

1993

Kennyu Jim Shaw v. Layton Construction Company, Inc., Steel Deck Erectors, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNY JIM SHAW,

Plaintiff/Appellant,

vs.

LAYTON CONSTRUCTION COMPANY,
INC., a Utah corporation,
STEEL DECK ERECTORS, INC.,
a Utah corporation, and
JOHN DOES A to Z,

Defendants/Appellees,

CASE NO. 930475-CA

LAYTON CONSTRUCTION COMPANY,
INC.,

Third-party Plaintiff,

vs.

BILT-RITE CONCRETE, INC., a
Nevada corporation; I.
CHRISTENSEN INC., a Nevada
corporation or partnership;
HARV & HIGHAM MASONRY, a Utah
corporation; and TECH STEEL,
a Utah corporation,

Third-party Defendants.

BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, THE HONORABLE PAT B. BRIAN, JUDGE

FILED

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BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, THE HONORABLE PAT B. BRIAN, JUDGE

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this matter pursuant to the provisions of Sections 3 and 5, Article VIII of the Utah Constitution; Utah Code Annotated §78-2a-3(2)(k), 1953 as amended;

and, Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR APPEAL AND STANDARD OF
APPELLATE REVIEW

1. Whether the trial court committed error in ruling, as a matter of law, that Nevada Workers Compensation law applies to this case and that Defendants are exempt from common law liability for injuries suffered by the Plaintiff.

2. Whether the trial court committed error in ruling, as a matter of law, that Plaintiff is not entitled to bring this action for personal injuries pursuant to the provisions of Utah Code Annotated, Section 35-1-62, 1953 as amended.

3. Whether the trial court committed error in ruling, as a matter of law, that Utah's Workers Compensation Act does not have extraterritorial effect and that Plaintiff is prohibited from bringing a personal injury claim against the named Defendants for injuries sustained by the Plaintiff.

4. Whether the trial court committed error in ruling, as a matter of law, that the choice of law doctrine of Lex Loci Delicti applies to workers' compensation cases where a Utah resident is injured while temporarily working in another state.

5. Whether the law of a foreign state should be applied in workers' compensation cases where a Utah resident is injured while temporarily working in another state and brings a third party action in Utah.

6. Whether the law of the state paying workers' compensation

benefits should be applied in cases where a resident of the State of Utah, receiving said benefits in Utah, brings a third party action in Utah.

The standard of review for all issues of law presented on appeal herein is one of assessment for correctness. State v. Rio Vista Oil, Ltd., 786 P.2d 1342 (Utah, 1990).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

Plaintiff submits the following Constitutional and Statutory provisions which are determinative of the issues presented for appeal herein:

1. U.S. Const. amend. XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Utah Const. art. I, Section 7:

No person shall be deprived of life, liberty or property, without due process of law.

3. Utah Const. art. I, Section 11:

"All courts shall be open and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to

which he is a party.

4. Utah Code Annotated, Section 35-1-62, 1953 as amended:
See Addendum "A".

5. Utah Code Annotated, Section 35-1-54, 1953 as amended:
See Addendum "B".

6. Nevada Restatement Statutes, §616.270: See Addendum "C".

PRELIMINARY STATEMENT

The Plaintiff/Appellant, Shaw, will sometimes be referred to as "Shaw"; and the Defendant/Appellee, Layton Construction Company, Inc., a Utah corporation, will sometimes be referred to as "Layton"; the Defendant/Appellee, Steel Deck Erectors, Inc., a Utah corporation, will sometimes be referred to as "Steel Deck".

"R." refers to Record; and "Ex." refers to Exhibit.

No record of the proceedings in the trial court was made or transcribed and therefore no reference will be made to the transcript of record.

STATEMENT OF THE CASE

A) Nature of the Case:

This is an action brought pursuant to the provisions of Utah Code Annotated, Section 35-1-62, 1953 as amended, arising from personal injuries sustained by Shaw while working on a construction project in the State of Nevada on February 5, 1990. The Plaintiff, his employer and the Appellees were, at all times relevant hereto, residents of the State of Utah and Shaw was hired in the State of Utah (R.377). Further, the subcontracts between Layton, Shaw's

employer and the other Defendants were executed in Salt Lake City, Utah in 1989. Plaintiff brought this action seeking damages for personal injuries he received as a result of the negligence of the named Defendants (R. 2-7; 12-18).

B) Course of Proceedings:

This is an Appeal from final Orders of the Third Judicial District Court in and for Salt Lake County, State of Utah, before the Honorable Pat B. Brian, District Court Judge, dated November 26, 1991 granting Layton's Motion to Dismiss and Steel Deck's Motion for Summary Judgment which were docketed with the Clerk of the District Court of Salt Lake County, State of Utah on or about the same said date, and from all Rulings and Orders of said Court affecting or pertaining to the rights claimed and asserted by the Plaintiff. (R. 321-325; 326-329).

Defendants Layton and Steel Deck are the only Defendants who have been served and who have entered an appearance in this matter. Defendant, Bilt-Rite Concrete, Inc. (named in the Complaint as Built-Right Concrete, Inc.) is believed to be a Nevada corporation and has not been served in this matter. However, it has been served and entered an appearance as a third-party Defendant in the underlying third-party action brought by Layton against the subcontractors involved. (R. 39-76; 86-87A; 105-110).

C) Disposition in Lower Court:

Hearing on Layton's Motion to Dismiss and Steel Deck's Motion for Summary Judgment was held before the Honorable Pat B.

