

1988

Kenneth Riddle v. Alan Mays and Mountain States Insulation Corp. : Reply Brief

Utah Supreme Court

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880204

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH RIDDLE,)

Plaintiff-Appellant,)
)

vs.)
)
)
)

ALAN MAYS and MOUNTAIN STATES)
INSULATION CORP., a Utah)
corporation,)

Defendants-Respondents.)

Case No. 880204

Category 14(b)

REPLY BRIEF OF RESPONDENTS

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Plaintiff-Appellant,)	
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vs.)	
)	Category 14(b)
ALAN MAYS and MOUNTAIN STATES)	
INSULATION CORP., a Utah)	
corporation,)	
)	
Defendants-Respondents.)	

REPLY BRIEF OF RESPONDENTS

Defendants/respondents Alan Mays ("Mays") and Mountain States Insulation Corporation ("MSI"), by and through their counsel of record, submit the following brief.

JURISDICTION OF THIS COURT AND NATURE OF THE PROCEEDINGS

Jurisdiction in this Court is proper pursuant to Article VIII, Section 3 of the Constitution of Utah and §78-2-2 Utah Code Ann. (1953 as amended), and Rule 3 of the Rules of the Utah Supreme Court. This is an appeal taken from a final order of Judge J. Phillip Eves after a hearing on respondents' Motion for Summary Judgment in the Fifth Judicial District Court.

STATEMENT OF THE ISSUE

The issue on appeal is whether the trial court was correct in ruling that since Mays and MSI were "employees" of Owens-Corning Fiberglass Corporation ("Owens-Corning") for purposes of the Workers' Compensation Act, Mays and MSI were entitled to the benefit of the exclusive remedy provision of Utah Code Ann. §35-1-60 and not subject to suit by appellant.

DETERMINATIVE STATUTES

This Court's interpretation of the following statutes is determinative of the issue on review and these statutes are set out verbatim in Addendum "A" of the addenda to this Brief.

1. Utah Code Ann. §35-1-42 (1953 as amended).
2. Utah Code Ann. §35-1-60 (1953 as amended).
3. Utah Code Ann. §35-1-62 (1953 as amended)

STATEMENT AND NATURE OF THE CASE

This is a negligence action by an Owens-Corning employee against MSI, a subcontractor of Owens-Corning, and an employee of MSI, for injuries received in an on-the-job accident. Mays and MSI filed a Motion for Summary Judgment based on the exclusive remedy provision of Utah Code Ann. §35-1-60. Riddle filed a Cross-Motion for Summary Judgment. Respondents' Motion for Summary Judgment was granted, and appellant's Motion for Summary Judgment was denied.

STATEMENT OF FACTS

1. Riddle was an employee of Owens-Corning, hired to construct a storage warehouse and assist in the installation of insulation. (Clerk's Record Index ["R."] 376 pp. 15-16, attached as Addendum "B").

2. Mays was an employee of Owens-Corning, hired to assist in construction of a storage warehouse and in the installation of insulation. (Clerk's Record Index ["R."] 376 p. 17, attached as Addendum "B", and R. 310).

3. Owens-Corning was a contractor at the Intermountain Power Project ("IPP") in Delta, Utah, hired to construct a storage warehouse and install insulation. (R. 376 pp. 15-16, attached as Addendum "B", and R. 310).

4. Owens-Corning subcontracted with MSI to provide labor to erect the storage warehouse. (R. 376 p. 18, attached as Addendum "B", and R. 310).

5. After Mays had been with Owens-Corning for three weeks, he and all Owens-Corning employees, except Riddle and one other man, were terminated. (R. 376 p. 18, attached as Addendum "B").

6. MSI then hired Mays as a laborer to help construct the storage warehouse and Mays continued doing the same work for MSI that he had done for Owens-Corning. (R. 376 pp. 17-19, attached as Addendum "B").

7. Riddle continued to be employed by

Owens-Corning and supervised the work done by MSI and its employees in erecting the storage warehouse. (R. 376 pp. 19-22, attached as Addendum "B").

