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Worker's Compensatoin - Exclusivity Provisions of the Worker's Compensation Act as a Bar to Third-Party Actions against Employers - Pan American Petroleum Corp. v. Maddux Well Service

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WORKER'S COMPENSATION—Exclusivity Provisions of the Worker's Compensation Act as a Bar to Third-Party Actions Against Employers. Pan American Petroleum Corp. v. Maddux Well Service, 586 P.2d 1220 (Wyo. 1978).

Maddux Well Service contracted with Pan American Petroleum Corp. to service oil wells owned by Pan American. On August 11, 1968, Maddux was engaged in workover services, pursuant to the master contract, on a well located in the Beaver Creek Field, Fremont County, Wyoming. The three-man Maddux crew used highly flammable petroleum condensate, placed on the site by Pan American, to aid in the rod-pulling procedure. During the operation, a fire broke out, and flames engulfed the site. Howard Grouns, a Maddux employee working atop the derrick, was killed when he was unable to escape, due to the lack of a Geronimo line, a commonly-used escape device. Grouns was covered by Maddux's worker's compensation fund, under which his widow and three children collected benefits.

Five months after the accident, Lynell Grouns, administratrix of her husband's estate, filed a wrongful death action against Pan American, alleging negligence on the part of Pan American, and requesting recovery of damages in the amount of $751,500.00. Pan American then filed a third-party complaint against Maddux, claiming that Maddux was liable.

Subsequent to the filing of the third-party complaint, Pan American reached a settlement with the plaintiff, in the amount of $72,000.00. Pan American sought, and was granted, leave to amend its complaint against Maddux, requesting recovery of the settlement sum, plus costs, attorneys' fees, and expenses incurred in the defense of the primary action. The amended complaint alleged Maddux's negligence, and, in addition, sought reimbursement under theories of express and implied rights of indemnity and warranty, breach of contract, and joint tortfeasor contribution. Maddux moved for summary judgment on the third-party complaint, denying its liability under all theories set forth by Pan American. The District Court granted Maddux's motion, its principal holding being that the exclusivity provisions of Wyoming's Worker's Compensation Act barred all third-party actions against a contributing employer.

Pan American appealed the district court's decision, reasserting its theories of recovery against Maddux as a negligent employer. Pan American also alleged error in the trial court's primary holding that the exclusivity provisions of the worker's compensation act clothed the contributing employer in impenetrable immunity from all third-party actions.

The Wyoming Supreme Court, speaking through Justice Rose, reversed the trial court's granting of the summary judgment to Maddux. The Court held that the Wyoming Worker's Compensation statute did not bar third-party claims for indemnity, at least insofar as those claims were based on express contractual obligations to indemnify.[1] The majority's interpretation of the exclusivity provisions of Wyoming's Worker's Compensation Act raises questions about the scope of a third party's right to recover against a negligent employer who falls within the act, and of the employer's potential liability beyond the statutorily-determined compensation award.

In a strongly worded dissent, Justice Raper argued that the majority's opinion destroyed the very foundation upon which the principles of worker's compensation are based —the concept of definite but limited liability of the contributing employer—and abrogated the constitutional immunity from common-law suit granted to the employer by the Wyoming Constitution.[2] Justice Raper's dissenting opinion encompasses additional issues; the legislature's intent in drafting the exclusivity clauses, and the nature and extent of the immunity granted to the employer by those same provisions.

This Note will examine several areas of concern created by this decision. First, the legislative intent behind Wyoming's Worker's Compensation Act will be examined to determine what relationships were meant to be governed, and what rights and responsibilities were to be affected. Second, the court's interpretation of the applicable exclusive-liability provisions will be analyzed to ascertain whether

1. Pan American Petroleum Corp. v. Maddux Well Service, 586 P.2d 1220, 1224 (Wyo. 1978).
2. *Id.*, at 1227 (dissenting opinion).

that construction of the act circumvents the legislature's intent by destroying immunities granted to the employer, and by giving to the employee an indirect method through which he may obtain double recovery. Finally, in light of the court's opinion, the circumstances will be set forth under which a contributing employer might be held liable to a third party seeking recovery.