Brian, Third District Court Judge, on November 8, 1991. Prior to the hearing, Layton and Steel Deck submitted memoranda in support of their respective motions. Shaw submitted memoranda in opposition to each of the motions. The Court permitted oral argument and thereafter took the parties' written and oral arguments under advisement. Thereafter, the Court issued its Memorandum Decision, containing its Findings of Fact, Conclusions of Law and its Order dated November 26, 1991 granting both Motions and dismissing Plaintiff's Complaint. (R. 110-120A; 121-138; 139-149; 165-174; 193-194; 195-237; 242-254; 256-272; 321-329).

This case was previously on appeal before this Court pursuant to a Notice of Appeal which was filed on December 26, 1991 (R.345-346). Inasmuch as this case also involves a third party Complaint by Layton against other third party Defendants, this Court, on its own Motion, dismissed that appeal on the grounds that this Plaintiff/Appellant did not obtain certification of the orders of dismissal as final judgments pursuant to Rule 54(b), Utah Rules of Civil Procedure. Accordingly, said appeal (case number 920685-CA) was dismissed without prejudice.

Pursuant to Motion and Stipulation, the parties hereto obtained a certification from the Trial Court as required by Rule 54(b) dated July 8, 1993. A Notice of Appeal was filed by the Plaintiff with the Third Judicial District Court in and for Salt Lake County, State of Utah on July 20, 1993. The matter is now before this Court for consideration of the issues raised by the

Appeal.

STATEMENT OF FACTS

On or about February 5, 1990, the Plaintiff, Shaw, was injured while working on Phase II of the Maximum Security Prison in Ely, Nevada. Shaw, at all times relevant hereto, was and is a resident of the State of Utah and at the time of his injury was employed by Harv & Higham Masonry, a Utah corporation and one of the subcontractors on the project at the time of Shaw's injury (R.322-323). Shaw was first employed by Harv & Higham in May, 1989 in Utah. (R. 2-7; 374) (See Kenny Shaw Deposition, page 17, line 18). At the time of his injury, Shaw had been in Ely, Nevada since about November, 1989. (R.377) (See Kenny Jim Shaw Deposition, page 20, lines 6-14).

Layton is a Utah corporation and was the general contractor on the prison project. Steel Deck, also a Utah corporation, was one of the subcontractors on the project. All of the subcontracts relevant to this action were executed and entered into in Salt Lake City, Utah in or about July, 1989 (R. 44-56).

Subsequent to his injury, Shaw applied for and received workers' compensation benefits from the Workers Compensation Fund of Utah and entered into a Compensation Agreement for his permanent/partial disability which was approved by the Industrial Commission of Utah.

Shaw filed this action pursuant to the provisions of Utah Code Annotated, Section 35-1-62, 1953 as amended, (Addendum "A") to

recover damages from negligent third parties including the Defendants herein. (R.2-7; 12-18).

Defendant, Layton, filed a Motion to Dismiss and Defendant, Steel Deck, filed a Motion for Summary Judgment. Both parties contended that Shaw's only remedy was that granted to him by Nevada's workers' compensation laws and that pursuant to those laws, he was barred from bringing any third party action. Defendants asserted the doctrine of *lex loci delicti* applies to workers' compensation cases where a Utah resident is injured while temporarily working in another state for a Utah employer and that he is prohibited from bringing a third party action in Utah.

In opposition to the Defendants' Motions, Shaw asserted that the Utah Legislature intended to give extraterritorial effect to Utah's Workmens Compensation Act including Shaw's right to bring a third party action under Utah Code Annotated, Section 35-1-62, 1953 as amended. Shaw contended that this right is especially applicable where the tortfeasors were Utah residents and where he was hired in Utah by a Utah employer and received workers' compensation benefits in Utah.

On November 8, 1991, a hearing on Defendants' Motions was held before the Honorable Pat B. Brian of the Third Judicial District Court in and for Salt Lake County, State of Utah. After taking the parties' written and oral arguments under advisement, the trial court granted both motions, ruling as a matter of law that Nevada's workers' compensation laws apply to this case and that the

Defendants were immune and exempt from liability for Shaw's injuries. The trial court further ruled that Shaw was not entitled to bring this action under Utah Code Annotated, §35-1-62, 1953 as amended, and that Utah's Workmens Compensation Act has no extraterritorial effect. (R. 321-325; 326-329).

SUMMARY OF ARGUMENT

The issue before this Court is whether Utah's workers' compensation law should be applied in allowing Shaw to pursue a third party action against the Defendants for injuries he sustained while temporarily working in Nevada for his Utah employer. While Utah's Workmens Compensation Act allows such suits, Nevada's workers' compensation law does not (Addendum "C"). This is not a contract or tort law choice of law issue, but rather a workers' compensation choice of law matter which is different due to certain governmental interests and the public policy of this state.

As it pertains to third party actions arising from within the workers' compensation context, Plaintiff contends that the workers' compensation laws of Utah should be applied in allowing such actions where certain factors are present. Namely, where the residence of the Plaintiff, his employer and the Defendants is in Utah; where Plaintiff was hired in Utah; and where the Plaintiff applied for and received workers' compensation benefits in Utah.

