EXAMINERS' ANALYSIS OF QUESTION 8

With respect to the first question, the fact that Zack was negligent and LNC took all reasonable precautions, is not a valid defense to Zack's claim for worker's compensation benefits. MCL 418.141 provides "it shall not be a defense . . . [t]hat the employee was negligent, unless it shall appear that such negligence was wilful." Here, the facts state that Zack's failure to engage the safety switch was negligent, not intentional or wilful. Therefore, there is no merit to LNC's rejection of Zack's claim on this basis. A worker's compensation judge would categorically reject the defense. Indeed, a *raison d'etre* for the workers' compensation statute is to prevent employers from successfully asserting such defenses against employees. Similarly, there is no comparative negligence analysis applicable either. *Hoste v Shanty Creek Mgt Inc,* 459 Mich 561, 570 (1999); see also, Welch and Royal, *Worker's Compensation in Michigan: Law and Practice,* § 1.2, p 2 (2012). And, gross negligence by the employee does not defeat a worker's compensation claim. See *Day v Gold Star Dairy*, 307 Mich 383, 392 (1943).

In answering this question, an examinee might mention that a provision of Michigan's worker's compensation statute provides: "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." MCL 418.305. However, because the question specifically indicates that Zack's failure to engage the safety switch was unintentional and merely negligent, this provision has no applicability here.

With respect to the second question, in order to receive wage loss benefits, Zack bears the burden of proving he is "unable to perform all jobs paying the maximum wage 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). To meet his burden of proof, Zack must "[p]rovide evidence as to the jobs, if any, he . . . is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of injury." MCL 418.301(5)(b). If Zack "is capable of performing any" such work, then he must "show that he . . .

cannot obtain any of those jobs. The evidence shall include a showing of a good-faith attempt to procure post-injury employment . . .” MCL 418.301(5)(d).

The Michigan Supreme Court case that served as the basis for the statute quoted above, is *Stokes v Chrysler LLC*, 481 Mich 266 (2008). *Stokes* explained that a worker’s compensation “claimant” was required . . . to show that he had considered other types of employment within his qualifications and training,” *Id* at 286, and these include appropriately paying jobs “even if he has never been employed at those particular jobs in the past.” *Id* at 282. This is how worker’s compensation appellate tribunals apply the standard. See, *e.g., Lewis* v *Darling International, Inc*, 2010, ACO #17.

Therefore, LNC’s assertion that, while it has no non-manual jobs to offer to Zack, Zack can earn a comparable wage at non-manual work can be a valid reason for rejecting Zack’s claim. It is Zack who bears the burden of proving that equal paying, non-manual work is either beyond his qualifications or training, or is unavailable.

Zack’s assertion that he cannot be required to seek work at jobs he has never previously performed is erroneous. It would be fatal to his claim for weekly wage loss benefits.