THE LEGISLATIVE INTENT

History and Philosophical Basis of Worker's Compensation

Modern worker's compensation legislation arose in response to the need for an efficient system through which an injured employee could obtain adequate financial relief. Although at common law the employee could sue his employer for damages, recovery hinged upon proof of the employer's negligence in causing the injury.[3] Not only was fault difficult to prove, but the employer could also raise the "unholy trinity" of defenses: contributory negligence, assumption of risk, and the fellow-servant rule.[4]

Worker's compensation acts have replaced the adversary contest of tort litigation, and the doubtful recovery thereunder, with a legislative system designed to provide automatic and rapid relief to the injured employee.[5] Under this system, fault plays no part in the determination either of the employer's liability or of the employee's right to recovery,[6] nor can the employer enterpose the common-law defenses of contributory negligence, assumption of risk, and the fellow-servant rule.[7] The new test of liability is the source of the injury; that is, did it arise from the employment?[8] Recovery under worker's compensation acts thus is based not on a philosophy of compensatory damages, nor upon actual need, but is statutorily determined upon the basis of loss of earning power due to the disability, and upon presumptions as to amounts needed for adequate support.[9]

3. PROSSER, TORTS § 80 (4th ed. 1971); 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 4.00 et seq (1978).
4. PROSSER, *supra* note 3.
5. Note, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts*, 42 VA. L. REV. 959, 961 (1956).
6. Fuhs v. Swenson, 58 Wyo. 293, 131 P.2d 333, 337 (1942).
7. PROSSER, *supra* note 3.
8. 1 LARSON, *supra* note 3, at § 2.10.
9. *Id.*, at §§ 2.40 and 3.30.

The purpose of worker's compensation is to provide expeditious and certain relief to the injured employee, so that he will not become a burden on society.[10] The philosophical basis of the legislation is that the cost of industry's human accident losses should be borne not by the individual worker, but by those for whose benefit he was employed when injured. Worker's compensation shifts the financial burden to the employer who, in regarding his worker's compensation premiums as a cost of doing business, raises his prices, thereby transferring the loss to the consumer.[11]

"In adopting the new system, both employees and employers gave up something that they each might gain something else."[12] Employees relinquished their common-law right to sue the employer in tort, in exchange for automatic benefits as statutorily prescribed.[13] Employers, in turn, accepted absolute, but limited, liability and a commitment to make payments to the appropriate worker's compensation fund, for which they were granted immunity from common-law suits brought by injured employees.[14]

Wyoming worker's compensation legislation developed along lines similar to those in other states. The first step toward a comprehensive worker's compensation system was taken in 1869, when the Territorial Legislature passed an employers' liability act protecting railroad employees on the job.[15] The state's first constitution also contained provisions protecting the rights of workers,[16] forbidding the passage of any law limiting the amount of damages recoverable upon the injury or death of any person,[17] and providing for the voiding of any contract waiving an employee's right to recover damages for injury or death.[18] It was further provided that no contract could be entered into which required, as a condition of employment, that the employee release the employer from liability for personal injuries received in the course of the employment.[19]

10. Prigosin v. Industrial Commission, 113 Ariz. 87, 546 P.2d 823, 825 (1976).
11. PROSSER, *supra* note 3.
12. Zancanelli v. Central Coal & Coke Co., 25 Wyo. 511, 173 P. 981, 989 (1918).
13. Morrisseau v. Legac, 123 Vt. 170, 181 A.2d 53, 57 (1962).
14. Seltzer v. Isaacson, 147 N.J. Super. 308, 371 A.2d 304, 307 (1977).
15. WYO. STAT. Ch. 97, § 1 (1876).
16. WYO. CONST. art. I, § 22.
17. WYO. CONST. art. X, § 4.
18. *Id.*
19. WYO. CONST. art. XIX, § 7, Labor Contracts; WYO. STAT. § 2522 (1899).

By 1913, a traditional worker's compensation system was contemplated, but it was believed that such legislation was forbidden by Section 4 of Article X of the state constitution, which read: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void."[20] A later amendment to this section[21] removed the constitutional obstacles to passage of Wyoming's first Worker's Compensation Act in 1915.[22]

Soon after Wyoming's acceptance of worker's compensation, employers attacked the provisions as "wrong, unfair, arbitrary, oppressive and a travesty on justice, in that they required employers without fault to contribute to a fund to pay for injuries to their employees."[23] Despite such vehement objections, however, the court, in the 1918 case of *Zancanelli v. Central Coal & Coke Co.*, upheld the worker's compensation laws as a constitutional, just and equitable way to deal with the consequences of an industrial society.[24]

The Scope of Worker's Compensation Legislation

The wording of Wyoming's Worker's Compensation statute reflects the legislature's intention to govern the rights and responsibilities of the employer and employee.[25] Section 27-78 of the Wyoming Statutes indicates that the