It is clear and unmistakable that the Utah Legislature and this Court have stated that the public policy of this state is to provide for a right of action on behalf of an injured employee

against a third party tortfeasor. Further, this right should be extended to Utah residents who are hired in Utah by a Utah employer and who are injured while temporarily working in another state. This right is clearly established by the extraterritoriality of Utah's Workmens Compensation Act as enunciated by this Court and our Legislature.

ARGUMENT

POINT I

UTAH'S WORKMENS COMPENSATION ACT GOVERNS RIGHT OF
UTAH RESIDENT TO BRING THIRD PARTY ACTION FOR
INJURIES SUSTAINED WHILE TEMPORARILY WORKING
IN ANOTHER STATE WHERE UTAH RESIDENT WAS
HIRED AND RECEIVED WORKERS' COMPENSATION
BENEFITS IN UTAH

The principal issue which is before this Court is essentially one involving a choice of laws. It is an issue which has not heretofore been settled by this Court and one which merits attention as it bears upon the substitutive rights of this state's residents who are hired by a Utah employer and are injured on the job while temporarily in another state. Specifically, can a resident of this State who is hired here and required to temporarily work in another state, sue negligent third parties who cause injury to him? It is not an issue of which state's contract or tort law applies, but rather which state's workers' compensation law applies because an individual's right to bring a third party action exclusively derives from the applicable workers' compensation law, i.e., Utah Code Annotated, §35-1-62, 1953 as

amended. Plaintiff contends that the trial court was in complete error in ruling that the tort doctrine of *lex loci delicti* applies in workmens compensation cases such as this and that Nevada law, which bars such actions, applies. Furthermore, the legal authorities which the Defendants submitted to the trial court in support of their arguments didn't involve or address this specific issue. Consequently, there was no legal basis for the trial court's ruling dismissing this case.

While this Court has not addressed this specific issue, the Plaintiff directs the Court's attention to numerous other jurisdictions, both state and federal, which clearly hold that the worker's compensation law of the state where the employee resides, where he was hired, and where he received workmens compensation benefits, determines his right to bring a third party action for injuries sustained in the course of employment while temporarily in another state. In Simaitis v. Flood, 437 A.2d 828 (Conn. 1980) an injured employee brought an action in Connecticut against a coemployee based upon the negligent operation of an automobile while they were in the state of Tennessee. Both the Plaintiff and Defendant were residents of Connecticut; they were hired in Connecticut, and their principal place of employment was in Connecticut. Each received workers' compensation benefits under Connecticut law for injuries sustained in Tennessee. Tennessee law did not allow an employee to sue a coemployee for injuries, and Connecticut's workers' compensation law did permit such suits.

By way of comparison to the case at hand, Plaintiff points out that he and the Defendants are residents of Utah; Shaw was hired in Utah and his principal place of employment is in Utah (R. 374, 377) as are the Defendants' principal places of business. Shaw applied for and received workers' compensation benefits in Utah for the injuries he sustained in Nevada. Nevada law does not allow suits against negligent third parties. Utah allows such suits pursuant to the provisions of Utah Code Annotated, §35-1-62, 1953 as amended, and the cases of Pate v. Marathon Steel Company, 777 P.2d 428 (Utah, 1989), and Bosch v. Busch Development, Inc., 777 P.2d 431 (Utah, 1989).

In Simaitis, supra, the Connecticut Supreme Court was faced with the issue of which state's workers' compensation law should be applied in determining whether a third party action would be allowed. It first addressed then rejected the contract choice of law rule. Id. at 831. Next, it discussed the tort choice of law rule requiring application of the law of the state where the injury occurred which is more commonly known as the rule of *lex loci delicti* being asserted by the Defendants in the present case. The Connecticut Supreme Court rejected the application of *lex loci delicti* in workers' compensation cases stating that:

"The place-of-the-injury rule affords only an unsatisfactory resolution to the workers' compensation choice of laws problem." Id. at 831 (emphasis added)

The Court continued:

The application of Connecticut's tort choice of law principles to compensation cases would bestow upon temporary visitors injured in Connecticut all the relief which the Connecticut compensation act affords, but deny that same relief to Connecticut residents injured while on temporary business outside the state, even when all of the incidents of employment such as in this case, are in Connecticut. Moreover, if this court were to adhere to strict application of the place-of-the-injury rule, a Connecticut resident and employee of a Connecticut employer under a Connecticut contract, who was injured while on temporary business in another jurisdiction might be left with no tort remedy whatsoever if that other jurisdiction applied a different choice of law rule. Id. at 831

The Court then went on to adopt and hold that there is a separate workers' compensation Choice of Law standard which should be applied in this type of case. It held that:

"Connecticut's interest in compensating the injured employee, a Connecticut resident to the fullest extent possible is clear and legitimate. Connecticut's other articulable interest lies in permitting the Plaintiff's employer, a Connecticut corporation, to recover from the Defendant the amount of compensation already paid or to be paid in the future..." Id. at 832.

The Court then cited Thomas v. Washington Gas Light Company, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980) and said:

Just as Virginia had no legitimate interest in preventing the District of Columbia from awarding relief supplemental to that awarded in Virginia, Tennessee has no legitimate interest in preventing Connecticut from providing the injured employee with a right of action for damages against a third party, particularly where both the employee and the alleged tortfeasor are Connecticut residents, the employer is a Connecticut corporation and

the employee was hired and principally employed in Connecticut. Simaitis, supra, at 832.

