

1993

Kenny Jim Shaw v. Layton Construction Company, Inc., Steel Deck Erectors, Inc. : Brief of Appellee

Utah Court of Appeals

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Lee C. Henning; David C. Richards; Christensen, Jensen and Powell; Ford G. Scalley; Steven B. Smith; Scalley and Reading; Attorneys for Appellee.

Steven Wall; Cory Wall; Wall and Wall; Attorneys for Appellant.

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930475

IN THE UTAH SUPREME COURT

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, Case No. 930475-CA :

Defendants/Appellees :

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 DEFENDANT/APPELLEE STEEL DECK ERECTORS, INC.

APPEAL FROM A MEMORANDUM DECISION OF THE
HONORABLE PAT B. BRIAN IN THE THIRD JUDICIAL
DISTRICT COURT OF UTAH, SALT LAKE COUNTY
GRANTING STEEL DECK ERECTOR'S MOTION FOR SUMMARY JUDGMENT

FORD G. SCALLEY
STEVEN B. SMITH
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, Utah 84111
(801) 531-7870
Attorneys for Defendant/Appellee
Steel Deck Erectors, Inc.

OCT 27 1993

LEE C. HENNING
DAVID C. RICHARDS
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, #500
Salt Lake City, Utah 84101
(801) 355-3431
Attorneys for Defendant/Appellee
Layton Construction Company

STEVEN WALL
CORY WALL
WALL & WALL
#9 Exchange Place, Ste 800
Salt Lake City, Utah 84111
(801) 521-8220
Attorneys for Plaintiff/Appellant
Kenny Jim Shaw

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FORD G. SCALLEY
STEVEN B. SMITH
SCALLEY & READING
261 East 300 South
Salt Lake City, Utah 84111
Telephone (801) 531-7870
Attorneys for Defendant/Appellee
Steel Deck Erectors, Inc.

LEE C. HENNING
DAVID C. RICHARDS
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, #500
Salt Lake City, Utah 84101
(801) 355-3431
Attorneys for Defendant/Appellee
Layton Construction Company

STEVEN WALL
CORY WALL
WALL & WALL
#9 Exchange Place, Ste 800
Salt Lake City, Utah 84111
(801) 521-8220
Attorneys for Plaintiff/Appellant
Kenny Jim Shaw

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 Third-Party Defendants. :
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BRIEF OF DEFENDANT/APPELLEE STEEL DECK ERECTORS, INC.

This Court has jurisdiction of this matter pursuant to Article VIII § 3 of the Utah Constitution; Utah Code Annotated § 78-2-2(3)(j) (as amended); and Rule 3(a) of the Utah Rules of Appellate Procedure.

**STATEMENT OF THE ISSUES PRESENTED AND THE STANDARD OF
APPELLATE REVIEW**

ISSUES PRESENTED

1. Whether the trial court erred in concluding as a matter of law that the law of Nevada rather than the law of Utah applies to this case and exempts those in the same employ from liability for the injuries Plaintiff Shaw received while working for a Utah based subcontractor which was performing a job for the State of Nevada in the state of Nevada.

2. Whether the trial court erred in concluding as a matter of law that *lex loci delicti* was the correct choice of law rule to apply to this case.

3. Whether the trial court erred in concluding as a matter of law that Utah Code Ann. § 35-1-62 does not always apply extraterritorially to Utah residents who are injured while working out of state.

STANDARD OF REVIEW

Because each issue on appeal involves only questions of law this Court should review the trial court's ruling for correctness. City of Logan v. Utah Power and Light Co., 796 P.2d 697 (Utah 1990).

DETERMINATIVE STATUTES

1. Nev. Rev. Stat. § 616.560 (1986)
(Attached as Exhibit "A")
2. Nev. Rev. Stat. § 616.085 (Supp. 1989)
(Attached as Exhibit "B")
3. Nev. Rev. Stat. § 616.270 (1986)
(Attached as Exhibit "C")

4. Utah Code Ann. § 35-1-62 (as amended)
(Attached as Exhibit "D")
5. Utah Code Ann. § 35-1-54 (as amended)
(Attached as Exhibit "E")
6. Utah Code Ann. § 35-1-44 (as amended)
(Attached as Exhibit "F")
7. Nev. Rev. Stat. § 616.260 (1986)
(Attached as Exhibit "G")

STATEMENT OF THE CASE

A. Nature of The Case

Plaintiff/Appellant, Kenny Jim Shaw (hereinafter "Plaintiff"), brought a negligent tort claim against Defendant/Appellee, Layton Construction Company, Inc. (hereinafter "Layton"); Defendant/Appellee Steel Deck Erectors, Inc. (hereinafter "Steel Deck"); Defendant Bilt-Rite Concrete (hereinafter "Bilt-Rite"); and John Does A to Z (hereinafter collectively referred to as "John Does") for injuries he claims to have received while working on the construction site of the Nevada State Prison in Ely, Nevada. Plaintiff's Complaint contained causes of action against all Defendants for negligence, res ipsa loquitur, and negligence per se.

B. Course of Proceedings and Disposition Below:

Defendants Layton and Steel Deck were served with Plaintiff's Complaint. Plaintiff, however, has not yet served Defendant Bilt-Rite or any John Does. Steel Deck answered Plaintiff's Complaint asserting various affirmative defenses including immunity from liability from this type of action

provided by the laws of Nevada. Layton also answered Plaintiff's Complaint and filed Third Party Complaints against Bilt-Rite; I. Christensen, Inc.; Harv & Higham Masonry, Inc.; and Tech Steel, Inc. Layton subsequently filed a Motion to Dismiss Plaintiff's Complaint and Steel Deck filed a Motion for Summary Judgment. Both Motions argued that Nevada law governed Plaintiff's cause of action and granted them immunity from his tort claim. Memoranda were submitted, the Motions were orally argued and on November 26, 1991, Judge Pat Brian granted both Motions and dismissed Plaintiff's Complaint against both Defendants.

Plaintiff appealed Judge Brian's dismissal of his Complaint. This Court, however, on its own Motion, dismissed Plaintiff's Appeal for lack of jurisdiction due to Plaintiff's failure to obtain a Certification of Finality from the trial court pursuant to Rule 54(b) Utah Rules of Civil Procedure. See Shaw v. Layton Construction Co., 215 Utah Adv. Rep. 36 (Utah Ct.App. 1993). Following dismissal of that appeal (Case No. 920025-CA) the parties appeared before Judge Brian and on July 8, 1993 obtained a Rule 54(b) Certification of Finality from the trial court. Notice of Appeal was filed on July 20, 1993, and this matter is again before this Court for a determination of the issues involved in the first appeal.