20. WYO. CONST. art. X, § 4.
21. WYO. CONST. art. X, § 4, amendment II.
> "As to all extra hazardous employment, the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be fixed by law according to proper classifications to each person injured in such employment or to the dependent families of such as die as the result of such injuries, except in case of injuries due solely to the sulpable negligence of the injured employee. Such fund or funds shall be accumulated, paid into the state treasury and maintained in such manner as may be provided by law. The right of each employee to compensation from such fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to such fund in favor of any person or persons by reason of any such injuries or death."

see also, Hotelling v. Fargo-Western Oil Co., 33 Wyo. 240, 238 P. 542, 543 (1925).
22. WYO. STAT. §§ 4315 - 4348 (1920).
23. Stephenson v. Mitchell, 569 P.2d 95, 98 (Wyo. 1977) at 991.
24. Zancanelli v. Central Coal & Coke Co., *supra* note 12.
25. WYO. STAT. § 27-50 (1957).
> "Compensation herein provided for shall be payable to persons injured . . . or the dependent families of such, as die, as the result of such injuries, . . . The right of each employee to compensation from such funds shall be in lieu of and shall take the place of any and all rights of action against any employer contributing, as required by law to such fund in

act is exclusive as to all other remedies and liabilities as between the employee and employer.[26] Nor is legislative intent difficult to ascertain as to the relationship of the employee and third parties. The compensation system does not extend immunity to a third party,[27] and the employee has retained his right to sue a third party whose negligence contributed to the injury.[28] Double recovery of the compensation award from the employer paid through the industrial accident fund, and of damages from the third party is prevented by requiring that the industrial accident fund be reimbursed from any such judgment recovery for the amount of the compensation award made to the employee.[29]

A major weakness of Wyoming's worker's compensation system as social legislation, is its failure to define unequivocally the relationship of third parties and employers under the act. The typical situation is where a third party pays a judgment award to an injured worker and then seeks to recover against an allegedly negligent employer, either on the basis of contribution or under theories of indemnity. The issue in such cases is whether the exclusivity provisions of the applicable worker's compensation legislation bar all

favor of any such person or persons by reason of any such injury or death."

WYO. STAT. § 27-51 (1957).

"The rights and remedies provided in this act for an employee on account of any injury shall be exclusive of all other rights and remedies, at common law or otherwise, of such employee, his personal or legal representatives or dependent family on account of such injury. . . ."

26. WYO. STAT. § 27-78 (1957).

"Each employee, who shall be injured in any of the extra-hazardous employments as herein defined, or the dependent family of any such injured workman, who may die as the result of such injuries, except in cases of injuries due solely to the culpable negligence of such injured employee, shall receive out of the industrial accident fund, compensation . . . and such right and payment shall be in lieu of and take the place of any and all rights of action against any employer contributing as required by this act, to the industrial accident fund in favor of any person or persons by reason of such injuries or death."

27. Markle v. Williamson, 518 P.2d 621 (Wyo. 1974); 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.00 (1976).

28. WYO. STAT. § 27-54 (1957).

"Where an employee coming under the provisions of this act receives an injury under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee . . . shall not be deprived of any compensation which he would otherwise receive under this act. He may also pursue his remedy at law against such third person, except he shall not be entitled to a double recovery for those injuries for which he has been paid compensation. . . . In the event that such employee recovers from such third person, in any manner . . . the proceeds of said recovery for those injuries for which he has been paid compensation under this act shall be divided as follows: the industrial accident fund shall be reimbursed . . . for the total amount of all awards received by the injured employer under this act.

29. *Id.*; Stephenson v. Mitchell, *supra* note 23, at 99, citing 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.20 (1976).

third-party actions against any employer covered by the act, or, if not, under what circumstances an employer will be held liable to such third party.[30]

As was stated in the case of *Ward v. Denver and R.G.W.R. Co.*, decisions on this issue "are in hopeless conflict."[31] That the controversy exists is not surprising, for there are valid arguments supporting both absolute immunity for the employer under the exclusivity provisions, including immunity from third-party actions, and the third-party's right to recover against a negligent employer. Those courts which have found that exclusivity provisions bar even third-party actions against the employer, usually have based their decisions upon two grounds. First, allowing third-party suits against allegedly negligent employers would destroy the central principle of worker's compensation, by reintroducing two concepts deliberately removed from the supposedly non-adversary system—fault and causation.[32] Second, permitting third-party recovery against an employer participating in the compulsory worker's compensation system would allow the employee to do indirectly that which he cannot do directly. That is, to sue the employer in tort through the conduit of a third party, who is seeking recovery of the amount paid to the employee as compensatory damages in the common-law action between the worker and third party.[33]