8. Riddle was sitting in a parked truck when he was hit by a truck driven by Mays. (R. 323).

9. It is undisputed that both men were working when the accident occurred. (R. 323).

SUMMARY OF ARGUMENT

It is the law in the State of Utah that a co-employee cannot maintain a civil action against another co-employee. Riddle and Mays began their employment with Owens-Corning and were in every respect co-employees. Mays then began performing the same duty with MSI and continuing to be supervised by Riddle. This change by Mays did not eliminate the co-employee relationship.

Allowing Riddle to maintain a negligence action against Mays, while at the same time not allowing Mays to maintain such a civil action against Riddle if Riddle were negligent, defies the whole concept of fairness and should not be allowed. The Supreme Court has determined that if Mays had been injured by Riddle, Mays could not maintain a civil action against Riddle. This Court's decision was made after an amendment to the Workers' Compensation Act narrowed the benefit of this exclusive remedy to those occupying an

employer-employee relationship. Because the statutory employer-employee language of the Workers' Compensation Act still applies, the policy behind the Workers' Compensation Act dictates that Riddle and Mays should be immune from civil suit against one another.

Finally, Riddle maintains that a genuine issue of fact exists regarding Owens-Corning's control over MSI. This control issue was answered to the trial court's satisfaction by appellant's own explanation of the facts. Appellant cannot refute his own testimony and Owens-Corning's control over MSI is no longer an issue in this case.

ARGUMENT

POINT I

UTAH CODE ANN. §35-1-60 PROVIDES THE ONLY REMEDY AVAILABLE TO APPELLANT IN THIS CASE.

When Mays first began working at IPP he was employed by Owens-Corning and was a co-employee with Riddle. After Owens-Corning subcontracted with MSI for the work being done by Riddle and Mays, Mays began receiving his paycheck from MSI while continuing to do the same work he did when he received a paycheck from Owens-Corning. Riddle continued in his employment with Owens-Corning and supervised the work of MSI and Mays.

The Utah Supreme Court has determined in Bambrough

v. Bethers, 552 P.2d 1286, 1291 (Utah 1976) that "a worker can be hired and paid by a subcontractor, but still be an employee of the general contractor." Following the Court's rationale in Bethers, Mays began work at IPP as an actual employee of Owens-Corning and because his duties did not change when MSI became the subcontractor for Owens-Corning, Mays is still an employee of Owens-Corning. The Court in Bethers went on to say that if an employee has the same employer as another employee, "he is entitled to and must accept workmen's compensation and cannot maintain an action against either of them [the employer or another employee of the same employer] for negligence in causing his injuries." Id. at 1289. See also, Gallegos v. Stringham, 442 P.2d 331 (Utah 1968) (plaintiff and defendant held to be working for the same employer and therefore plaintiff cannot recover outside workers' compensation).

Respondents' position is supported by the following language in Utah Code Ann., §35-1-60 (1953 as amended) ("Section 60"):

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer posed by this Act shall be in place of any and all other civil liability whatsoever at common law or otherwise. . . .

(Emphasis added). Section 60 does not say that this exclusive remedy of the Workers' Compensation Act is available only against the actual employer or actual employee of the employer. That section merely states that this exclusive remedy is available against the employer or employee of the employer. Because Riddle and Mays are co-employees of Owens-Corning, Section 60 gives Mays immunity from civil suit. Also, because no civil suit can be maintained against Mays, Riddle has no theory for bringing a civil claim against MSI. Therefore, the denial of appellant's claims against respondents by the trial court was proper and should be upheld by this Court.

POINT II

THE POLICY OF THE WORKERS' COMPENSATION ACT SHOULD NOT ALLOW AN EMPLOYEE OF THE GENERAL CONTRACTOR TO SUE THE SUBCONTRACTOR OR AN EMPLOYEE OF THE SUBCONTRACTOR.

The primary purpose of the Workers' Compensation Act ("Act") was to:

eliminate the uncertainty, the time, effort and expense involved in the old system which required an injured employee to prove negligence of his employer as a prerequisite to any recovery, and to create a system whereby the injured employee would be assured of medical and hospital care, and a certain though modest compensation for injuries and disabilities suffered, with the attendant benefits to themselves, their families, and to society generally, including the stabilizing effect upon the economy.