In its conclusion, the Court in Simaitis then held that

"the applicable law in a workers' compensation case is the law of the place of the employment relation, because the existence of the employer-employee relation within the state gives the state an interest in controlling the incidents of that relation, one of which incidents is the right to receive and the obligation to pay compensation" Id. at 833. (emphasis added)

Plaintiff here urges this Court to adopt the same Choice of Law standard in workers' compensation cases such as this for the same reasons enunciated by the Connecticut Supreme Court and the authorities cited hereafter. As in Simaitis, Utah clearly has an interest in compensating a Utah resident who is injured while temporarily working in another state, to the fullest extent possible. Likewise, Utah's interest also lies in permitting Shaw's employer, a Utah corporation and the workers' compensation carrier, to recover from the Defendants those amounts of compensation paid as is permitted under Utah Code Annotated, §35-1-62.

The workers' compensation law of the State of Utah, which allows third party actions, should be applied because Shaw and his employer are Utah residents; Shaw was hired in Utah; Shaw received workers' compensation benefits in Utah; the Defendants are also Utah residents; Shaw's presence in Nevada was only temporary and was an incident of his employment (R. 322-323). To bar any recovery for Shaw against third parties would run contrary to the

holding of the United States Supreme Court in the Thomas case, cited supra in that Nevada has no legitimate interest in preventing Utah from providing Shaw with a right of action for damages against a third party, especially where the parties involved are Utah residents and Shaw was hired in Utah by a Utah corporation and Shaw is principally employed in Utah.

Connecticut is not alone in holding that there is a distinct Choice of Law standard involving workers' compensation cases which doesn't recognize the tort standard of *lex loci delicti*.

In Braxton v. Anco Electric Co., 397 S.E.2d 640 (N.C.App. 1990) the North Carolina Court of Appeals dealt with a case which is squarely on point with the one now before this Court. In Braxton, a North Carolina resident was employed by a plumbing subcontractor, a North Carolina corporation, to work on a shopping center in Virginia. The general contractor and the electrical subcontractor, Anco, named as defendant, were also North Carolina corporations. Braxton was injured in an electrical explosion. He applied for and received workers' compensation benefits in North Carolina. He also filed a civil action in North Carolina against Anco alleging negligence of Anco's employees in causing his injuries. Anco sought and obtained a dismissal on the grounds that the action was barred by Virginia's Worker's Compensation Act which prohibits such actions.

The North Carolina Court of Appeals reversed the dismissal and held that even though the principle of *lex loci* applies in standard

tort cases, it does not apply in third party workers' compensation cases due to certain governmental interests and public policy of North Carolina. The Court stated: "North Carolina is the place of Plaintiff's residence, the location of Defendant's business, and the place of initial hiring." Id. at 643. It held that North Carolina's workers' compensation law should be applied in permitting the third party suit because North Carolina's public policy is "to provide for a right of action on behalf of an injured employee against a third party tortfeasor (even if a fellow subcontractor) and even though the injured employee applied for and received workers' compensation benefits." Id. at 643.

Utah Code Annotated §35-1-62, and this Court's decisions in Marathon Steel and Bosch clearly establish this state's public policy to provide the same relief to an injured Utah employee against a third party tortfeasor as does North Carolina and the other jurisdictions cited herein.

In Hauch v. Connor, 453 A.2d 1207 (Md. 1983) the Maryland Court of Appeals recognized and adopted the same Choice of Law standard set forth in Simaitis and Braxton. In discussing the rule of *lex loci delicti*, that Court said: "Here we are concerned not with differences between Maryland and Delaware tort law, but with differences in the workmen's compensation law of the two states." Id. at 1210 (emphasis added). The Court continued:

Today, however, many courts recognize that workmen's compensation law conflict issues present distinct policy questions and should

not be treated as tort or contract matters for choice of law purposes. We agree with this approach. Id. at 1211

The Maryland Court held that even though the injury in question didn't occur in Maryland, there were "greater Maryland issues" involved, and that Maryland workers' compensation law should determine the threshold question of the right to bring suit in Maryland courts. Id. at 1214.

In Saharceski v. Marcure, 366 N.E.2d 1245, (Mass. 1977), the Massachusetts Supreme Court faced with the identical issue concluded that the workers' compensation laws of the state of employment determines whether a third party tort action may be brought. In Saharceski, Massachusetts law barred third party suits and the Court held that a Massachusetts resident injured in Connecticut could not recover. The Court determined that the reasonable expectations of the parties was significant and that reference to the place of common employment provides both a certain source for resolution of the issue and the "assurance that the ability to maintain a tort action will not turn solely on the fortuitous circumstance of where the accident takes place." Id. at 1249 (citing Wilson v. Faull, 141 A.2d 768 {NJ 1958}).

In the present case, there is a clear conflict between Nevada's workers' compensation laws and Utah's. Nevada's law prohibits third party actions of this type while Utah's does not. As was argued to the trial court by this Plaintiff, this is not a common law tort action governed by the common law doctrine of lex

loci delicti. The cited authorities clearly agree. This cause of action is granted by statute and a different Choice of Laws issue arises. The State of Utah has a clear interest in overseeing and regulating the rights of its residents who are hired in Utah by a Utah employer and who are injured while temporarily outside of this state.