The cases holding that exclusive liability provisions do not bar all third-party actions, are based upon notions of equitable loss-allocation.[34] The theory is that to bar a third party from seeking recovery against the employer is to impose upon that third party liability for all of the damages, when in fact he might be liable only for part (under contribution theory) or none at all (under concepts of indemnity).[35] These decisions uniformly hold that third-party actions against employers are not barred, since worker's compensa-

30. 2A LARSON, *supra* note 27, at § 76.10.
31. Ward v. Denver R.G.W.R. Co., 119 F. Supp. 112, 113 (D. Colo. 1954).
32. Note, *New Policies Bearing on the Negligent Employer's Immunity from Loss-Sharing*, 29 MAINE L. REV. 243, 244-5 (1978).
33. 2A LARSON, *supra* note 27, at § 76.52; Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E. 2d 768, 777 (1953).
34. Note, *New Policies Nearing on the Negligent Employer's Immunity from Loss-Sharing*, *supra* note 32, at 248.
35. Note, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts*, *supra* note 5, at 959.

tion statutes govern only the rights of employees and employers, and do not touch upon other relationships.[36] It is reasoned that since third parties gained nothing by the employer and employee compromises,[37] worker's compensation laws should not be construed to abrogate third-parties' common-law right to sue, in the absence of specific legislation so providing.[38]

The latter position can be defended by the specific language of most worker's compensation statutes, which speak only to those in the status of employer and employee, and do not refer to those outside that relationship. Even those cases upholding the exclusivity provisions as a grant of absolute immunity to the employer, explicitly recognize the need for some remedy being afforded to a third party; many decisions allow recovery against the employer when an express contract to indemnify can be found.[39] Nevertheless, the lack of explicit statutory definition in this area continues to be a problem.

In deciding the issue of a third-party's right to recover against an employer, most courts analyze the scope of the employer's immunity under theories of contribution and indemnity. Contribution involves the sharing of the loss among tortfeasors who are concurrently liable.[40] Indemnity, on the other hand, is grounded upon a contractual obligation, and the tortfeasor who shouldered the financial burden seeks full reimbursement.[41] Broadly stated, the right of indemnity "is where one who is compelled to pay money which, in justice, another ought to pay, the former may receive from the latter the sums so paid."[42]

The majority rule is that employers covered under the worker's compensation laws may not be sued, either under

36. Pittsburgh-Des Moines Steel Co. v. American Surety Co. of New York, 365 F.2d 412, 416 (10th Cir. 1966); American Surety Co. of New York v. Pittsburgh-Des Moines Steel Company, 238 F. Supp. 850, 854 (D. Wyo. 1965); Lunderberg v. Bierman, 241 Minn. 349, 63 N.W. 2d 355, 365 (1954).
37. Carlson v. Smogard, 215 N.W.2d 615, 619 (Minn. 1974), citing Lunderberg v. Bierman, *supra* note 36.
38. Blackford v. Sioux City Dressed Pork, 118 N.W.2d 559, 565 (Iowa 1963); Markle v. Williamson, *supra* note 27, at 623.
39. Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp., 65 A.2d 304, 308 (Md. 1949).
40. American District Telegraph Co. v. Kittleson, 179 F.2d 946, 951 (8th Cir. 1950).
41. McFall v. Compagnie Maritime Belge S.A., 304 N.Y. 314, 107 N.E.2d 463, 471 (1952).
42. DeShaw v. Johnson, 472 P.2d 298, 301 (Mont. 1970); RESTATEMENT OF RESTITUTION § 96 (1937).

contribution statutes or at common law, by a third party seeking contribution.[43] The rationale is simple, contribution requires as its basic elements that there be two or more joint tortfeasors who are commonly liable to the plaintiff, and that one of them has been adjudged liable for or has discharged an unequal proportion of the common burden.[44] In order for the tortfeasors to share a "common liability," the plaintiff must have a legally enforceable claim against both. Under worker's compensation statutes,

> the requisite common liability of the tortfeasors would not exist. This is true because the plaintiff employee could not sue his employer for actionable negligence due to the exclusive remedy provisions of the workmen's compensation act which bar an action at law for damages. While the plaintiff can sue the defendant [third party] in tort, his only remedy against the employer is under the applicable workmen's compensation act, and thus the defendant and the employer are not commonly liable nor is each guilty of *actionable* negligence toward the plaintiff employee.[45]

Unfortunately, decisions regarding the third-party's right to recover under theories of indemnity are not so uniform. Common-law indemnity refers to an implied promise to indemnify based not on any contractual relationship between the third party and the employer, but upon the parties' relationship as concurrent tortfeasors.[46] Since this indemnity is based upon duties owed by the third party and employer, not to each other, but to the injured employee, it closely resembles contribution, in that a common liability of the tortfeasors to the plaintiff employee is required. As was discussed above, the requisite common liability is absent from the employee-employer-third party triangle, since the employer cannot, under worker's compensation laws, be held actionably negligent toward the employee. Therefore, as in contribution, recovery by the third party on the basis of common-law indemnity is usually denied.[47] Such was the