STATEMENT OF RELEVANT FACTS

Layton, a general contractor from Utah, entered into a contract with the State of Nevada to construct "Phase II" of a maximum security prison in Ely, Nevada (hereinafter "the Nevada

Project"). (R. 3, 13, 140, 196, and 322) In order to construct the Nevada Project, Layton entered into subcontracts with subcontractors from Nevada and Utah. (R. 40, 44, 49, 55, and 106) Those who are parties to the action which underlies this appeal (Bilt-Rite Concrete, Inc., a Nevada corporation; I. Christensen, Inc., a Nevada corporation; Tech Steel, Inc., a Utah corporation; Steel Deck Erectors, Inc., a Utah corporation; and Harv & Higham Masonry, Inc., a Utah corporation) were all subcontractors on the Nevada Project. (R. 40, 44, 49, 55, 106, and 322)

Plaintiff was hired by Harv & Higham in July of 1989, to work on a prison under construction in Gunnison, Utah. (R. 374 and 376-380) Four months later, as that project neared completion, Plaintiff voluntarily elected to go out of state and join a Nevada Union in order to work on the Nevada Project. Plaintiff could have continued to work for his employer, Harv & Higham, on jobs in Salt Lake City, Orem, or Ogden, Utah. He, however, chose to work on the Nevada Project and joined a Nevada Union because his pay would almost double. (R. 377-379)

Plaintiff was injured on February 5, 1990, while working on the Nevada Project. (R. 3-4, 14, 122-122, 140, 196-197 and 243) Subsequent to his injury Plaintiff sought and received workers' compensation pursuant to Utah law (R. 142 and 245-246) and thereafter filed his lawsuit against Layton, Steel Deck, Bilt-Rite and John Does claiming causes of action against those Defendants for negligence, *res ipsa loquitur*, and negligence *per se*. (R. 2-6A, 8-9, 12-18 and 20-22) The Defendants who were

served with process successfully argued to the trial court that Plaintiff's Complaint against them should be barred by Nevada law, (R. 321-329) and this appeal has been taken. (R. 345-346)

SUMMARY OF THE ARGUMENT

This appeal presents a conflict of laws problem. The application of Nevada law to this dispute would prevent Plaintiff from maintaining his negligence claim against these Defendants, while the application of Utah law would not do so. Because Plaintiff filed suit in Utah, Utah's Choice of Law rules should be used to decide which state's law should apply. Utah has consistently held that procedural matters should be decided by the laws of the forum state, while issues affecting the parties' substantive rights should be resolved by applying the *lex loci delicti* or the law of the place of the wrong. The issue on appeal in the instant case, Plaintiff's ability to pursue a negligent tort claim against these Defendants and Defendants' right to be free from such a lawsuit, directly impacts the substantive rights of the parties, and should therefore be resolved by applying the *lex loci delicti* which is the law of Nevada. Furthermore, Utah's workers' compensation laws do not create an exception to the choice of law rule of *lex loci delicti* in this case.

If this Court concludes that *lex loci delicti* should not be used to resolve conflict of law issues where workers' compensation may be involved the result will remain the same regardless of which choice of law analysis is used.

The most significant contacts approach to this choice of law question (which looks to: the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered) leads to the conclusion that Nevada's contacts to the incident which underlies Plaintiff's lawsuit are greater than Utah's contacts. The injury occurred in Nevada; the allegedly negligent conduct occurred in Nevada; some of the parties to this lawsuit are Utah residents and corporations, others have Nevada domiciles but at the time of Plaintiff's injuries all were doing business in Nevada; and the relationship between the parties was centered entirely in Nevada.

Using an interest analysis to resolve the choice of law problem presented by this appeal also dictates that Nevada law should govern this action. Utah has a valid and legitimate interest in seeing that its citizens receive compensation for work related injuries. Plaintiff has been compensated pursuant to the workers' compensation laws of Utah and has various avenues to augment that award if it is insufficient to adequately compensate him for his injuries. Utah, however, has an even greater interest in ensuring its citizens, subcontractors, and general contractors can continue to seek and receive out of state work on an equal basis with citizens, subcontractors and general contractors from other states. If Nevada law is found to apply to

the instant case citizens and companies who are residents of Utah could continue to compete for out of state work on an equal basis with the residents of other states. Conversely, if Utah law is applied to this dispute, Utah citizens permitted to work on an out of state project as employees, subcontractors or general contractors would expose all others on the same job site to the risk of a lawsuit for negligence in the courts of this state. That risk would end up being eliminated by the systematic exclusion of Utah citizens and companies from out of state projects.

A balancing of only Utah's interests dictates that Nevada law should govern this dispute. An interest analysis approach to choice of law questions, however, requires the interests of both jurisdictions to be considered. Nevada was and is the owner of the Nevada Project. Nevada is also a potential defendant. Nevada has an obvious and legitimate interest in having its own law govern disputes involving a job it commissioned to be completed within its borders. Nevada also has an interest in protecting individuals working within its borders and in ensuring that resident corporations and others doing business within the state will be protected from third party liability for negligence where workers' compensation is involved. The interests of both Utah and Nevada favor the application of Nevada law to this dispute.

ARGUMENT

I.

THE CHOICE OF LAW RULE TRADITIONALLY ADHERED TO IN UTAH OF LEX LOCI DELICTI SHOULD BE USED TO DETERMINE WHICH STATE'S LAW SHOULD GOVERN THIS DISPUTE

Plaintiff, a Utah Resident, filed a tort claim in the Third Judicial District Court for the State of Utah seeking to recover for injuries he received while working on a construction project in the state of Nevada for the State of Nevada. If Utah law governs Plaintiff's Complaint, pursuant to Utah Code Ann. § 35-1-62 (1953 as amended), he could maintain his negligence claim against the Defendants named in his Complaint as well as others. If, however, Nevada law is found to govern this action, Plaintiff's Complaint against those in the same employ which includes the general contractor, the subcontractors and all of their employees, would be barred pursuant to Nev. Rev. Stat. §§ 616.560 (1986), 616.270 (1986), 616.085 (Supp. 1989) and 616.116 (1986). This Court must decide which State's law should govern Plaintiff's Complaint.

When faced with a conflict of laws, the forum court should apply its own choice of law rules to determine the outcome of the conflict. Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487, 491 61 S.Ct. 1020, 85 L.E.D. 1477 (1941). Since, Utah is the forum for this controversy its choice of law rules should be used to decide this issue. In Utah, conflicts over procedural matters are governed by the law of the forum while conflicts over parties' substantive rights are resolved by applying the

traditional rule of *lex loci delicti* or the law of the place of the wrong. Buhler v. Maddison, 176 P.2d 118, 122 (Utah 1947). See also 168 A.L.R. 177; and 16 Am.Jur.2d. Conflicts of Law § 5, 98, 99 and 118.

This Court referred to the procedural/substantive characterization of conflicts questions in Rhoades v. Wright, 622 P.2d 343, 348-49 (Utah 1980). In order to resolve the matter at hand, the conflict between Utah and Nevada law should first be classified as procedural or substantive. Procedural matters are those dealing with the conduct of the litigation; the machinery for carrying on the suit including pleading, process, evidence and practice, June v. Erie R.R. Co., 140 N.E. 366 (Ohio 1922); or the mode by which a legal right is enforced. Bohme v. Southern Pacific Co., 8 Cal. App. 3d 291, 87 Cal.Rptr. 286 (Cal.App.2d 1970). Substantive matters, on the other hand, involve the creation, definition and regulation of individuals' rights and duties. Sohm v. Bernstien, 279 A.2d 529 (Maine 1971).

