

EXAMINERS' ANALYSIS OF QUESTION NO. 4

1. With respect to the first question, workers' compensation is payable if an employee sustains a "personal injury arising out of and in the course of employment." MCL 418.301(1). Joe's lifting of a box at work in performance of his duties clearly satisfies the "arising out of . . ." requirements, i.e., Joe was at work and engaged in a risk of employment. *McClain v Chrysler Corp*, 138 Mich App 723, 728-29 (1984). The close question is -- given Joe's preexisting, non-work related back problem -- could the lift-induced back pain at work be considered a compensable "personal injury"? The mere fact Joe's back problems predated his lift at work does not necessarily mean he has not sustained a fully compensable injury because employers take employees as they are. *Zaremba v Chrysler Corp*, 377 Mich 226, 231-32 (1966). Work can compensably aggravate a preexisting problem. *Rakestraw v General Dynamics Land System*, 469 Mich 220, 230-231 (2003). Whether aggravation of a preexisting problem is compensable is specified by statute: "A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury." MCL 418.301(1).

Therefore, Joe's back pain attributable to the lift at work may or may not constitute a compensable work related injury. It will depend on whether or not the lift created a medically distinguishable pathological change in his preexisting condition. If no medically distinguishable pathology resulted from the lift, then there is no compensable injury. If a medically distinguishable pathological change did result, then there is a compensable injury. Put differently, did Joe merely experience a symptomatic expression of his preexisting back problem at the workplace? Or, did Joe's lift at work result in a pathology medically distinguishable from his preexisting back problem?

The examinee should recognize that additional information is needed to make a credible determination and, **MORE IMPORTANTLY**, should articulate what such information might be. Joe's attorney will need to compare and contrast the medical pathology of Joe's back condition before and after the lift at work. Since Joe saw his doctor both before and after the lift, his doctor is a good source for test results and findings (e.g., X-rays, EMGs, MRIs

etc.) that would likely provide crucial information to formulate a sound opinion.

2. With respect to the second question, the workers' compensation statute defines "disability" as "a limitation of an employee's wage-earning capacity in work suitable to his or her qualifications and training resulting from a personal injury . . . A limitation of wage-earning capacity occurs only if a personal injury . . . results in the employee's being unable to perform all jobs paying the maximum wages in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills." MCL 418.301 (4) (a); *Stokes v Chrysler LLC*, 481 Mich 266, 281-83 (2008). "'(W)age earning capacity' means the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned. For the purposes of establishing a limitation of wage-earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee . . . A magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available." MCL 418.301(4) (b); *Stokes*, *supra*.

Per Joe's doctor's restrictions, Joe cannot return to work at ABC because all jobs there exceed Joe's limitations. And, per Joe's doctor, Joe would not be able to work elsewhere at any job requiring lifting over 20 lbs. While it is possible these facts alone could support a finding of "disability," much more needs to be investigated to formulate a reliable opinion. The attorney needs to know the range of Joe's qualifications and training, e.g., his educational background, prior job experience, and whether Joe's skills might transfer to other work he has not performed before. The attorney also must determine: whether there are any jobs within Joe's qualifications and training "reasonably available;" whether Joe has searched in good faith for work (and, if so, with what result); and, the pay level of any other reasonably available work in comparison to Joe's wages at ABC.

Therefore, the examinee should recognize that to intelligently answer the disability question posed by Joe, an examination of specific statutory criteria is necessary. The bare bones information Joe related to the attorney is insufficient to make a reasoned opinion. The attorney must investigate the factors the statute deems relevant to the determination of disability.