43. 2A LARSON, *supra* note 27, at §§ 76.10 and 76.21.
44. Comment, *Wyoming Contribution Among Joint Tortfeasors*, 9 LAND AND WATER L. REV. 589, 592 (1974).
45. Forney, *Employer's Liability for Contribution or Indemnity*, 34 INS. CO. J. 362, 363 (July 1967).
46. *Id.*, at 364.
47. *Id.*, at 365-6.

case in *Iowa Power and Light Co. v. Abild Construction Co.*, where recovery was denied under a theory of common-law indemnity, due to the lack of common liability.[48] The New Mexico court, in *Royal Indemnity Co. v. Southern California Petroleum Corp.*, likewise held that the worker's compensation statute had destroyed the right to recover against an employer on the basis of common-law indemnity.[49]

Express indemnity, unlike common-law indemnity, involves an explicit agreement in the contract for one party to indemnify the other, irrespective of liability.[50] When such provisions are expressed in "clear and unequivocal" language,[51] the majority of courts have held that the exclusive-liability provisions of the worker's compensation acts cannot bar a claim for indemnity by the third party.[52] Even those courts that have upheld the employer's immunity have agreed that worker's compensation acts do not prohibit the employer from waiving his immunity by voluntarily and expressly contracting to indemnify a third party.[53] By implication, these courts have acknowledged a third-party's right to recover against an employer on the basis of express indemnity.[54]

The question becomes, therefore, not whether recovery will be allowed under a theory of express indemnity, but what constitutes an express contract of indemnification. The New Mexico Supreme Court held that a contract provision implying that the employer agreed to perform work without negligence, did not constitute a contract of indemnity.[55] A similar result was reached by the Supreme Court of Hawaii, which held that a permit provision holding the employer responsible for any damage to property or persons during the course of its operations, did not create an express contract of indemnification.[56] Other courts have held that im-

48. Iowa Power and Light Co. v. Abild Construction Co., 144 N.W.2d 303 (Iowa 1966).
49. Royal Indemnity Co. v. Southern California Petroleum Corp., 67 N.M. 137, 353 P.2d 358, 362 (1960).
50. Greenstone, *Spreading the Loss—Indemnity, Contribution, Comparative Negligence and Subrogation,* 13 FORUM 266, 269 (Fall 1977).
51. *Id.*
52. Note, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts, supra* note 5, at 969.
53. Young v. Anaconda American Brass Co., 43 Wis.2d 36, 168 N.W.2d 112, 122 (1969); Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminals Corp., *supra* note 39.
54. *Id.*
55. Royal Indemnity Co. v. Southern California Petroleum Corp., *supra* note 49, at 362.
56. Kamali v. Hawaiian Electric Co., 504 P.2d 861 (Hawaii 1972).

plied obligations to perform the job in a "workmanlike manner" neither constitute express agreements of indemnification,[57] nor waive the employer's immunity from suit under the worker's compensation acts.[58]

Absent an express contract of indemnity, some courts have allowed recovery under a theory of implied consensual indemnity, usually referred to simply as implied indemnity. Implied indemnity depends upon the existence of a special legal relationship between the employer and the third party, from which arise certain rights and duties, the breach of which creates an implied obligation to indemnify.[59] This theory of indemnity, which involves a direct duty running from the employer to the third party, should not be confused with common-law indemnity in which the duty runs from the employer and the third party, as tortfeasors, to the employee. Implied indemnity envisions a situation which

> involves a contractual relationship between the defendant [third party] and the employer under which the employer has agreed to perform certain work. When the employer fails to carry out his undertaking properly and breaches [his duty], the courts will imply an obligation upon the part of the employer to indemnify the defendant for the damage proximately resulting from his breach of contract.[60]

Courts allowing recovery under implied indemnity have justified their holdings under one of two theories. The statutes may be interpreted as barring only those claims which are derivative of the employee's claim, and therefore not affecting the third-party's action, which arises not "on account of" the injury to the workman, but from the breach of an independent duty owed by the employer to the third party.[61] This was the holding in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*,[62] which interpreted the following