To now prohibit Shaw and other Utah residents in the same position from pursuing this type of action based solely on the "fortuitous circumstance" of where the injury occurred is clearly against the policies established by our Legislature and this Court and is repugnant to the underlying goals of our workers' compensation statutes. Without any question, had the injury occurred in Utah, Shaw would be allowed to proceed against the Defendants involved herein. However, the Defendants and the trial court feel that because Shaw was in Nevada when the injury occurred he should now be barred from pursuing the remedies available to him from the state where he was hired and where he received his workers' compensation benefits. This clearly runs contrary to the reasonable expectations of Shaw and anyone in his position that he will be protected by the workmens compensation laws of this state should they be required to work temporarily in another state.

In Quiles v. Heflin Steel Supply Company, 699 P.2d 1304 (Ariz. App. 1985), the Arizona Court of Appeals dealt with this same issue. In that case, a California resident, who was hired in California by a California employer, was injured in the course of

his employment while temporarily working in Arizona. The injury was alleged to have been caused by an employee of a third party. Quiles applied for and received workers' compensation benefits in California. The lawsuit was filed by the workers' compensation insurance carrier against the negligent third party to recover benefits paid by it pursuant to California law. Similarly, Utah Code Annotated, §35-1-62, provides for the same cause of action by the insurance carrier and/or the employer.

Quiles himself intervened in the case seeking special and general damages for negligence which was also permitted under the California statute and which is likewise permitted under Utah's workers' compensation laws in this case. In deciding which law should govern, the Arizona Court held:

When compensation has been paid the law of the state of compensation should govern in third-party actions including the nature and extent of lien subrogation, and assignment of rights. Id. at 1308. (emphasis added)

In the present case, the lawsuit which was filed against the Defendants is in the form of a lien subrogation action brought on behalf of Workers Compensation Fund of Utah and is also a third party action for negligence brought on behalf of the Plaintiff, Shaw. According to the ruling in Quiles, the workers' compensation laws of the state of Utah should govern in allowing this type of third party action brought by the Plaintiff on behalf of himself and the workers' compensation carrier since the workers' compensation benefits were paid here and not in Nevada. See also,

Miller v. Yellow Cab Co., 31 N.E.2d 406 (Ill. 1941).

In Quiles, the Court further held that "workers' compensation rights are substantive not merely procedural and therefore, once the worker has exercised his choice of where to seek compensation the compensation scheme of that state shall apply." Supra. at 1309, See also, Restatement Second Conflict of Laws, §§6, 145 and 181-185 (1971).

In this case, a claim was filed in Utah with the Workers Compensation Fund of Utah and Shaw received compensation benefits in Utah. At no time did any of the Defendants protest Shaw's receiving benefits here nor have they disputed his rights to receive such benefits here. According to the ruling in Quiles, the "compensation scheme" of Utah should apply and that includes the provision allowing third party actions under Utah Code Annotated, §35-1-62.

Time and time again, the standard set forth in this type of case is not the traditional *lex loci delicti* standard for a common law tort action. This is due to the fact that this type of case is not a traditional common law tort action. Although the claim is against third parties for negligence, it is different in that it is a claim which is created by statute based on certain public policy considerations enunciated by the Legislature and this Court. Second, this type of case is different in that the Plaintiff's presence in the other state is a direct result of an employment contract entered into in Utah and Plaintiff is required to go to

the other state as a condition of his employment. It is not a situation where someone who is just passing through or vacationing in another state is injured as a result of someone else's negligence. Such an occurrence has no connection to Utah's workers' compensation laws and the policies contained therein.

The prevailing rule clearly states that an employee, who is hired in one state, and who is injured in the course of his employment while temporarily working in another state is entitled to the benefits under the workers' compensation law of the state where he is employed, including the right to bring a third party action if the workers' compensation laws of the state of employment so allows. Dueitt v. Williams, 764 F.2d 1180 (5th Cir. 1985), O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2nd Cir. 1978), certiorari denied, Gillespie v. Schwartz, 493 U.S. 1034, 99 S.Ct. 638, 58 L.Ed.2d 696, Gregory v. Garrett Corp., 578 F.Supp. 871 (D.C.N.Y. 1983), Fox v. Sharlow, 579 A.2d 603 (Conn. Super. 1990), Fagan v. John J. Casale, Inc., 16 Misc.2d 1046, 184 N.Y.S.2d 109 (1959).

The Plaintiff urges this Court to adopt this rule and hold that the provisions of Utah's workers' compensation laws should be applied in allowing Shaw to maintain a third party action against negligent tortfeasors for injuries he sustained while temporarily working in the state of Nevada. It is obvious and clear that the State of Utah has a compelling and legitimate interest in applying its own workers compensation laws based on employment relationships

and contracts which are made within its boundaries by and between its residents. Although no constitutional issues were raised before the trial court, the denial of Shaw's right to bring and maintain this lawsuit may constitute a violation of the Equal Protection provisions of both the United States and Utah State Constitutions. For example, it would be manifestly unjust and discriminatory to allow one of Shaw's coemployees who is injured in Utah to have more remedies than someone like Shaw who has to go out of this state to work on a temporary basis. This would constitute unequal treatment of two Utah residents who work for the same Utah employer. Also, it is clear that one of the policy reasons for extending the protection of Utah's Workmens Compensation Act to someone in Shaw's position is to prevent the loss of protection to such an individual simply because his employer assigns him to go outside of this state on a temporary basis to work. Such an employee should not have to suffer merely because of the "fortuitous circumstance" of where he may be injured.

