

ANSWER TO QUESTION No. 15

Intentional Tort: While Jason might file an intentional tort action against MCA, it would not be successful under Michigan law. MCL 418.131(1) provides that workers' compensation is an employee's "exclusive remedy against the employer for a personal injury or occupational disease." There is a statutory exception for intentional torts that must be considered, however. Intentional torts for this purpose are specifically defined as follows:

"An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.*

Here, MCA might be negligent in exposing its employees to the deleterious material, given its past experiences with the material and knowledge that injuries have previously occurred from the exposure. But, the courts have held that a mere showing that an injury or accident is likely to occur is not sufficient to establish an intentional tort under MCL 418.131(1). *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743 (1999). An employer must be shown to have the purpose of inflicting an injury upon the employee. *Travis v Dreis & Krump Manufacturing Co*, 453 Mich 149 (1996). There must be a specific intent that there be an injury. *Herman v City of Detroit*, 261 Mich App 141 (2004). There is no indication under the facts that MCA "specifically intended an injury" to Jason. Nor is there a suggestion MCA had "actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge."

Therefore, Jason has no intentional tort remedy. His remedies would lie exclusively within the workers' compensation statute.

Michigan Jurisdiction: Jason can seek a workers' compensation remedy under Michigan workers' compensation statute for an injury occurring in Ohio. MCL 418.845 is the provision defining Michigan's jurisdiction over injuries occurring outside of the state. The provision says Michigan can exercise jurisdiction "over all controversies arising out of injuries suffered outside the state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state."

The Act covers all private employers regularly employing three or more employees. MCL 418.115(a). Jason is a resident of Michigan. He was only temporarily dispatched to Ohio. And, Jason's contract of hire was made in Michigan. If either one of these latter two criterion is satisfied, Michigan has jurisdiction. Both are satisfied and, consequently, Michigan clearly has jurisdiction.

[An examinee might note that Jason could likely also pursue workers' compensation benefits under Ohio's workers' compensation statute. If he receives benefits from Ohio, then the amount recovered under the law of Ohio would be credited against the benefits payable under Michigan's statute. MCL 418.846.]

Job Search: Jason's refusal to search for work outside of MCA could be fatal to his claim for weekly disability benefits. "Disability" in Michigan is defined as a limitation of wage earning capacity. MCL 418.301(4)(a). And, "[f]or the purposes of establishing a limitation of wage earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee, taking into consideration the limitations from the work-related personal injury or disease." MCL 418.301(4)(b). This job search requirement became a statutory requirement as of December 19, 2011 upon enactment of 2011 PA 266. And, before enactment of 2011 PA 266, a job search requirement was reflected in case law: e.g., *Stokes v Chrysler EEC*, 481 Mich 266, 279, 283 (2008). Also, even if there were no equal paying jobs available elsewhere, Jason's refusal to look for lesser paying work would adversely affect his potential rate of weekly benefits under MCL 418.301(8).

Jason's lack of job search would have no adverse effect on his claim for medical benefits or for any request by him for vocational rehabilitation. MCL 418.315 and MCL 418.319, respectively.