The conflict in this case involves Plaintiff's right to maintain a cause of action in Utah for an injury he received while working in Nevada and the Defendants' right to be free from such a lawsuit. The conflict at hand directly affects the parties' substantive rights. A. Larson, The Law of Workmen's Compensation, (1990) § 88.21, 16-193. In the opening paragraph of the argument section of Plaintiff's Brief, Plaintiff acknowledges that the conflict in question "bears upon the substantive rights of this state's [sic] residents..." including

Plaintiff. (Plaintiff's Brief at 10) Therefore, according to the choice of law rule traditionally followed in Utah, the rule of *lex loci delicti*, the substantive law of the place of the wrong should govern actions based on that wrong. Bodrug v. United States of Am. and F.A.A., 832 F.2d 136, 137 (10th Cir. 1987); citing Madison v. Deseret Livestock Co., 574 F.2d 1027, 1032 (10th Cir. 1978); Jackson v. Continental Bank & Trust Co., 443 F.2d 1344, 1349 n. 6 (10th Cir. 1979); Valesquez v. Greyhound Line, Inc., 12 Utah 2d 379, 366 P.2d 989, 991 (1961), overruled on other grounds; Harris v. Utah Transit Auth., 672 P.2d 217 (Utah 1983); and Hudson v. Decker, 7 Utah 2d 24, 317 P.2d 594, 595 (1957).

The purpose of the rule of *lex loci delicti* is, and always has been, to promote stability in the law, predictability of result, justice among the parties and to prevent the scourge of forum shopping. 16 Am.Jur.2d Conflicts of Law §§ 5, 98, 99 and 118. See also Northeast Utilities, Inc. v. Pittman Trucking Co., 595 So.2d 1351, 1353 (Ala. 1992) and O'Conner v. O'Conner, 519 A.2d 13 (Conn. 1986). The case at hand is an ideal situation to apply the choice of law rule of *lex loci delicti* and promote the above values.

In some situations where the traditional tort choice of law rule of *lex loci delicti* has been rejected (in cases dealing with automobile guest statutes or interspousal immunity) the courts have focused on the fortuitousness of the place of the injury. See Forsman v. Forsman, 779 P.2d 218, 219-220 (Utah

1989). But see Wood v. Taylor, 332 P.2d 215, 216 (Utah 1958); and Hudson, 317 P.2d. at 594-595. In the instant case, however, the converse is true. The fortuitous facts surrounding this dispute are the parties' domiciles. See LaBounty v. American Insurance Co., 451 A.2d 161, 163 (N.H. 1982), and Clark v. Clark, 222 A.2d 205, 208 (N.H. 1966). The owner of the Nevada Project, the State of Nevada, was certain and known to all. The job site of Ely, Nevada was also permanent, continual, open, obvious and known to all involved. The domiciles of the general contractor, the subcontractors (all licensed to do construction work in the state of Nevada) and the individual employees (many of whom like Plaintiff were members of Nevada unions), however, were undisclosed and unknown to the others. The record does not indicate how many subcontractors or individual employees were Nevada residents. Two Nevada corporations are currently parties to this lawsuit and in light of the size of the Nevada Project, its owner and its location there are likely to be many others involved, including the State of Nevada.

Because of the various domiciles of the parties and potential parties, applying Utah's law to Plaintiff's Complaint would create confusion, uncertainty and would promote forum shopping. Confusion and uncertainty would result when Plaintiff attempts to serve Bilt-Rite or any of the John Does with domiciles other than Utah. Plaintiff emphasizes time and time again that the Defendants in this case are all residents of Utah. (Plaintiff's Brief at 8, 9, 11 and 14) Plaintiff seems to ignore

the fact that his Complaint named a Nevada Corporation and 26 John Does as Defendants in this action and that various third party claims have been filed against Nevada residents by Layton. It is likely that many of those John Does (which likely includes the State of Nevada) are residents of Nevada or other states. The application of Utah law to Steel Deck and Layton would beg the question what law would apply to the defendants with domiciles other than Utah? The application of *lex loci delicti* to this case, however, would raise no such question. It would be certain for all and would prevent forum shopping.

Another question which would have to be addressed by this court is which law would apply if the injured party seeking to maintain a negligence action were not a resident of Utah? It is not inconceivable that one or more individuals with various domiciles were injured while working on the Nevada Project. If this court applies some rule other than *lex loci delicti* the question of which state's law should apply could become an issue for injuries on this or any other out of state project where a Utah resident, contractor or subcontractor was involved. This case is ideally suited to reaffirm Utah's reliance on *lex loci delicti* to resolve choice of law issues in tort to promote certainty, predictability and the effective administration of justice.

In the case at hand "the acts alleged and complained of [in Plaintiff's First Amended Complaint], and which give rise to the various causes of action enumerated [therein], occurred

exclusively within Ely, Nevada." (R. 2-3 and 13) Furthermore, the injuries for which Plaintiff seeks to recover were sustained exclusively in Ely, Nevada. (Plaintiff's Brief at 6) There is no dispute that Nevada is the place of the wrong. Therefore, unless this Court elects to undertake a new course for choice of law in Utah, the law of Nevada should govern the parties substantive rights and obligations, and bar Plaintiff's Complaint against Steel Deck.

II.

UTAH CODE ANN. §§ 35-1-44(6), 35-1-54 AND 35-1-62 DO NOT CREATE AN EXCEPTION TO THE RULE OF LEX LOCI DELICTI

Plaintiff argues that lex loci delicti should not apply to the instant situation because Utah Code Ann. § 35-1-62 (1953 as amended) grants individuals entitled to workers' compensation an action for damages against some negligent third parties, and Utah Code Ann. § 35-1-54 (1953 as amended) allows a worker, who is hired or regularly employed in this state and is injured during the course of his employment outside of this state, to receive compensation according to the laws of this state. Plaintiff argues that the trial court erred when it ruled, as a matter of law, that "Utah's Workers [sic] Compensation Act is not applicable extraterritorily [sic] for injuries to a Utah worker occurring [sic] outside the state of Utah." (R. 328 ¶ 7) While the trial court's conclusion of law misstates the law as set forth in Utah Code Ann. § 35-1-54, Steel Deck contends that the trial court intended paragraph seven to read "Utah Code Ann. §

35-1-62 of Utah's Workers' Compensation Act is not applicable extraterritorially for injuries to a Utah worker occurring outside the state of Utah." That conclusion would be the only position consistent with the Motions and Memoranda submitted by Defendants Layton and Steel Deck. (R. 166-172 and 257) Nevertheless, the trial court's decision is to be reviewed for correctness and the outcome below was correct.