Smith v. Alfred Brown Company, 493 P.2d 994, 995 (Utah 1972). Thus, the Act was designed to insure that an injured employee would be compensated for any work-related injury.

"Employee" is defined as follows in Utah Code Ann. §35-1-42 (1953 as amended) ("Section 42") as not only an employee of the same employer in the ordinary sense, but also more broadly to include subcontractors and employees of subcontractors:

If any person who is an employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision and control, and this work is a part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him and all persons employed by any of these subcontractors, are considered employees of the original employer.

This broadening of the definition of "employee" effectuates the policy behind the Act of providing insurance for an employee's work-related injuries. Thus, if an employer hires a subcontractor over whose work he "retains supervision and control," and the work "is a part or process in the trade or business of the employer," the subcontractor and all employees of the subcontractor are considered employees of the original employer, or "statutory employees" for purposes of the Workers' Compensation Act. Bennett v. Industrial Com'n of Utah, 726 P.2d 427 (Utah 1986).

Appellant argues that the 1975 amendments to Utah

Code Ann. §35-1-62 (Section 62) make the provisions of Section 42 not applicable to determining which employers are immune from third-party suits. However, appellant concedes that if Mays had been injured by the negligence of appellant, Mays would not be allowed compensation outside of the Act because of the current Utah case law on this issue as outlined in Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978). See appellant's Brief at pp. 17-18. In Hinds, Hughes was an independent subcontractor who constructed a building for the general contractor. Hughes contracted with Hayes to construct the masonry walls in the building. The plaintiff, Hinds, was an employee of Hayes and was injured in an on-the-job accident.

Appellant attempts to distinguish Hinds from the case at bar by referring to Mays as a "downstream" employee. Appellant contends that because Riddle was injured by a "downstream" employee, he should be allowed to maintain a civil action. This argument ignores the whole concept of fairness as outlined in Smith v. Alfred Brown Company, 493 P.2d 994 (Utah 1972). In Smith, the Utah Supreme Court stated as follows:

It would be quite inconsistent with our ideas of even-handed justice to apply a liberal interpretation of the Act in order to assure coverage to employees, but if it appears that there is other coverage, to then reverse the policy and apply a restricted view to exclude coverage in order to allow an employee to sue an employer. We think the ends of justice

will best be served and the beneficial purposes of the Act will be best accomplished for employees and employers alike, if the statute is applied in an uniform manner, whomever's rights may be at stake.

Id. at 995. Thus, what appellant requests the Court to do in this instance is allow them to pursue a civil suit against Mays when appellant in fact admits that if Mays had been injured by the negligence of appellant, no such suit would be allowed under current Utah law.

Appellant also contends that dicta in Shupe v. Wasatch Electric Co., 546 P.2d 896 (Utah 1976) controls this appeal. While Shupe was decided after the 1975 amendment to Section 62, the case arose prior to this amendment and the amendments had no bearing on the Shupe decision. In fact, the Justice who provided the dicta relied on by appellant in his brief had a dissenting opinion in Hinds. The majority in Hinds rejected the dissenting Justice's interpretation of the 1975 amendments to Section 62 and determining that Section 42 should still be used to define employer for purposes of determining immunity from civil suit. Because Hinds has remained good law in Utah for over ten years, it should not now be overturned based on a dissenting opinion and dicta from an earlier case.

The language in the 1975 amendment to Section 62 and the applicable case law decided since that amendment does not

support appellant's position that a civil suit can now be maintained. The applicable portions of Section 62 now read as follows:

When any injury or death from which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employee, officer, agent, or employee of said employer, the injured employee, or in case of death his dependants, may claim compensation and the injured employee or his heirs or personal representative may also have a action for damages against such third person

For purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

This amendment did away with the language, "not in the same employment," and replaced it with the language, "person other than an employer." The Court in Hinds considered this amendment and stated that the amendment:

enables an employee to sue a tort-feasor not his employer (or the employer's agent, etc.), [i.e. 'employer' as defined in Section 42 which includes 'statutory employer'] even though the injured person and the tort-feasor may be engaged in the same employment.