POINT II

UTAH'S WORKMENS COMPENSATION ACT HAS EXTRATERRITORIAL
EFFECT PERMITTING AN INJURED UTAH RESIDENT TO BRING
A THIRD PARTY ACTION FOR INJURIES RECEIVED OUTSIDE
OF THE STATE

In its Conclusions of Law, the trial court ruled, as a matter of law, that Utah's Workers Compensation Act does not have extraterritorial effect for injuries to a Utah worker injured in another state and that Shaw is prohibited from bringing a personal

injury claim against the Defendants herein (R. 321-325; 326-329). The ruling is incorrect and contrary to the prevailing statutory and case law. In United Air lines Transport Corp. v. Industrial Commission, 151 P.2d 591, 596, 107 Utah 52 (Utah 1944) the Utah Supreme Court addressed this issue recognizing that Utah's Workmens Compensation Act had extraterritorial effect. In deciding whether to exercise jurisdiction and apply Utah law where a Utah worker is injured outside of this state, the Court must first look at where the contract of employment was entered into and the residency of the parties to that contract. In Allen v. Industrial Commission, 172 P.2d 669, 675 (Utah 1946) the Utah Supreme Court dealt with a situation similar to that presented in this case. In deciding whether Utah's Workmens Compensation Act should apply where a Utah resident was injured in another state, the Court stated:

The entering into a contract of employment within the state between residents and citizens thereof creates the relationship of employer and employee, although the same is not localized within this state, which is sufficient to give this state jurisdiction to regulate that relationship. This state is interested in providing this protection to its residents and citizens. (emphasis added)

The underlying contract between Layton and Shaw's employer, Harv & Higham Masonry, was entered into in Salt Lake City, Utah on July 19, 1989. All of the parties involved, including Layton, Harv & Higham Masonry, and Shaw himself were and still are Utah residents. Consequently, the State of Utah has jurisdiction to regulate that relationship and apply its workers' compensation laws

even though the injury occurred in another state. As stated in the Allen case supra, the state of Utah has an interest in protecting its citizens when they are hired in this state by another Utah resident but injured in a foreign jurisdiction. In determining whether a workers' compensation act should be applied extraterritorially, the general rule is to look at the intention of the legislature in the enactment of the statute.

Generally speaking, whether or not the workmen's compensation act of the state where the contract of employment was made extends to injuries received outside the state depends upon the intention of the legislature, and such intention is to be ascertained in accordance with the general rules of statutory construction. There is very little difficulty in applying the act of the state of employment where the legislative intention so to apply it is made manifest by the provision of the act.
99 C.J.S. Workmen's Compensation §23(a).

In addition to the earlier cited cases which were decided by this Court declaring that Utah's Workmens Compensation Act had extraterritorial effect for injuries received by Utah residents while temporarily outside of the state, Plaintiff directs the Court's attention to the provisions of Utah Code Annotated, §35-1-54 which clearly states the Legislature's intention that the Act is to be applied extraterritorially in situations such as the one now before this Court. §35-1-54 provides:

If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents in case of his death, shall be entitled to compensation

according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving the state, unless prior to the expiration of such six months the employer has filed with the Industrial Commission of Utah notice that he has elected to extend such coverage a greater period of time.

The Defendants argued in the trial court that the extraterritorial aspects of Utah's Workmens Compensation Act applied only to the right of the injured employee to receive "compensation" and not his right to bring a third party action under §35-1-62. Plaintiff submits that such an argument is erroneous and runs contrary to the intent of our Legislature to protect the interests and rights of residents of Utah who are injured while temporarily in another state. Further, based upon the authorities cited herein, Plaintiff contends that the Legislature intended that the entire Act be applied extraterritorially and not in a piecemeal fashion. This would include the provisions of §35-1-62 permitting third party actions against negligent tortfeasors.

Furthermore, it is this Plaintiff's position that unless the Act specifically states otherwise, it is to have extraterritorial effect in its entirety. In State ex. rel. Loney v. State Industrial Accident Board, 286 P 408 (Mont. 1930) the Montana Supreme Court held:

The weight of authority in this country sustain the assertion that a Workmen's Compensation Act will apply to injuries to workmen employed in the state and injured

while temporarily out of its limits, unless there is something in the act making it inapplicable or clearly denying the right of the employee to recover in such case. Id at 409.

In the context of the extraterritorial application of a workers' compensation act in a third party tort action, the United States Fifth Circuit Court of Appeal in discussing the Mississippi workers' compensation statute said:

Under certain conditions an employee, regularly employed in one state, who is injured in the course of his employment while temporarily employed in another state, shall be entitled to benefits under the workmen's compensation law of the state where he is regularly employed.

Dueitt v. Williams, 764 F.2d 1180, 1182 (5th Cir. 1985), rehearing denied 779 F.2d 682.

Under this standard, it is clear that since Shaw was employed in the state of Utah, and more specifically was "regularly employed" in this state, he should be entitled to all of the benefits under Utah's Workmens Compensation Act which would include his right to bring a third party tort action against the Defendants herein.

In the case of Wessel v. Mapco, Inc., 752 P.2d 1363 (Wyo. 1988), the Wyoming Supreme Court was faced with an issue almost identical to that now before this Court. In that case, a Wyoming resident was killed while working for his Wyoming employer on a temporary basis in the State of Colorado. The employee's estate filed a lawsuit against the employer, the employer's corporate

grandparent and coemployees for wrongful death. The Wyoming Supreme Court held that Wyoming's workers' compensation statute applied to a worker while he was temporarily working in Colorado and that the personal representative of the employee's estate was entitled to maintain a culpable negligence suit against coemployees although the injury occurred in Colorado.