57. Desert Steel Co., Inc. v. Superior Court, County of Maricopa, 22 Ariz. App. 279, 526 P.2d 1077, 1079 (1974).
58. American Radiator and Standard Sanitary Corp. v. Mark Engineering Co., 230 Md. 584, 187 A.2d 864, 867 (1963).
59. Greenstone, *supra* note 50.
60. Forney, *supra* note 45, at 366.
61. United States Fidelity & Guaranty Co. v. Kaiser Gypsum Co., Inc., 539 P.2d 1065, 1067 (Ore. 1975); Kamali v. Hawaiian Electric Co., *supra* note 56, at 865.
62. Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

subsection of the Longshoremen's and Harbor Worker's Compensation Act:

> The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages at common law or otherwise on account of such injury or death.[63]

The Supreme Court held that the purpose of the provision was "to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone* claiming under or through such employee, *or on account of his injury or death arising out of that employment.*"[64] The Court reasoned that the statute was not intended to preclude a third party's right of recovery over against the employer, since that right arose from the breach of an independent duty owed to the third party, and not through the employee's claim.[65]

Although the *Ryan* case applied admiralty law, its holding has been the basis for courts adjudicating non-marine cases as well.[66] Most courts have found the breach of an independent duty to be a sufficient basis upon which to allow implied indemnity. The Iowa court, for example, in the case of *Blackford v. Sioux City Dressed Pork,* allowed a claim for indemnity based upon the employer's breach of a duty to perform the work safely and to protect his own employees.[67]

The famous case of *American District Telegraph Co. v. Kittleson* involved a suit by Armour's employee against American.[68] The employee was injured when one of American's employees, working on the roof of Armour's plant, fell through a skylight and landed on the plaintiff employee. The skylight had become encrusted with dirt, and was indistinguishable from the solid portions of the roof. The court

63. *Id.* at 128-199.
64. Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., *supra* note 62, at 129.
65. *Id.* at 129-132.
66. Forney, *supra* note 45, at 367.
67. Blackford v. Sioux City Dressed Pork, *supra* note 38.
68. American District Telegraph Co. v. Kittleson, *supra* note 40.

allowed American's claim for indemnity, saying that Armour had breached a duty it owed to American to provide the latter's employees a safe place to work.[69]

The Court of Appeals for the Tenth Circuit, in *Pittsburgh-Des Moines Steel Co. v. American Surety Co. of New York,* held that when a subcontractor breached his duty to inspect the scaffolding upon which his employees worked, and a resultant defect caused injury to an employee, the prime contractor was entitled to indemnification for the loss he sustained from a negligence suit brought by the injured worker.[70] Most recently, the Oregon Supreme Court found the Oregon worker's compensation statute did not bar an action for indemnity "when the third-party plaintiff's liability to the injured workman [had] resulted from the breach of an independent duty, express or implied, owed by the employer to the third-party plaintiff."[71]

The key to these cases seems to be that the employer performs, under contract, some service for the third party, from which is implied an obligation to perform with due care.[72] Once such duty is found to exist, a further obligation to indemnify the third party for damages resulting from the breach is implied.[73]

A few courts have allowed indemnity not upon the finding of a breach of an independent duty arising from the contractual relationship between the employer and the third party, but upon the equitable basis of loss-allocation according to fault.[74] The philosophy behind these decisions is that if the third-party indemnitee has become liable on purely vicarious grounds, the worker's compensation legislation should not be held to bar his claim against the negligent employer.[75]

In summary, the majority of courts have held that the legislative purpose underlying worker's compensation statutes was not to bar all third-party actions against employers, but to govern the employee-employer relationship and to

69. *Id.* at 954.
70. Pittsburgh-Des Moines Steel Co. v. American Surety Co. of New York, *supra* note 36.
71. United States Fidelity & Guaranty Co. v. Kaiser Gypsum Co., Inc., *supra* note 61.
72. 2A LARSON, *supra* note 27, at § 76.43(d).
73. *Id.*
74. Dale v. Whiteman, 388 Mich. 698, 202 N.W.2d 797, 800-1 (1972).
75. 2A LARSON, *supra* note 27, at § 76.43(d); PROSSER, *supra* note 3, at § 51.

grant the employer immunity from personal injury suits brought by the employee or those claiming through him. Recovery in the form of contribution has been disallowed, on the basis that worker's compensation precludes the employer's liability to his employee in tort. Along the same lines, recovery under the theory of common-law indemnity has been held to be barred. Recovery under theories of express and implied indemnity has generally been allowed as not destructive of the principles underlying worker's compensation.