Id. at p. 562. The Supreme Court in Hinds recognized that the employer-employee definitions as outlined in Section 42

should still be used to determine whether an employer-employee relationship existed. This amendment did away with overbroad language that had precluded civil suits in the past and replaced that language with the more narrow definitions found in Section 42. Finally, the 1975 amendment does not have the effect of insulating everyone at the work place from civil liability as appellant contends. With this amendment and its subsequent interpretation in Hinds outlined above, only employers and employees meeting the requirements of Section 42 receive immunity from civil liability.

Appellant contends that the language, "notwithstanding the provisions of Section 35-1-42," in the 1975 amendment to Section 62 removes the application of the concept of statutory employer from this section. However, this contention presents difficulties in reconciling such language with the remaining language of Section 62. Section 62 goes on to state that only those who are not occupying an "employee-employer relationship may maintain a civil action." Thus, the definitions in Section 42 must be applied to determine an employer-employee relationship. The intent of the 1975 amendment to Section 62 was not to abrogate civil immunity on behalf of "statutory employers," but to confine that immunity to only those employers as defined in Section 42. Again, respondents' position is supported by the Hinds decision discussed earlier, which interpreted the 1975

amendment to Section 62. Also, accepting appellant's position on this amendment would require MSI to pay workers' compensation premiums for the employees of every subcontractor working side-by-side with MSI on a given work site in order for MSI to protect itself from civil liability for any injury to employees of other subcontractors caused by MSI employees. The Utah Supreme Court has repeatedly affirmed, that the Utah Workmen's Compensation Act is designed both to provide swift and certain compensation to employees and for:

the correlated important purpose of assuring employers that if they provide this protection for their employees, the employers will themselves be protected against the possibility of exorbitant claims for injuries.

Smith v. Alfred Brown Co., 493 P.2d at 995. It makes no sense to afford limited liability to entities qualifying as statutory employers under the Workmen's Compensation Act, while denying such limited liability to subcontractors and others working on a site with an injured employee who have much less control over, and even less contact with, the injured employee than the protected statutory employer has.

POINT III

THE "LOANED SERVANT DOCTRINE" PRECLUDES
RIDDLE FROM SUING EITHER MSI OR MAYS.

The "loaned servant doctrine" applies to a situation

in which one employee of an employer works so closely with the employees of another employer to effectuate the second employer's purpose that the employee is said to be "loaned" to the second employer. The effect of this doctrine precludes the loaned employee from suing the second employer.

The case of Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976) illustrates this loaned servant doctrine. In Bethers, the plaintiff employee was employed by D & L Corporation, the first employer, as a truck driver. Bethers, the second employer, contracted with D & L Corporation to load wood from Bethers' truck to a D & L Truck, and to haul the load to Colorado. Plaintiff was assigned to load the wood and haul it and plaintiff was told to work according to the procedures of the second employer. In the process of operating a forklift to load the wood onto the second truck, plaintiff was badly injured. The Court held that Bambrough, the plaintiff, was a "loaned servant" and therefore the second employer's liability to Bambrough was limited to benefits under the Act.

Bambrough argued that the loaned servant doctrine should not apply because (1) there had been no written contract between the two employers, (2) Bambrough had not consented to be loaned to the second employer, and (3) the first employer had not surrendered control over his employee to the second employer. Bambrough at 1291-92. The Court ruled that:

The Utah Workman's Compensation Act does not expressly require consent on the employee's part to establish the requisite relationship, nor is a written contract a required formality for workmen's compensation purposes under the laws of Utah.

Bambrough at 1291. In addition, the Court stated: "it has never been held by this Court that for the loaned servant doctrine to apply, the original employer must completely surrender all control over his loaned employee." Bambrough at 1292. The Court focused on the effect of the working arrangement and discounted the significance of individual elements.

Applying the effect of the working arrangement between the parties in the instant case, Riddle was a "loaned servant" and employed by Owens-Corning to work with MSI employees on the construction of a storage warehouse. Because of this close working relationship with MSI and Mays, Riddle's ability to recover against respondents should be limited to benefits under the Act.

POINT IV

NO GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING THE ISSUE OF OWENS-CORNING'S CONTROL OVER MSI.