The statute then before the Wyoming Court was §27-12-208(a), W.S. 1977, 1983 Replacement which provided:

If an employee, while working outside of the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act {§§27-12-101 through 27-12-804} had the injury occurred within this state, the employee, or in the event of his death resulting from the injury, his dependents, are entitled to the benefits provided by this act, if at the time of the injury:

- (i) his employment is principally located in this state;
- (ii) he is working under a contract of hire made in this state in employment not principally localized in any state; or
- (iii) he is working under a contract of hire made in this state in employment principally localized in another state whose worker's compensation law is not applicable to his employer.

This statutory provision, as noted by the Wyoming Court, is almost identical to the Model Worker's Compensation Act pertaining to extraterritorial coverage for employees while working on a temporary basis in a state other than that where the employee was hired. Plaintiff points out that both the Wyoming statute and the

Model Worker's Compensation Act merely state the employee or his heirs are entitled to the benefits provided by the act. These statutes do not specifically state that the employee or his heirs have a right to bring a third party action for injuries received outside of the state. Nevertheless, the Wyoming Supreme Court in this case relied upon the extraterritorial language of this statute in holding that it extends to the right of the employee to bring such a third party action. Accordingly, any contention by the Defendants that the extraterritorial provisions of the Utah Act apply only to the employee's rights to receive "compensation" and nothing else is erroneous and without any legal basis whatsoever.

The Defendants may contend that the terms "benefits" and "compensation" have different meanings and that Utah's statute should be more narrowly construed. Plaintiff directs the Court's attention to §35-1-44(6) which defines the term "compensation" as follows: "Compensation" shall mean the payments and benefits provided for in this title" (emphasis added). Just as in the Wyoming Act and the Model Worker's Compensation Act, the term "benefits" is used and it is apparent that this term can and should be construed to mean all of the benefits allowed under the Workmens Compensation Act including the right to bring a third party tort action for injuries received by the employee while temporarily outside of the state.

Nowhere in the Utah Act does it state that it is not to have extraterritorial effect and as stated earlier, it is a generally

accepted and well established principle that unless a workers' compensation act expressly provides that it shall have no extra-territorial effect, it applies to workmen employed in a state to do work outside of the territorial limits of that state. Gooding v. Ott, 87 S.E. 862 (W.Va.). The Utah Act contains no provision which states that it should have no extraterritorial effect. On the contrary, §35-1-54 clearly states that it is to have such an effect and that all of the benefits included in the entire act are to be extended to Utah residents who are hired within this state and who are injured while temporarily working outside of its boundaries. And, as already set forth above, this includes the right granted under §35-1-62 to sue negligent third parties who caused the injuries to the employee while he was temporarily working outside of the state.

CONCLUSION

As set forth above, the prevailing authority clearly states that in the context of workers' compensation cases, and third party actions arising from injuries in a foreign jurisdiction, there is a choice of law standard which is separate and apart from the lex loci delicti standard used in common law tort cases which the Defendants are urging should be applied. For various and legitimate policy reasons, the workers' compensation law of the state where the Plaintiff resides, where he was employed, and where he received his workers' compensation benefits applies in determining his right to bring a third party action, not the

workers' compensation laws of the state where he was injured. Of further relevance and importance is the residence of the employer and the tortfeasors. Essentially, every factor in this case is directly associated with Utah and its workers' compensation laws. Consequently, the extraterritoriality of Utah's Workmens Compensation Act and the provisions of Utah Code Annotated, §35-1-62 of the Act allowing third party suits, should be applied to this case allowing this Plaintiff to proceed with his lawsuit against any and all negligent tortfeasors including the name Defendants herein.

Therefore, Plaintiff respectfully requests that the Orders of the trial court granting Summary Judgment and Dismissal be reversed and that this matter be remanded to the trial court for further proceedings.

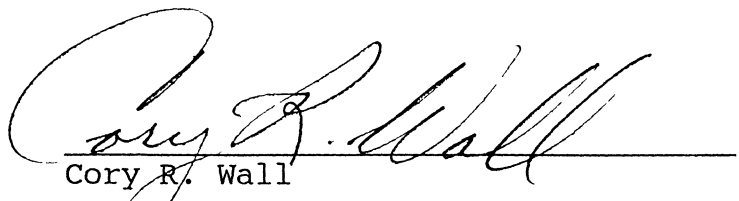
Respectfully Submitted,



CORY R. WALL
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CERTIFICATE OF MAILING

This is to certify that 4 true and correct copies of the foregoing Brief were hand delivered to Lee C. Henning, 175 South West Temple, #500, Salt Lake City, Utah 84101 and Steven B. Smith, 261 East 300 South, #200, Salt Lake City, Utah 84111 this 8th day of October, 1993.



Cory R. Wall

ADDENDUM "A"

UTAH CODE ANNOTATED §35-1-62, 1953 AS AMENDED

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

ADDENDUM "B"

UTAH CODE ANNOTATED §35-1-54, 1953 AS AMENDED

35-1-54. Employee injured outside state — Entitled to compensation — Limitation of time.

If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents in case of his death, shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state, unless prior to the expiration of such six months period the employer has filed with the Industrial Commission of Utah notice that he has elected to extend such coverage a greater period of time.

