ANSWER TO QUESTION 15

The injury itself is unquestionably one "arising out of and in the course of" work. MCL 418.301(1). It arose from a risk at the workplace and on employer premises. *E.g. Ruthruff v Tower Holding Corp (On Reconsideration),* 261 Mich App 613 (2004). While this might be noted by the examinee, resolution of the questions turns on the following analysis.

(1) ABC does not have any workers' compensation liability to Brandon. The reason is that Brandon would not be considered an "employee" as defined under the Workers' Disability Compensation Act (Act). Only "employees" are entitled to collect workers' compensation benefits. *Hoste v Shanty Creek Management, Inc,* 459 Mich 561, 564 (1999). The Act defines "an "employee" as every person in the service of another "under any contract of hire, expressed or implied." MCL 418.161(1). The Supreme Court has explained that the "of hire" aspect of this phrase means the worker must be receiving "payment intended as wages, i.e., real palpable, and substantial consideration." *Hoste,* 459 Mich at 576. *Hoste's* rational is that Michigan's workers' compensation system "provide[s] benefits to those who have lost a source of income. It does not provide benefits to those who can no longer take advantage of a gratuity or privilege that serves merely as an accommodation." *Id.* at 575. In the *Hoste* case itself, a ski patroller for Shanty Creek was injured. He had received from Shanty Creek "privileges of free skiing, complementary hot beverages, and meal discounts" in exchange for his patrol services. *Id.* at 577. That consideration was not deemed substantial enough to be considered "payment intended as wages." *Id.* at 575. Therefore, benefits were denied because he was not deemed an employee.

Here ABC's pizza, soft drinks, and Detroit Tigers baseball game tickets would similarly be viewed as a gratuity rather than "payment intended as wages." And, Brandon did not "los[e] a source of income. He would not be considered an "employee" of ABC and, therefore, he is ineligible for workers' compensation. The examinee might note this leaves Brandon free to consider a civil action against ABC, since the Act's "exclusive remedy" provision would be inapplicable. The exclusive remedy provision only shields employers from civil actions brought by an "employee." MCL 418.131(1).

(2) ABC's position on weekly wage loss benefits to Joe is less certain. In order to prove an entitlement to weekly wage loss

benefits, Joe needs to demonstrate that his injury constitutes a "disability, as that term is defined in MCL 418.301(4) of the Act. The Supreme Court has explained that the inability to return to one's last job is, generally speaking, not enough to prove disability. *Stokes v Chrysler, LLC,* 481 Mich 266, 281-283 (2008); *Sington v Chrysler Corp,* 467 Mich 144, 161 and 156-157 (2002). Instead, the employee must demonstrate an inability to perform "all jobs within his qualifications and training" at his maximum earning capacity; that requires employee to offer proofs on "the proper array of alternative available jobs" suitable to their qualifications and training. *Stokes,* 481 Mich at 283. These requirements contemplate proofs speaking to the employee's "full range of available employment options," not just the inability to perform prior jobs. *Id.* at 282.

Here Joe's inability to perform his ABC job due to his inability to stand for eight hours would not necessarily preclude him from doing other work, such as sedentary work. Given that he is a college graduate and has experience negotiating with sales agents, there is arguably other work suitable to his qualifications and training that would not demand standing for eight hours per day. Therefore, depending on what other available work might be suitable to Joe's qualifications and training, he may or may not be eligible for weekly benefits. The examinee should demonstrate recognition of the need to prove more than just the inability to return to one's last job.