Appellants argue that a genuine issue of fact exists as to Owens-Corning's control over MSI. However, it should be pointed out that at the trial court level, respondents

presented evidence from Riddle's deposition to show that Riddle had supervision and control over respondents. Riddle specifically stated in his deposition that he supervised and controlled what was done on the job site by MSI. Thus, the issue of control having been answered by appellant himself, the trial court correctly determined that no genuine issue of material fact existed with regard to this issue.

CONCLUSION

The Utah case law, as it has interpreted the 1975 amendment to Section 62, specifically precludes those in a statutory employer-employee relationship from bringing civil actions against one another. While appellant admits that Mays could not bring a civil action against Riddle had he been the injured party in this case, appellant asks the Court to allow him to bring a civil action against Mays despite the statutory employer-employee relationship. The concept of fairness, as espoused in previous Utah Supreme Court cases, requires that this exclusive remedy of the Workers' Compensation Act be applied uniformly no matter which party's rights are at stake. Thus, because Riddle and Mays are essentially co-employees as defined under Section 42 and the applicable case law, Riddle is precluded under Section 60 from bringing a civil action. In addition, Riddle's only claim against MSI is through Mays and given the fact that no claim outside the Workers' Compensation

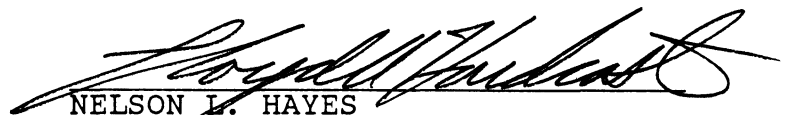
Act exists against Mays, no such claim would exist against MSI.

Appellant's contention that applying the 1975 amendment to Section 62 in the manner espoused by respondents and as applied by the Utah Supreme Court would give every individual on the job site immunity from civil suit is wholly without merit. Obviously, the provisions of Section 42 governing the statutory employer-employee relationship would still need to be met regarding supervision and control and part or process in the same trade or business to obtain immunity from civil suit.

Finally, by appellant's own admission, he supervised the work being done by respondents and because appellant was employed directly by Owens-Corning, Owens-Corning's control over respondents is imputed through the actions of appellant. For these reasons, respondents respectfully request that this Court affirm the lower court's decision to grant summary judgment.

DATED this 30th day of December, 1988.

RICHARDS, BRANDT, MILLER
& NELSON

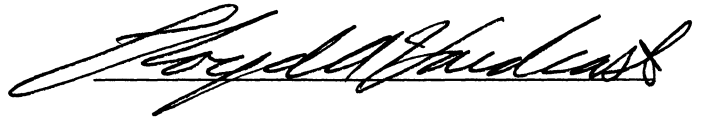


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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing instrument was mailed on this 30th day of December, 1988 to the following counsel of record:

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RIDDLE4/LAH

ADDENDUM "A"

35-1-42. Employers enumerated and defined -

Regularly employed - Independent contractors.

The following constitute employers subject to the provisions of this title:

(1) The state, and each county, city, town, and school district in the state.

(2)(a) Every person, firm, and corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except:

(i) agricultural employers: (A) whose employees are all members of the immediate family of the employer, which employer has a proprietary interest in the farm, the inclusion of any immediate family member under the provisions of this title being at the option of the employer; or (B) who employ five or fewer persons other than immediate family members for 40 hours or more per week per employee for 13 consecutive weeks during any part of the preceding 12 months; and

(ii) domestic employers who do not employ one employee or more than one employee at least 40 hours per week.

(b) Employers of agricultural laborers and domestic servants have the right to come under the terms of this title by complying with the provisions of this title and the rules of the commission.

(3) As used in this section:

(a) "Regularly" includes all employments in the usual course of the trade, business, profession, or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

(b) Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and this work is a part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

(c) Any person, firm, or corporation engaged in the performance of work as an independent contractor is considered an employer.

(d) "Independent contractor" means any person, association, or corporation engaged in the performance of any work for another who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted.

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

History: L. 1917, ch. 100, § 76; C.L. 1917, § 3132; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-57; L. 1949, ch. 52, § 1.

Cross-References. — Employment of children, § 34-23-1 et seq.