THE COURT'S INTERPRETATION OF WYOMING'S WORKER'S COMPENSATION LEGISLATION

The principal holding of the trial court, and the basis upon which the decision was appealed, was that the provisions of Wyoming's Worker's Compensation Act barred all rights of action against any employer, including third-party claims for indemnity.[76] In reversing the trial court's decision, and in holding that worker's compensation provisions did not bar third-party claims for indemnity, the Wyoming Supreme Court raised further questions as to the extent of an employer's liability to third parties.[77]

The Court's analysis of the scope of the worker's compensation exclusivity provisions began with an examination of parties barred from bringing suit against covered employers. The Court considered both statutory provisions and the seemingly less-restrictive language of the Wyoming Constitution.[78]

Section 27-50 of the Wyoming Statutes provided in relevant part that "compensation . . . shall be payable to persons injured . . . or the dependent families of such, as die, as the result of such injuries, . . . The right of each employee to compensation . . . shall take the place of any and all rights of action . . . in favor *of any such person* or persons by reason of any such injury or death." [emphasis supplied by the Court][79]

76. Summary Judgment, Ninth Judicial District, Civil No. 14396, at 17.
77. Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1.
78. *Id.*
79. WYO. STAT. § 27-50, cited in Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1, at 1224.

Section 27-51 of the Statutes, provided that

> The rights and remedies provided in this act for an employee on account of any injury shall be exclusive of all other rights and remedies, at common law or otherwise, of such employee, his personal or legal representatives or dependent family on account of such injury; and the terms, conditions and provisions of this act for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries shall be exclusive, compulsory and obligatory upon both employers and employees coming within the provisions hereof.[80]

The applicable constitutional provisions of Article X, Section 4, state that "The rights of each employee to compensation . . . shall be in lieu of and shall take the place of any and all rights of action against any employer . . . in favor of any person or persons by reason of such injuries or death."[81]

In holding that the above-stated provisions did not bar a third-party claim for indemnity, the Court followed the Supreme Court's reasoning in the *Ryan* case, deciding that a third-party claim arose not "by reason of" the employee's injury, but from "the breach of an independent duty owed by the employer to the third party."[82] The Court found the employer-third party relationship to be beyond the explicit language of the applicable provisions of the act. Therefore, the third party could not be held to have relinquished any of his rights, including the right to maintain a suit against the employer.[83]

The Court's language would seem to indicate that a third party could bring a claim for relief under any of the three theories of indemnity. The Court, however, limited its holding to approval of third-party actions based on express contractual indemnity, and declined to decide whether causes of action based on contribution, implied indemnity, or common-law indemnity could be brought.[84]

80. WYO. STAT. § 27-51 (1957).
81. WYO. CONST. art. X, § 4.
82. Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1.
83. 2A LARSON, *supra* note 27, at § 76.52, cited in Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1.
84. Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1.

To the extent the Court held that claims based on express indemnity were not barred by the exclusivity provisions of the Worker's Compensation Act, the decision is clearly in line with the majority rule.[85] The Court's reluctance to discuss alternate theories of third-party recovery, however, leaves unanswered the extent of an employer's liability to such third parties.

As stated above, the court based its holding upon the fact that the third party-employer relationship was beyond the scope of Wyoming's Worker's Compensation Act, and that therefore the third party retained his right to sue for breach of an independent duty. This language indicates approval of claims based on implied indemnity. Furthermore, the court expressed dissatisfaction with the decision in *Shields v. Bechtel Power Corp.*, in which the federal district court held that the "only justifiable way to abrogate the Wyoming Worker's Compensation provision, and its exclusive remedy thereunder, is by the existence of a written contract of indemnity against the employer."[86] The Wyoming Supreme Court indicated that the dicta in *Shields* allowing third-party claims only upon a theory of express indemnity was "overly narrow."[87] Again, the court hints at approval of a third-party cause of action broader than that of express indemnity alone. The court also stated that the lack of any express contractual indemnity in the instant case would not "affect the ability of Pan American to pursue its implied-indemnity claims,"[88] a clear indication that implied indemnity rights exist under Wyoming's compensation law. Despite such indications, however, the court declined to discuss third-party actions based on implied indemnity, or upon contribution, because such issues were not directly before the court.[89]

While the issue of recovery based on contribution could not have been an issue in the case—Wyoming did not recognize the right of contribution among joint tortfeasors until 1973, five years after the initiation of the primary action in

85. Note, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts*, *supra* note 5.
86. Shields v. Bechtel Power Corp., 439 F. Supp. 192, 194 (D. Wyo. 1977).
87. Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1, at 1223.
88. *Id.* at 1226.
89. *Id.* at 1224.