Plaintiff contends that Utah's Workers' Compensation statute was intended to have extraterritorial effect and cites dubious cases in support of that contention. Steel Deck agrees that Utah's legislative scheme to compensate employees who are injured on the job extends to employees who are injured while out of state. Steel Deck, however, disagrees with Plaintiff's interpretation of Utah Code Ann. § 35-1-44(6) construing the word "benefits" to include "the right to bring a third party tort action for injuries received by the employee while temporarily out of state." (Plaintiff's Brief at 28)

Reading Utah Workers' Compensation Act (Utah Code Ann. §§ 35-1-1 through 35-1-107) as a whole, demonstrates the lack of logic or reason in Plaintiff's position regarding the meaning of "and benefits." Utah Code Ann. § 35-1-45 and 35-1-50, (1953 as Amended) provide in part that an employee injured by accident in the course of his employment, regardless of where it occurs, "shall be paid compensation for loss sustained on account of the injury . . . and such amount for medical, nurse, and hospital services and medicines . . . as provided in this chapter." Steel

Deck contends that the payments for "medical, nurse, and hospital services, and for medicines, and [] such artificial means and appliances necessary to treat the patient" provided for in Utah Code Ann. § 35-1-81 (1953 as amended), in addition to compensation, are the "benefits" referred to in § 35-1-44(6). Plaintiff's interpretation of "payments and benefits" is further undermined by the legislature's use of: the phrase "Workers' Compensation Benefits" in Utah Code Ann. § § 35-1-46(1), (2) and 35-1-46.10 through .30; "compensation or other benefits in lieu of the compensation and other benefits provided by this title" in Utah Code Ann. § 35-1-52; and "the employee's claim for benefits under this chapter is wholly barred" if not brought within 180 days in Utah Code Ann. § 35-1-99. (emphasis added) Using the term "benefits" to include an injured employee's right to sue negligent third parties would arguably create a 180 day statute of limitations on such actions.

Plaintiff's contention that an individual's right to maintain a negligence action against third parties is a benefit of Utah's Workers' Compensation Act which should apply extraterritorially is not supported by statute, nor case law and is contrary to the legislature's intent. The language of this State's workers' compensation law fails to provide a basis for this Court to reject the long standing doctrine of *lex loci delicti* for resolving choice of law issues in negligence actions even where workers' compensation is involved. See Dueitt v. Williams, 764 F.2d 1180, 1182-1183 (5th Cir.).

III.

NEVADA LAW SHOULD BE FOUND TO GOVERN PLAINTIFF'S COMPLAINT WHETHER THE CONFLICT OF LAWS PRESENTED BY THIS APPEAL IS RESOLVED BY APPLYING A "MOST SIGNIFICANT CONTACTS" APPROACH; AN "INTEREST ANALYSIS" APPROACH; OR A COMBINATION OF THOSE APPROACHES

Plaintiff's brief urges this Court to reject the choice of law rule of lex loci delicti for this case and argues for the adoption of a different choice of law rule for workers' compensation matters. The standard being advocated appears to be a combination of a "most significant contacts" test and an "interest analysis" test. If this court elects to choose a specialized choice of law rule to govern cases involving conflicts of law in workers' compensation matters Nevada law should still be found to govern the instant case.

A. Nevada's Relation to the Occurrence is Greater than Utah's Connection, and Nevada Law Should be Found to Govern this Dispute if a "Most Significant Contacts" Test is Used to Resolve This Conflict of Law

The "most significant contacts" test expounded in Restatement (Second) Conflicts of Law § 145 states:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred;
- (b) the place where the conduct causing the injury occurred;

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

i. The Injuries Sustained by Plaintiff were Sustained in Nevada

The injury which underlies Plaintiff's lawsuit occurred in Nevada. (R. 2-4 and 12-14). In Barringer v. State, 727 P.2d 1222, 1227 (Idaho 1986) the Idaho Supreme Court, in a case dealing with a conflict of laws in the workers' compensation context, held that "of the contacts to be considered, 'none has a more significant relationship to the issue . . . than . . . the place of the injury.'" Id. quoting Johnson v. Pischke, 700 P.2d 19, 24 (Idaho 1985). The Nevada Supreme Court has also recognized the primacy of the place of the injury in resolving choice of law questions arising in the context of workers' compensation. Tab Construction Co. v. Eighth Judicial District Court, 432 P.2d 90 (Nev. 1967); See also Northeast Utilities, 595 A.2d at 1353.

There is no question that the place of the injury which underlies Plaintiff's Complaint was Nevada and that that contact favors the application of Nevada law to this dispute.

ii. The Conduct Causing Plaintiff's Injuries Occurred Exclusively in Nevada

Plaintiff alleges that his injuries resulted from Defendants' negligence in failing to make safe a hole in tin

decking material at the Nevada Project. (R. 4-6 and 14-17) He also contends that "[t]he acts . . . which give rise to the various causes of action enumerated [in his Complaint] occurred exclusively within Ely, Nevada." (R. 2-3 and 13) Each jurisdiction has an interest in protecting those within its boundaries from injuries due to negligent conduct and in regulating such conduct. See Wood, 332 P.2d at 216-217; and Hudson, 317 P.2d at 595. Because the conduct involved in the incident which underlies this action occurred exclusively in Ely, Nevada, that contact also favors the application of Nevada law to this case.

iii. While the Parties to this Appeal May All be Residents of Utah Some Unserved Defendants and Third Party Defendants are Residents of Nevada

Plaintiff, Steel Deck and Layton are all Utah residents. Bilt-Rite, I Christensen and the State of Nevada, however, are not residents of this State. Those with Utah domiciles could reasonably foresee a visit to a Utah courtroom, but not for a personal injury action arising from alleged negligent conduct performed in Nevada which allegedly caused injuries in Nevada, on a construction project in Nevada which had been commissioned, directed and was owned by the State of Nevada.

An important aspect of this factor is the place of business of the parties. In the instant action all of those involved, parties and potential parties, were doing business in Nevada at the time of the incident upon which Plaintiff's claim is based. While Utah has some connection to the occurrence via

some of the parties' domiciles, Nevada's relation to the parties, as far as this occurrence is concerned, however, is equal to or greater than Utah's relation, and it also favors the application of Nevada law to this dispute.

iv. The Parties' Relationship was Centered Entirely in Nevada

Plaintiff and his employer began their relationship in the State of Utah. Some of the Subcontractors also began their relationship with Layton in Utah. Nevertheless, Steel Deck's relationship with Plaintiff began, existed and ended in Nevada. Steel Deck had no contact whatsoever with Plaintiff prior to the arrival of both parties at the job site of the Nevada Project in Ely, Nevada. Because Steel Deck had no actual or constructive knowledge of Plaintiff's existence until that point in time, consideration of the place of the parties' relationship also demonstrates that Nevada is the State with the greatest contacts to and relationship with the occurrence and the parties involved in this dispute.

