ANSWER TO QUESTION NO. 10

Craig would argue that his injury is one "arising out of and in the course of employment." MCL 418.301(1). The injury occurred on the employer's premises during regular work hours. And, the employer created the risk of such injury by providing a treadmill for employees. While Craig was not actually working at the time of his injury, workers' compensation coverage can extend to include "horseplay" activities incidental to the workplace. *E.g., Crilly v Ballou,* 353 Mich 303 (1958); *Petrie v General Motors Corp,* 187 Mich App 198 (1991). Craig would also emphasize that the overall purpose of the area was to maintain and promote employee health and morale. In that sense, ABC was encouraging employee use of the equipment. Since he was engaging in employee camaraderie and in a fitness activity, he was fulfilling an objective the employer at least subtly encouraged. *Thomason v Contour Fabricators Inc,* 255 Mich App 121, (modified in part and remanded) 469 Mich 960 (2003). Craig would also argue that, while he knew of the employer's lunch time policy, he had been leaving his work post to visit Jessica during her lunch time previously, and he had not been reprimanded by ABC for doing so. See *Backett v Focus Hope, Inc,* 482 Mich 269 (2008).

ABC would argue that, while the injury occurred on employer premises and while Craig was arguably engaged in a risk ABC created, the activity was elective, not required. Moreover, ABC would argue there should be no coverage under either one of two exclusionary provisions in the Worker's Disability Compensation Act. MCL 418.301(3) provides in pertinent part:

"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. 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."

The Michigan Supreme Court has explained that the social and recreational exclusion in the second sentence above has general application and is not limited to injuries sustained while going to and coming from work. *Eversman v Concrete Cutting & Breaking,* 463 Mich 86 (2000). Relying on this defense, ABC would argue the "major" purpose of Craig's activity at the time of Craig's injury was "social or recreational." That is, even if there is deemed to

be some work-related purpose to his activity, the "major" reason why he was running fast on the treadmill was for the social reason of impressing Jessica and/or the recreational use of the treadmill itself.

The employer would also urge the following exclusion in MCL 418.305, "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." ABC would emphasize its strict policy against using the area except during one's lunch time and that Craig was not on his lunch time when using the area. *Brackett, supra.* Craig's conduct should therefore constitute "misconduct." And, Craig's actions were "intentional and willful," not negligent. Finally, the employer would argue his injury was "by reason of" his misconduct, i.e., by reason of his breaking the rule. *Daniel v Department of Corrections,* 468 Mich 34 (2003). ABC might argue it was unaware of Craig's prior breaches of the rule and that is why it had not been previously reprimanded.

The examinee's projection of the outcome of the issue if litigated is less important than the examinee's ability to make cogent arguments for each side. In terms of the result, Craig would likely be able to rebuff the §305 wilful misconduct claim on the basis that the misconduct (breaking the rule) was not the immediate cause of injury, as opposed to his using the treadmill. That is, using the treadmill, *per se,* is not misconduct; it is simply when the treadmill is used that is arguably "misconduct." Craig will have a more difficult time with the §301(3) social and recreational exclusion, however. It is more likely than not that the injury would be deemed not covered because Craig was injured in pursuit of an activity whose "major purpose" was "social or recreational."