this case[90]—it is not so certain that the court could not have discussed, at least in dicta, the right to recover under a theory of implied indemnity. In granting Maddux's motion for summary judgment, the trial court held that, absent the exclusivity provisions of the worker's compensation act, Pan American could have been entitled to prevail on the theory of implied indemnity arising out of the contractual relationship between Maddux and Pan American (*i.e.* based on a breach of independent duty).[91] On appeal, however, Pan American chose not to pursue its implied indemnity rights, but instead alleged error in the trial court's finding that there was no express contractual basis from which Pan American could raise its claim of express indemnification from Maddux.[92]

In discussing this issue, the court held only that Maddux's contractual obligation to perform in a "workmanlike manner" was not a proper basis for finding an express contract of indemnity.[93] This is in conformity with the general rule that such contractual obligations will not be construed as express agreements to indemnify.[94]

The court should have determined, however, what would be a proper basis upon which to ground a right of express contractual indemnity. Given its language regarding a third party's right to sue upon a breach of an independent duty, the court also could have spoken to the issue of implied indemnity arising from a breach of such duty. While it is true that Pan American did not pursue its implied indemnity rights at the appellate level, the issue had nevertheless been decided at the trial level, and was a proper subject for comment.

CONSEQUENCES OF THE COURT'S DECISION

Insofar as the court held that the exclusivity provisions of the Worker's Compensation legislation did not bar a third-party action based on express indemnity, the decision was in conformity with the majority rule. By limiting its discussion to that one topic, however, the court missed an opportunity

90. WYO. STAT. ANN. § 1-7.3 to 1-7.6 (Cum. Supp. 1973).
91. Summary Judgment, *supra* note 76, at 9.
92. Brief for Appellant at 35.
93. Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1, at 1226.
94. Desert Steel Co., Inc. v. Superior Court, *supra* note 57.

to give valuable guidance to lower courts, who in the future will undoubtedly face cases brought under theories of implied indemnity rights to recover.

Despite Justice Raper's fears, as expressed in his dissenting opinion,[95] that the court's holding totally emasculated the worker's compensation system in Wyoming, the majority's opinion in fact goes no further than the most conservative of courts, and merely brings Wyoming in line with other jurisdictions in construing the exclusive-liability provisions of worker's compensation acts. By not unequivocally stating the scope of its own ruling, however, the court did leave open to debate the extent of an employer's liability to third parties. That third-party actions based on express contractual indemnity will be allowed is clearly the holding, but much beyond that remains in doubt.

With Wyoming's recognition, in 1973, of the right to contribution among joint tortfeasors, the issue of a third party's right to contribution against a covered employer is sure to come before the court. Questions of implied and common-law indemnity rights have yet to be answered.

The impact of this decision, however, may be greatly lessened by the passage of a revised worker's compensation act.[96] The exclusive-liability provision of the revised legislation does not parallel the exclusivity sections of the 1957 act, and the new statute will require interpretation apart from any constructions given to previous acts. In light of the reworded exclusive-liability section, the court may well have to reconsider its holding in *Pan American.* At the very least, questions left unanswered by this opinion will soon demand response.

It is clear that the most expeditious solution to this problem lies not with the courts, but with the Legislature. A definitive worker's compensation act is needed, stating in unequivocal terms what parties are governed by the legisla-

95. Pan American Petroleum Corp. v. Maddux Well Service, *supra* note 1, at 1226-7.
96. WYO. STAT. § 27-12-103(a) (1977).
> "The rights and remedies provided in this act for an employee and his dependents for injuries incurred in extra-hazardous employments are in lieu of all other rights and remedies against any employer . . . but do not supersede any rights and remedies available to an employee and his dependents against any other person."

tion, and the extent of their rights and responsibilities thereunder.

CONCLUSION

Worker's compensation legislation arose from a desire to provide expeditious and certain relief to injured employees, in exchange for an immunity from suit being granted to employers. The majority rule is that the exclusive liability provisions of many worker's compensation acts do not bar third-party claims against an allegedly negligent employer. Claims based on express contractual indemnity are usually allowed. The result as to actions based on implied indemnity is less clear, but many courts find a right to relief based on a breach of an independent duty owed by the employer to the third party. Contribution and common-law indemnity claims are universally disallowed.

The Wyoming Supreme Court's decision in *Pan American Petroleum Corp. v. Maddux Well Service* clearly states that the exclusivity provisions of Wyoming's Worker's Compensation Act do not bar third-party claims based on express contractual indemnity. The Court did not rule on the further issue of whether third-party actions based on implied indemnity are statutorily precluded. The narrowness of this decision leaves in doubt the extent of an employer's liability to third parties under the act. The subsequent passage of a new Worker's Compensation Act, as ambiguous as the old law, means that the question undoubtedly will be relitigated.

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