History: L. 1917, ch. 100, § 65; C.L. 1917, § 3126; R.S. 1933, 42-1-52; L. 1941, ch. 37, § 1; C. 1943, 42-1-52.

NOTES TO DECISIONS

ANALYSIS

Employees of foreign corporation.
Foreign compensation laws.
Injuries in interstate commerce.
Operation and effect.
Words and phrases defined.
Cited.

Employees of foreign corporation.

Since relation of employer and employee existed between foreign transportation company and truck driver in this state at time of injury, Industrial Commission had jurisdiction to make award, and such power in nowise depended upon reading into his contract of employment the law of Colorado where the contract was made, for when employer sent his employee into Utah to work for it there, it subjected itself to this chapter. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937).

Employer or its insurance carrier are not required to make payments to injury benefit fund where airline stewardess, employed in California by employer with its principal offices in California, is killed in course of temporary employment in Utah leaving no surviving dependents. *United Air Lines Transp. Corp. v. Industrial Comm'n*, 110 Utah 590, 175 P.2d 752 (1946).

Foreign compensation laws.

In action by employee for personal injuries arising in state of Wyoming, defense that Wyoming had adopted Workmen's Compensation Act, and that such act furnished adequate and exclusive remedy to employee to recover compensation, was sustained. *Bozo v. Central Coal & Coke Co.*, 54 Utah 289, 180 P. 432 (1919).

Resident employee who was injured in

course of employment in another state was entitled to compensation for such injuries, although employer was insured under laws of other state. *Pickering v. Industrial Comm'n*, 59 Utah 35, 201 P. 1029 (1921).

In the absence of proof it will be presumed that the provisions of the Workmen's Compensation Act of another state are the same as those of the forum. *Shurtliff v. Oregon Short Line R.R.*, 66 Utah 161, 241 P. 1058 (1925).

Injuries in interstate commerce.

Industrial Commission had power to make award under this section for injury to trucker employed by foreign corporation under foreign contract notwithstanding that trucker was in interstate commerce when injured. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937).

Operation and effect.

If employer-employee relationship is maintained in this state, Industrial Commission has jurisdiction to make an award notwithstanding that original contract of employment was entered into in foreign state and that injury occurred in foreign state. *Fay v. Industrial Comm'n*, 100 Utah 542, 114 P.2d 508 (1941).

Commission had right to award compensation for death of salesman occurring in Idaho, under first sentence of this section, notwithstanding that original contract of employment

ADDENDUM "C"

NEVADA REVISED STATUTE, §616.270

616.270. Employers to provide compensation; relief from liability.

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

2. Travel for which an employee receives wages shall, for the purposes of this chapter, be deemed in the course of employment.

3. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided. (1947, p. 572; CL 1929 (1949 Supp.), § 2680.26; 1971, p. 2058.)

CASE NOTES

- I. General Consideration.
- II. Injury Arising Out of and In Course of Employment.
- III. Exclusivity of Act.
- IV. Provision of Coverage by Employer.

I. GENERAL CONSIDERATION.

Cited in: *Simon Serv. Inc. v. Mitchell*, 73 Nev. 9, 307 P.2d 110 (1957); *Tab Constr. Co. v. Eighth Judicial Dist. Court*, 83 Nev. 364, 432 P.2d 90 (1967); *Heitman v. Bank of Las Vegas*, 87 Nev. 201, 484 P.2d 572 (1971); *Nevada Indus. Comm'n v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977); *Spencer v. Harrah's Inc.*, 98 Nev. 99, 641 P.2d 481 (1982); *Lewis v. United States*, 680 F.2d 68 (9th Cir. 1982).

II. INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Negligence of fellow employee. — When an employee is injured on the job as a result of the negligence of a fellow employee, his remedy is compensation under the Nevada Industrial Insurance Act. *Leslie v. J.A. Tiberti Constr. Co.*, 99 Nev. 494, 664 P.2d 963 (1983).

Assault while at work. — Where an employee is assaulted and injury is inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment, the employee cannot recover compensation simply because he is assaulted when he is in the discharge of his duties. Under such circumstances, the injury does not arise out of the course of employment, and the employment is not the cause of the injury, although it may be the occasion of the willful act and may furnish the opportunity for its execution. *McColl v. Scherer*, 73 Nev. 226, 315 P.2d 807 (1957).

Assault by insane coemployee. — Employee's death, as a matter of law, arose out of the employment, where he was assaulted in the course of his employment by an insane fellow employee. *Cummings v. United Resort Hotels, Inc.*, 85 Nev. 23, 449 P.2d 245 (1969).

Shooting of employee. — In a personal injury action brought against a club owner by a waitress who was shot by a customer while on duty, summary judgment for the employer on grounds that she was covered by the Industrial Insurance Act was improper, where there was no determination as to whether her injury resulted from being placed in a position of danger by reason of her employment or was the result of enmity, grudge, or other personal relationship. *McColl v. Scherer*, 73 Nev. 226, 315 P.2d 807 (1957).

Recreational activity. — Recreational activity should not be deemed to be within the course of employment unless it is a regular incident of employment, or is required by the employer, or is of direct benefit to the employer beyond the intangible value of employee health and morale common to all kinds of recreation and social life; thus, where it was not a regular incident of employee's employment to enjoy recreation on his day off at golf driving range, and his employer did not require his presence there, nor did the employer receive a direct benefit from that off-duty activity beyond the intangible value of employee health and morale common to all kinds