Utah Occupational Disease Disability Law, § 35-2-1 et seq.

Meaning of "this act". — See the note under the same catchline following § 35-1-46.

35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

History: L. 1917, ch. 100, § 72; C.L. 1917, § 3133; L. 1921, ch. 100, § 1; R.S. 1933, § 42-1-58; L. 1939, ch. 51, § 1; C. 1943, 42-1-58; L. 1945, ch. 65, § 1; 1971, ch. 76, § 3; 1973, ch. 67, § 7; 1975, ch. 101, § 3.

ADDENDUM "B"

1 Q Mark Riddle, Portageville, Missouri. Is he still in
2 Portageville?

3 A He's in Wardell.

4 Q And Linda Joyce Riddle May, Portageville. Is she
5 still in Portageville?

6 A She's in Essex.

7 Q And one or both of those would know how to get a
8 hold of your first wife; is that right?

9 A Yes.

10 Q Let me go back with you again. So Owens Corning
11 informed you that they needed some construction workers to
12 build a shed; is that what you said?

13 A Yes. I was sent here to mobilize the job. We had a
14 start date from T. C. Construction. We had a subcontract.

15 Q And when you arrived, you were told that additional
16 people would be needed to build this outbuilding of some kind?

17 A Warehouse storage.

18 Q And what was your job then? What was your job
19 classification? What were you called?

20 A My job classification with Owens Corning Fiberglass
21 is carpenter, general foreman.

22 Q Was that your classification when you came here to
23 Utah?

24 A I came here -- you can take this off the record if
25 you want to. Thoseoppers in the bag house, we had to set

1 one of them up. I'd scaffolded it out completely, and then
2 they sent a sheet metal man off of another job out of Nevada
3 over here and took the measurements off of it. See, we
4 prefabed every piece of that power house that we installed at
5 our factory. And I was sent here to specifically get that one
6 scaffold up, the only one, and build a warehouse for storage.

7 Q You were kind of the supervisor of the whole thing
8 on site?

9 A I was the supervisor.

10 Q Was there anyone else when you were sent here that
11 were Owens Corning employees?

12 A No.

13 Q Were you supervising anyone is what I'm asking?
14 Were you supervising the work of anybody else?

15 A No.

16 Q And to build this warehouse --

17 MR. JENSEN: Nelson, let me ask, when you say was he
18 supervising the work of anyone else, what do you mean?

19 MR. HAYES: When he arrived here. When he came, was
20 he brought here with other people to supervise anybody.

21 THE WITNESS: There was no other people except me.

22 Q (BY MR. HAYES) And some time subsequent to that,
23 you hired Alan Mays and apparently some other people to build
24 a warehouse for Owens Corning, I assume?

25 A Alan Mays did not come on the job until after the

1 warehouse was built.

2 Q So he wasn't brought in to construct the warehouse?

3 A No.

4 Q What was he hired to do, then?

5 A He was hired by Mountain States Insulation Company
6 as a laborer.

7 Q Let me back up with you, I guess I misunderstood
8 what you told me. I understood that you told me that you
9 hired him to come out from Kansas to work as a laborer,
10 construction person in the building of a warehouse for Owens
11 Corning.

12 A I did.

13 Q Why did you tell me that?

14 A Because I didn't know what the company had planned.
15 They told me to get people on the job, get the scaffold up for
16 measurement.

17 Q Okay.

18 A I done exactly that. He was employed by Owens
19 Corning Fiberglass approximately three weeks.

20 Q So he did come out from Kansas at your request and
21 was employed with Owens Corning Fiberglass to put up this one
22 scaffold for three weeks?

23 A I didn't say the one scaffold, he worked
24 approximately three weeks.

25 Q Putting up the scaffold?

1 A Moving scaffolding.

2 Q When was that?

3 A I don't know. The dates I'm not sure of.

4 Q In relationship to January of 1985, when was it?

5 A January of 1985? In relationship to what?

6 Q I mean, when was he putting up scaffolding in
7 relation to January of 1985?

8 A In January of 1985, he didn't work for me, he worked
9 for Mountain States Insulation.

10 Q That's what I'm asking. Was it one month before,
11 two months before?

12 A Four or five months.

13 Q And at the end of the three weeks that he worked
14 under you when you were the foreman, what was his reason for
15 terminating?