B. Analyzing and Comparing the Various Interests of the Concerned Jurisdictions Demonstrates that the Interests of Both Utah and Nevada Favor the Application of the Immunity Provided by the Law of Nevada

Some courts have rejected traditional contract and tort choice of law principles "in favor of the rules traditionally applied to workers' compensation conflicts cases." Fox v. Sharlow, 579 A.2d 603, 606-607 (Conn.Super. 1990); citing Simaitis v. Flood, 437 A.2d 828 (Conn 1980). In Wilson v. Faull, 141 A.2d 768 (N.J. 1958) the Supreme Court of New Jersey, ruling

on a conflict between the workers' compensation laws of two states which dealt differently with a plaintiff's right to maintain a tort action stated:

[t]he classification of the plaintiff's claim as one involving 'tort law' or 'contract law' or 'employment relations law,' with the consequence that the court need then only mechanically apply the respective choice of law rule, i. e., the law of the state of the injury, or the state where the employment contract was entered into, or of the state with the most significant contacts with the employment relation, does not in our opinion provide a satisfactory choice of law rule where the employee is not claiming compensation benefits but is instead seeking to maintain a common law tort action.

Id. at 774.

The New Jersey Supreme Court went on to hold that:

[c]hoice of law in the situation presented here should not be governed by wholly fortuitous circumstances such as where the injury occurred, or where the contract of employment was executed, or where the parties resided or maintained their places of business, or any combination of these 'contacts.' Rather, it should be founded on broader considerations of basic compensation policy which the conflicting laws call into play, with a view toward achieving a certainty of result and effecting fairness between the parties within the framework of that policy.

Id. at 778-779.

Other courts and authorities have adopted the reasoning expressed in Wilson. See Larson, A. The Law of Workmen's Compensation (1990) §§ 88.13 through 88.14, 16-185 through 16-192. Recently the New Jersey Supreme Court stated that the "decision in Wilson, foreshadowed, if it did not fully comport with, contemporary choice of law doctrine in which the determinative law is that of the state with the greatest interest in governing the particular issue." Eger v. E. T. Du Pont

DeNemours Co., 539 A.2d 1213, 1217 (N.J. 1988). See also LaBounty, 451 A.2d at 164. In Braxton v. Anco Electric, Inc., 409 S.E.2d 914 (N.C. 1991), the Supreme Court of North Carolina rejected the application of *lex loci delicti* to resolve a conflict of laws regarding the exclusive remedy bar of two states' workers' compensation statutes and applied the law of the state whose interests it determined were paramount. Id. at 916. The Supreme Court of Massachusetts has also held that:

[i]n situations involving a conflict of laws concerning the fellow employee's claimed exemption from liability, the better reasoned cases focus on the established relationship of the parties, their expectations, and the degree of interest of each jurisdiction whose law might be applied.

Saharceski v. Marcure, 366 N.E.2d 1245, 1248 (Mass. 1977).

Many courts have elected to look to the interests of involved jurisdictions to resolve conflicts of law in the workers' compensation context. If this court elects to utilize an interests analysis approach the law which should be applied to the case at bar will be the law of Nevada.

i. Utah's Interests in Seeing its Residents Compensated and Enabling its Citizens and Residents to Continue to Seek and Receive Out of State Work Favor the Application of Nevada Law to Plaintiff's Complaint

There is no question that Utah has an interest in seeing that its citizens are compensated for injuries they receive regardless of where the injury may be sustained. Cleveland v. U.S. Printing Ink, Inc., 588 A.2d 194 (Conn. 1991); citing Simaitis, 437 A.2d at 832. The instant case, however,

does not involve a choice between compensation or no compensation for a Utah citizen. Nor does it involve a right to supplemental workers' compensation payments as in Thomas v. Washington Gas Light Co., 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980). Plaintiff applied for and received his workers' compensation payments and benefits pursuant to Utah law. He is now seeking to receive additional compensation by way of a third party tort claim. The majority of those employees injured in the course of their employment cannot or choose not to seek more money by initiating lawsuits. In Bozo v. Central Coal & Coke Co., 180 P.2d 432 (Utah 1919) this Court recognized that in many cases workers' compensation payments and benefits are a sufficient remedy.

Plaintiff contends that "[h]is recovery from Workers [sic] Compensation Fund of Utah has not been adequate to meet his future needs" (R. 251) and that he needs and deserves an avenue by which to recover additional compensation. The legislature has provided the State Industrial Commission with continuing jurisdiction to modify awards and increase compensation when the facts so merit. Utah Code Ann. § 35-1-78 (1953 as amended). Plaintiff could also seek additional benefits pursuant to Utah Code Ann. § 35-1-70 (1953 as amended) or appeal the ruling or order of the Industrial Commission pursuant to Utah Code Ann. § 35-1-82.53 (1953 as amended) in order to alleviate his claimed problem of undercompensation.

Plaintiff's right to compensation has been honored.

His medical bills, rehabilitation and training have been paid for and Utah's interests in that regard have been satisfied. The State's interest in permitting Plaintiff to seek additional compensation is dwarfed by its interest in ensuring his initial recovery of workers' compensation and benefits. LaBounty, 451 A.2d at 164. Preventing Plaintiff from pursuing his cause of action against these Defendants by applying Nevada law to this dispute would only preclude him from trying to recover additional compensation by way of a lawsuit.

Utah also has a valid and legitimate interest in allowing workers' compensation insurance carriers and the employer's of injured employees to seek subrogation from responsible third parties. Nevada also gives insurers and employers a right to subrogate against responsible third parties. Nevertheless, in its workers' compensation scheme co-employees are exempt from liability for negligence. Despite Utah's interest in allowing subrogation claims to be brought the main purpose of the workers' compensation laws is to ensure that injured employees are taken care of. Plaintiff has received his compensation payments and benefits. Utah's interest has been partially satisfied and its interest in allowing Plaintiff to go forward with his negligence action is fairly insignificant when the other policy considerations are looked at.

Preventing Plaintiff from pursuing his negligence cause of action by the application of Nevada law may somewhat reduce his recovery. Allowing Plaintiff's lawsuit to proceed, however,

by applying Utah law to this situation would detrimentally impact the ability of Utah citizens, contractors and subcontractors to compete for, seek and receive work on out of state projects. Applying Utah law to this situation would permit Utah residents who are injured while employed outside of this state to subject general contractors, subcontractors and their employees to a negligence lawsuit in the courts of this state. That risk would not exist if no Utah residents contractors or subcontractors were present on an out of state project. Applying Utah law to the instant case would create a great disincentive to hire or employ residents or contractors of this state. The risk of having to answer a negligence lawsuit in Utah would exist for every participant on an out of state project whenever a Utah contractor or subcontractor was working on the job site. In order to avoid the risk of tort liability in a Utah courtroom, owners of projects as well as general contractors or others responsible for letting contracts would systematically refuse to give contracts or work to individuals or companies from this State. See Howe v. Diversified Builders, Inc., 69 Cal.Rptr. 56,59 (Cal.App.2d 1968).

