate to non-work matters. A lead case on this subject is *Crilly v Ballou,* 353 Mich 303 (1958). There, two young employees of a roofing company were throwing shingles at one another and one of the employees was injured. The court held that, "If the injury results from the work itself, or from the stresses, the tensions, the associations, of the working environments, human as well as material, it is compensable." *Id.* at 326. The court further explained that the "arising out of and in the course of employment" formula should include all activities that one can reasonably expect a person to engage in during his or her work time, regardless of whether they are furthering the employer's business. Compare, *Andrews v General Motors,* 98 Mich App 556 (1980).

Another important case in this area, *Petrie v GMC,* 187 Mich App 198 (1991), defined the boundaries of what constitutes compensable behavior by borrowing from Professor Larson's treatise on the subject. *Petrie* said Larson's following four-point test is relevant:

"[W]hether initiation of horseplay is a deviation from course of employment depends on: (1) the extent and seriousness of the [deviation], (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay."

Applying these rules here, Jack and Henry's discussion and disagreement would likely be considered an activity reasonably emanating from associations in a work environment, per *Crilly.* Similarly, applying Petrie/Larson's criteria, their disagreement: would not constitute a serious deviation from work (they were working at the time); the discussion leading to the argument was commingled with the performance of their work; the implication is that their conversations about sports were an accepted part of their everyday employment; and, the nature of their employment would be expected to include such discussions and "horseplay."

An examinee might identify and discuss the possibility that the injury is not compensable under either one or both of the following provisions of the statute. MCL 418.301(3) excludes from compensation "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational." This exclusion should not apply because the "major purpose" of Henry's activity was not social or recreational. Another provision excludes injuries occurring "by reason of . . intentional and wilful misconduct" by the employee. MCL 418.305. Henry's conduct would not be considered "misconduct" for the reasons stated earlier plus the fact Jack was the aggressor.

Therefore, in all likelihood, the injury resulting from the pushing incident would be deemed compensable as an injury arising out of and in the course of employment.

Question 2: The examinee should recognize the likelihood that GK, the general contractor, would likely be found liable under the statute's statutory-principal/contractor-subcontractor provision. MCL 418.171; *Bennett v Mackinac Bridge Authority*, 289 Mich App 616 (2010). This provision says that where a general contractor contracts with a subcontractor who does not have workers' compensation insurance, the general contractor is liable to an injured employee of the subcontractor under the workers' compensation system. MCL 418.171(1). Therefore, Henry has an avenue of recovery against GK, the general contractor. While the question does not specifically indicate that GK has workers' compensation insurance or is self insured, that is the implication in the sense that GK is identified as a large and well-established general contracting company. Even if there remains doubt whether GK has insurance or is self insured, a competent attorney should know this option needs to be explored. Bennett, *supra.*

The examinee may add that GK (if found liable) has, in turn, a right of indemnification against the uninsured subcontractor ABC under MCL 418.171(2). Also, although the question asks only for remedies under the workers' compensation system, an examinee might

note that the workers' compensation statute provides that a civil action may also be pursued by an employee against an uninsured employer. MCL 418.641. Rather than any points being detracted for such an observation, credit might be given for it.