16 A The company terminated all O.C. employees, except me
17 and Steve Gabb.

18 Q Why?

19 A They hired Mountain States Insulation Company to
20 supply labor.

21 Q Had you worked with Mountain States Insulation prior
22 to that time?

23 A I've never worked for them.

24 Q I didn't say for them, I said with them.

25 A Never.

1 Q Had they been on the job before then?

2 A No.

3 Q So when they hired Mountain States Insulation, Alan
4 Mays went over and worked for them?

5 A They put him on their payroll.

6 Q Was he doing the same thing he'd been doing working
7 for you?

8 A Yes, basically.

9 Q Were you supervising him?

10 A No.

11 Q You weren't supervising him?

12 A No.

13 Q You weren't responsible for what he was doing?

14 A I was in a sense. My property manager would tell me
15 what work was to be done on what particular part of the power
16 house. I had only to go to the foreman of a carpenter, the
17 foreman of a laborer and the work was disbursed from there.

18 Q Who would you go to that you were aware of that
19 would supervise or instruct Mr. Mays?

20 A Maynard Crossland was the labor superintendent.

21 Q Crossland?

22 A Yes, sir.

23 Q And he was an employee of Mountain States?

24 A He's a brother of Mountain States Insulation
25 Company.

1 Q What?

2 A He owns 30 percent of the Mountain States Insulation
3 Company, to my understanding. His brother owns Mountain
4 States Insulation Company.

5 Q Well, my question is Maynard Crossland was the
6 supervisor with Mountain States?

7 A Yes.

8 Q And you would tell him what had to be done?

9 A We would confer, have meetings daily.

10 Q Would you oversee what was being done by Maynard
11 Crossland and his people?

12 A Exactly. That's what I was there for.

13 Q You were there to tell them, for instance, how to do
14 the work?

15 A I was to --

16 MR. JENSEN: I'll just object to you telling him
17 what he was doing. I don't have a problem with you asking him
18 what his responsibility was.

19 MR. HAYES: Well, I think he's an adverse witness.
20 I think I can probably ask him any way I need to.

21 THE WITNESS: Bring that question back.

22 Q (BY MR. HAYES) Was it your responsibility to tell
23 them how to do the work?

24 A If it was wrong, I'd raise the question. I worked
25 through Owens Corning for safety, OSHA regulations on erecting

1 scaffolding.

2 Q But what I'm interested in is were they erecting
3 scaffolding?

4 A He was a laborer.

5 Q Was Alan Mays erecting scaffolding?

6 A No.

7 Q What was he doing?

8 A He was a step and fetch man. He was getting
9 scaffolding for carpenters.

10 Q And were you on the job when he was performing his
11 activities?

12 A Yes.

13 Q You were there and you would oversee and see what
14 was happening?

15 A Exactly.

16 Q As Mountain States would perform their work?

17 A Right.

18 Q And if it wasn't being done properly, you had
19 authority to require that it be done properly?

20 A Exactly.

21 Q And you had authority to, as a result of your
22 involvement with Owens Corning and your knowledge of OSHA
23 regulations and so on and so forth, you had authority to make
24 sure that it was done safely?

25 A Yes.

1 Q And you could tell Mr. Crossland or the people that
2 worked under him how to do the work if it wasn't being done
3 safely?

4 A Yes.

5 Q And if it was being done improperly, you could
6 require that they do it properly?

7 A Yes.

8 Q When you were performing that function, did you have
9 anyone working under you?

10 A No.

11 Q And the only other person that was an Owens Corning
12 employee was this Steve Gabb?

13 A Yes.

14 Q What was he doing?

15 A He was a sheet metal superintendent.

16 Q You were the construction superintendent?

17 A Nope. I was carpenter general foreman. I seen to
18 and took care of the scaffolding.

19 Q So Steve Gabb was performing a different function?

20 A Installation of materials.

21 Q Was he doing the same thing, as far as supervising
22 or overseeing the work of Mountain States Insulation?

23 A Exactly.

24 Q Who did you report to?

25 A Stacy Eskelin.