In order to resolve a conflict of law using an interest analysis the interests of the forum must be considered. Utah's interest in seeing its citizen compensated has been mostly satisfied through the workers' compensation law of this state. The lesser State interest of permitting a citizen to pursue a negligent tort claim would be slightly impaired if Nevada law is applied to this dispute. The impairment of that interest,

however, is minor when compared to the significant detriment to Utah citizens, contractors and subcontractors that would result if it is decided that Utah law should govern this dispute. When only Utah's interests are considered, public policy demands that Nevada law govern this dispute.

ii. Nevada's Interests In: Conduct Within its Borders; Protection of Those Working and Doing Business Within Its Boundaries And Recognition of the Exclusive Remedy Provisions of Its Workers Compensation Laws Also Favor the Application of Nevada's Law to the Dispute

Plaintiff contends "that Nevada has no legitimate interest in preventing Utah from providing Shaw with a right of action for damages against a third party..." (Plaintiff's Brief at 14). That position reveals an extremely narrow vision of the facts, circumstances, issues and policies at stake in this controversy. Nevada has a greater interest in the application of its laws to the present lawsuit than any other state. The State of Nevada was the owner and overseer of the Nevada Project; Nevada is a potential defendant in this lawsuit; because it was a Nevada Union job it can be assumed that a significant number of Nevada residents and subcontractors were employed to complete the Nevada project; and the injury and actions at the heart of this lawsuit occurred in Nevada:

The function of Workers Compensation Law in an industrialized society is easy to understand in terms of making physical losses suffered by employees a part of the cost of operation to be borne not only by injured individuals and their families but by the employment enterprise as a whole, ultimately to be passed on to its customers as part of the cost of the product or service provided for their use.

Leflar, R.; McDougall, L.; and Felix, R. American Conflicts Law (4th ed.) § 158 p. 447.

Workers' compensation laws also represent a quid pro quo which bestows both benefits and detriments upon all parties to the trade off. See generally A. Larson The Law of Workmen's Compensation § 88.00 et seq. 16-171 through 16-213; and Restatement (Second) Conflicts of Law § § 180 through 185 pp 536 through 555. The employer must provide workers' compensation insurance to pay for all work related injuries regardless of fault. In exchange for that benefit the employee surrenders his right to pursue other remedies. Wilson, 141 A.2d at 776. Because of the quid pro quo in the present situation both Nevada and Utah have an interest in seeing that the injured employee receive compensation. Nevertheless, when an injured employee seeks to maintain a tort action against a party who has been granted immunity by one of the state's laws requiring the provision of workers' compensation protection, the law of the state providing freedom from liability is generally applied. Eger, 539 A.2d 1217; citing Wilson 141 A.2d at 774-775. To ignore the exclusive remedy provision of one state workers' compensation law would do violence to the quid pro quo of workers' compensation.

Plaintiff may argue that only his employer provided him with Workers' Compensation protection and therefore should be the only entity that should be protected from liability. The laws of Nevada, however, require that the general contractor remain

ultimately liable for payment of workers' compensation benefits. Nev. Rev. Stat. §§ 616.085 and 616.270. In order to comply with its obligation, the general contractor incurs a cost. As a result of that cost the employee receives a benefit, additional protection for work related injuries. Plaintiff may also argue that the same trade off does not justify the extension of the immunity provided by Nevada's Workers' Compensation Act to subcontractors. The costs to the general contractor, however, are passed on to, and ultimately borne by, the subcontractors on the job. Furthermore, all the subcontractors on a job enter into a similar quid pro quo. All of the subcontractors and their employees give up their right to sue any of their co-employees and in return receive immunity from negligence lawsuits such as Plaintiff's. Allowing Plaintiff's lawsuit to continue would modify Nevada's statutory scheme for providing protection to employers and employees within its boundaries. See Eger, 539 A.2d at 1219-1218.

In addition to maintaining the integrity of its own workers' compensation laws Nevada has a vital and legitimate interest in regulating injury causing conduct within its borders. The United States Supreme Court held that: "few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power [than] the bodily safety and economic protection of employees injured within it." Pacific Employers Ins. Co. v. Industrial Acc. Cmm'n. 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 946 (1939). See also Hudson

317 P.2d and Wood 332 P.2d.

Nevada has exempted some out of state employees from the provisions of its workers' compensation law. Nev. Rev. Stat. § 616.260(1) (1986). The Nevada legislature, however, has declared an express interest in regulating all employees from within or without of the state on jobs where the total value exceeds Two Hundred Fifty Thousand Dollars (\$250,000). The express waiver of that exemption is set forth in Nev. Rev. Stat. § 616.260(3). The cost of the Nevada Project was several times \$250,000. The contract between Plaintiff's employer and Layton was for over One Million One Hundred Thousand Dollars (1,100,000). To infringe upon the express interests of Nevada would not only create confusion it would violate principles of comity. See Jackett v. Los Angeles Department of Water and Power, 771 P.2d 1074, 1076-1077 (Utah App. 1989).

Once it is determined that Nevada law should govern this cause of action it becomes necessary to determine what effect Nevada Law would have on plaintiff's Complaint. In Meers v. Haughton Elevator, 701 P.2d 1006, 1007 (Nev. 1985) the Nevada Supreme Court stated that "[i]t is well established that employees and persons in the same employ as a person injured in the course of employment, are immune from liability under the Nevada Industrial Insurance Act" (emphasis added). Pursuant to Nevada Rev. Stat. § 616.560 (1986) "a person 'in the same employ' as a claimant is relieved from Common Law liability for damages resulting from injuries entitled to compensation under the

Workman's Compensation Statute." Watson v. G. C. Associates Ltd. Partnership, 691 P.2d 416, 418 (Nev. 1984); citing Howard v. Eighth J. Dist. Ct., 640 P.2d 1320, 1321 (Nev. 1982); and Aragonez v. Taylor Steel Co., 462 P.2d 754, 755 (1969). The issue in the case at hand, therefore, is whether plaintiff and defendant Steel Deck were "in the same employ" and therefore, whether Steel Deck is protected by statute from plaintiff's claim. Pursuant to Nev. Rev. Stat. 616.085 and 616.116 subcontractors, independent contractors and their employees are all considered to be employees of the principal or general contractor. In Meers the Nevada Supreme Court specifically recognized that "in the construction business, subcontractors and independent contractors will invariably be held to be statutory employees of the general contractor. Meers, 701 P.2d at 1007. In the case at hand Steel Deck and plaintiff were both performing work under subcontract agreements in furtherance of Layton's general construction contract of the Nevada Project. They are co-employees pursuant to Nevada law. Nevada law shields Steel Deck from liability for Plaintiff's injuries which are at the heart of this action. Plaintiff's claim against Steel Deck, therefore, should be found to be barred by statute and the decision of the trial court upheld.

CONCLUSION

The primary issue in this case is a conflict of law. In Utah lex loci delicti governs the substantive rights of the parties while procedural issues are resolved pursuant to Utah

law. Because the conflict in question deals with the parties' substantive rights the law of the place of the wrong should apply. Because plaintiff's injuries as well as the acts and omissions which allegedly caused those injuries all occurred in Nevada the law of Nevada should govern the substantive rights of the parties.

If this Court elects to pursue a new course for choice of law in Utah, either by way of a "most significant contacts" test or an "interest analysis" Nevada law should still govern Plaintiff's Complaint. The accident occurred in Nevada, the injuries were incurred in Nevada, there are parties from various domiciles involved in this matter and the relationship of all involved was wholly centered in Nevada. Taking the interests of both jurisdictions into account the conclusion is the same. Utah wants to see its residents compensated. Plaintiff has been compensated. Even though Plaintiff's recovery could be somewhat diminished by the application of Nevada's law to this dispute the burden upon all of the contractors, subcontractors and individuals from Utah who seek work out of state is too great to permit Plaintiff to maintain this action in the Courts of Utah. Furthermore, Nevada has an expressed interest in those who work and receive compensation within its borders. It has implemented a comprehensive workers' compensation scheme to protect and promote that interest. If this Court refuses to acknowledge that interest and applies Utah law to this dispute Nevada will be severely prejudiced.

According to Nevada law co-employees are free from liability for injuries sustained by co-employees during the course and scope of their employment. Plaintiff and Steel Deck were co-employees. Plaintiff is now trying to recover in tort for injuries he received on the job, allegedly as the result of acts and/or omissions of Steel Deck's employees in furtherance of its subcontract agreement for construction of the Nevada Project. The claim that Plaintiff is attempting to bring is barred by Nevada substantive law. We, therefore respectfully submit that the trial court was correct in its rulings and the lower court's decision should be upheld.

RESPECTFULLY SUBMITTED this 26th day of October, 1993.

SCALLEY & READING

Attorneys for Defendant/Appellee
Steel Deck Erectors, Inc.



Steven B. Smith

CERTIFICATE OF MAILING

I certify that 2 copies of the foregoing Brief were mailed first class mail, postage prepaid, this 27th day of October, 1993, to the following:

Steven B. Wall, Esq.
Cory B. Wall, Esq.
WALL & WALL
Attorneys for Plaintiff
9 Exchange Place, Suite 800
Salt Lake City, Utah 84111

Lee Henning, Esq.
CHRISTENSEN, JENSEN & POWELL
Attorneys for Defendant - Layton Construction Co., Inc.
175 South West Temple
Salt Lake City, Utah 84101



STEVEN B. SMITH, Esq.

ADDENDUM

EXHIBIT "A"

any compensation due the employee which was awarded or accrued but for which a check was not issued or delivered at the date of death of the employee is payable to his dependents as defined in NRS 616.615. (1947, p. 592; 1955, p. 71; 1979, p. 1055; 1983, p. 1880; 1985, p. 1434.)

Cross references. — As to executions and exemptions, see NRS 21.010 to 21.340. As to hospital liens not valid against person coming under the Nevada Industrial Insurance Act, see NRS 108.590.

OPINIONS OF ATTORNEY GENERAL

The federal government, under the taxing power, can garnish moneys payable from the commission to its claimants in order to recover delinquent taxes. AGO 260 (5-1-1957).

616.555. Compensation of nonresident alien dependents.

Payments to the consul general, vice consul general, consul or vice consul of the nation of which any dependent of a deceased employee is a resident or subject, or a representative of such consul general, vice consul general, consul or vice consul, of any compensation due under this chapter to any dependent residing outside of the United States, any power of attorney to receive or receipt for the same to the contrary notwithstanding, shall be as full a discharge of the benefits or compensation payable under this chapter as if payments were made directly to the beneficiary. (1947, p. 592; 1955, p. 71.)

616.560. Liability of third parties for damages; reduction of compensation; subrogation of insurer to employee's rights; lien on proceeds of recovery; jury instructions.

1. When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which injury was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:

(a) The injured employee, or in case of death, his dependents, may take proceedings against that person to recover damages, but the amount of the compensation to which the injured employee or his dependents are entitled under this chapter, including any future compensation under this chapter, must be reduced by the amount of the damages recovered, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.

(b) If the injured employee, or in case of death his dependents, receive compensation under this chapter, the insurer has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of his dependents to recover therefor. In any action or proceedings taken by the insurer under this section evidence of the amount of compensation, accident benefits and other expenditures which the

insurer has paid or become obligated to pay by reason of the injury or death of the employee is admissible. If in such action or proceedings the insurer recovers more than the amounts it has paid or become obligated to pay as compensation, the excess must be paid to the injured employee or his dependents.

(c) The injured employee, or in case of death his dependents, shall first notify the insurer in writing of any action or proceedings, pursuant to this section, to be taken by the employee or his dependents.

2. In any case where the insurer is subrogated to the rights of the injured employee or of his dependents as provided in subsection 1, the insurer has a lien upon the total proceeds of any recovery from some person other than the employer, whether the proceeds of such recovery are by way of judgment, settlement or otherwise. The injured employee, or in the case of his death his dependents, are not entitled to double recovery for the same injury, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.

3. The lien provided for under subsection 2 includes the total compensation expenditure incurred by the insurer for the injured employee and his dependents,

4. Within 15 days of the date of recovery by way of actual receipt of the proceeds of the judgment, settlement or otherwise, the injured employee or his representative shall notify the insurer of such recovery and pay to the insurer the amount due under this section together with an itemized statement showing the distribution of the total recovery

5. In any trial of an action by the injured employee, or in the case of his death by his dependents, against a person other than the employer or a person in the same employ, the jury shall receive proof of the amount of all payments made or to be made by the insurer. The court shall instruct the jury substantially as follows:

(a) "Payment of workmen's compensation benefits by the insurer is based upon the fact that a compensable industrial accident occurred, and does not depend upon blame or fault. If the plaintiff does not obtain a judgment in his favor in this case, he is not required to repay his employer or the insurer any amount paid to him or paid on his behalf by his employer or by the insurer"; and

(b) "If you decide that the plaintiff is entitled to judgment against the defendant, you shall find his damages in accordance with the court's instructions on damages and return your verdict in the plaintiffs favor in the amount so found without deducting the amount of any compensation benefits paid to or for the plaintiff. The law provides a means by which any compensation benefits will be repaid from your award." (1947, p. 595; 1949, p. 659; CL 1929 (1949 Supp.), § 2680.75, 1957, p. 519; 1973, p. 498, 1977, pp. 216, 424; 1979, p. 1055; 1981, p. 1491.)

EXHIBIT "B"

entitled to the benefits of this chapter (1971, p. 249; 1973, p. 1580; 1981, p. 487; 1985, p. 576.)

616.083. "Employee": Trainees in facility operated by rehabilitation division of department of human resources.

Trainees in a rehabilitation facility operated by the rehabilitation division of the department of human resources, while engaged in an evaluation or training program and while acting under the direction or authorization of the rehabilitation division of the department of human resources in any county, city or town, shall be deemed, for the purpose of this chapter, employees of the rehabilitation division of the department of human resources receiving a wage of \$200 per month, and shall be entitled to the benefits of this chapter upon compliance by the rehabilitation division of the department of human resources. (1965, p. 92; 1967, p. 832; 1973, p. 1406.)

Cross references. — As to determination of disability for vocational rehabilitation, see NRS 615.220.

616.084. "Employee": Volunteer workers at facilities for inpatients of mental hygiene and mental retardation division of department of human resources.

Volunteer workers at a facility for inpatients of the mental hygiene and mental retardation division of the department of human resources, while acting under the direction or authorization of the supervisor of volunteer services of such a facility, shall be deemed, for the purpose of this chapter, employees of the facility, receiving a wage of \$350 per month, and are entitled to the benefits of this chapter upon compliance therewith by the facility. (1969, p. 236; 1973, pp. 118, 1406; 1987, ch. 397, § 2, p. 921.)

Cross references. — As to labor by clients of mental health centers, see NRS 433.524.

616.085. "Employee": Subcontractors and employees.

1. Except as otherwise provided in NRS 616.262, subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of this chapter.

2. If the subcontractor is a sole proprietor or partnership licensed pursuant to chapter 624 of NRS, the sole proprietor or partner shall be deemed to receive a wage of \$500 per month for the purposes of this chapter.

3. This section does not affect the relationship between a principal contractor and a subcontractor or independent contractor for any purpose outside the scope of this chapter. (1947, p. 571; 1951, p. 485; 1987, ch. 771, § 3, p. 2047; 1991, ch. 723, § 42, p. 2399.)

EXHIBIT "C"

★ 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. *Leahy 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

EXHIBIT "D"

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;

EXHIBIT "E"

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

EXHIBIT "F"

Educ. of Alpine School Dist. v. Olsen, 684 P.2d 49 (Utah 1984).

Welfare or relief recipients.

Under voluntary arrangement between two state agencies, state fair association and public welfare department, pursuant to latter's plan to compel welfare recipients who were able to work to work out their relief payments on certain projects, whereby such recipients were directed to report to association for work and were placed by latter under supervision and control of its superintendent of fairgrounds at work having substantial economic value to as-

sociation, recipient was "employee," association was "employer" and "contract of hire" existed within meaning of this section, as amended in 1945, so as to entitle injured recipient to compensation, where association was required by welfare commission to furnish compensation insurance for such workers, and had right to hire, fire, control, supervise and regulate pay of them, although payment of compensation and relief payments were made by welfare board. *Commission of Fin. v. Industrial Comm'n*, 113 Utah 73, 191 P.2d 598 (1948).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 59 et seq.

Key Numbers. — Workers' Compensation ⇐ 230.

35-1-44. Definition of terms.

The following terms as used in this title shall be construed as follows:

(1) "Order" shall mean and include any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at, or decision made, by such commission.

(2) "General order" shall mean and include an order applying generally throughout the state to all persons, employments or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(3) "Welfare" shall mean and include comfort, decency and moral well-being.

(4) "Safe" and "safety," as applied to any employment or place of employment, shall mean such freedom from danger to the life, health or welfare of employees as the nature of the employment will reasonably permit.

(5) "Personal injury by accident arising out of or in the course of employment" shall include any injury caused by the willful act of a third person directed against an employee because of his employment. It shall not include a disease, except as it shall result from the injury.

(6) "Compensation" shall mean the payments and benefits provided for in this title.

(7) "Award" shall mean the finding or decision of the commission as to the amount of compensation due any injured, or the dependents of any deceased, employee.

(8) "Average weekly earnings" shall mean the average weekly earnings arrived at by the rules provided in Section 35-1-75.

History: L. 1917, ch. 100, § 52; C.L. 1917, § 3112; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-42.

EXHIBIT "G"

SCOPE AND OPERATION

616.255. Applicability to interstate commerce and certain plans for benefits in effect before July 1, 1947.

LEGAL PERIODICALS

Review of Selected Nevada Legislation,
Health and Welfare. 1987 Pac LJ Rev Nev
Legis 117.

616.256. Plans for benefits in effect before July 1, 1947: Determination of sufficiency; applicability of chapter.

LEGAL PERIODICALS

Review of Selected Nevada Legislation,
Health and Welfare. 1987 Pac LJ Rev Nev
Legis 117

616.260. Exemption of employer and employee temporarily within state; exception; effect of employee working in another state where coverage required.

1. Except as limited in subsection 3, any employee who has been hired outside of this state and his employer are exempted from the provisions of this chapter while the employee is temporarily within this state doing work for his employer if his employer has furnished industrial insurance coverage under the industrial insurance act or similar laws of a state other than Nevada so as to cover the employee's employment while in this state, provided

(a) The extraterritorial provisions of this chapter are recognized in the other state, and

(b) Employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance act or similar laws of the other state.

The benefits under the industrial insurance act or similar laws of the other state are the exclusive remedy against the employer for any injury, whether resulting in death or not, received by the employee while working for the employer in this state.

2. A certificate from the administrator or similar officer of another state certifying that the employer of the other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state is prima facie evidence that the employer carried the industrial insurance.

3. The exemption provided for in this section does not apply to the employees of a contractor, as defined in NRS 624.020, operating within the scope of his license on a project whose cost as a whole exceeds \$250,000

4. An employer is not required to pay premiums to the system for an employee who has been hired or is regularly employed in this state, but who is

performing work exclusively in another state, if the other state requires the employer to provide coverage for the employee in the other state. If the employee receives personal injury by accident arising out of and in the course of his employment, any claim for compensation must be filed in the state in which the accident occurred, and such compensation is the exclusive remedy of the employee or his dependents. This subsection does not prevent an employer from maintaining coverage for the employee under the provisions of this chapter. (1947, p. 594, 1955, p. 187; 1981, p. 1464, 1989, ch. 276, § 1, p. 578; 1989, ch. 325, § 1, p. 682.)

Editor's note. — This section was amended by two 1989 acts which do not appear to conflict and have been compiled together.

Effective date. — Acts 1989, ch. 276, § 1 became effective October 1, 1989. Acts 1989, ch. 325, § 1 became effective June 13, 1989 pursuant to ch. 325, § 2.

Effect of amendment. — The 1989 amend-

ment by ch. 276, § 1, as amended by ch. 325, § 1, in the introductory paragraph of subsection 1, added "Except as limited in subsection 3" at the beginning of the paragraph, added the present subdivision 1(a) and redesignated the former subdivisions 1(a) and 1(b) as the present subdivisions 1(b) and 1(c), respectively, and added subsections 3 and 4.

616.263. Real estate broker or salesman who hires independent contractor not considered employer.

Any person licensed pursuant to the provisions of chapter 645 of NRS who engages an independent contractor to maintain or repair property on behalf of an individual property owner or an association of property owners is not a statutory employer for the purposes of this chapter. (1957, ch. 199, § 4, p. 450.)

LEGAL PERIODICALS

Review of Selected Nevada Legislation
Workers Compensation, 1957 Pac. L.J. Rev.
Nev. Legis. 219

616.265. Devices modifying liability void; exception.

1. Except as otherwise provided in subsection 2

(a) A contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by this chapter.

(b) A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by this chapter is void.

2. Nothing in this section prevents an owner or lessor of real property from requiring an employer who is leasing the real property from agreeing to insure the owner or lessor of the property against any liability for repair or maintenance of the premises. (1947, p. 572, CL 1929 (1949 Supp.), § 2680.25, 1989, ch. 582, § 1, p. 1245.)