Land & Water Law Review

Volume 18 | Issue 1 Article 10

1983

Worker's Compensation - Constitutionality of Wyoming's Co-Employee Immunity Statute under Article 10, Section 4, of the Wyoming Constitution - Meyer v. Kendig

Patrick R. Day

WORKER'S COMPENSATION—Constitutionality of Wyoming's co-employee immunity statute under article 10, section 4, of the Wyoming Constitution. Meyer v. Kendig, 641 P.2d 1235 (Wyo. 1982).

Early in the morning of November 3, 1977, at the AMAX Coal Company's Belle Ayr Mine, a haul truck driven by Dan Muirhead backed into another truck driven by Pamela Sue Kendig. The collision crushed the cab of Kendig's truck, pinning her inside and seriously injuring her legs. Kendig filed suit against Muirhead and nine other co-employees alleging culpable and ordinary negligence in the operation of the truck, the backing procedure used by Muirhead, and the training and hiring of Muirhead. AMAX Coal Company was dismissed from the suit as Kendig's employer[1] under Wyoming's Worker's Compensation Act.[2]

The defendant co-employees moved to dismiss Kendig's ordinary negligence claim,[3] arguing that it was barred by Section 27-12-103(a) of the Wyoming Statutes,[4] which grants co-employees immunity from suit unless they have been "culpably" negligent.[5] Kendig responded to the motion with the contention that the co-employee immunity statute was unconstitutional.[6]

The trial court agreed with Kendig and ruled that the statute violated article 1, section 34 (an equal protection guarantee); article 3, section 27 (also an equal protection provision); and article 10, section 4 (the worker's compensa-

---

1. Meyer v. Kendig, 641 P.2d 1235, 1237 n.5 (Wyo. 1982).
2. WYO. STAT. §§ 27-12-101 to -805 (1977).
3. Defendants moved to dismiss all of Kendig's claims, both ordinary and culpable negligence. Because the trial court ruled that Kendig could proceed on an ordinary negligence theory, the culpable negligence claim was apparently abandoned.
4. WYO. STAT. § 27-12-103(a) (1977) states in part:
   > The rights and remedies provided in this act (worker's compensation) . . . are in lieu of all other rights and remedies against any employer contributing as required by this act, or his employees acting within the course of their employment unless the employees are culpably negligent . . . .
5. The Wyoming Supreme Court has defined culpable negligence to mean "willful and wanton misconduct," which is the same standard used to determine the appropriateness of punitive damages. *See* Barnette v. Doyle, 622 P.2d 1349, 1361-62 (Wyo. 1981); Danculovich v. Brown, 593 P.2d 187, 194 (Wyo. 1979).
6. Brief for Appellee at 7, Meyer v. Kendig, 641 P.2d 1235 (Wyo. 1982).

tion enabling section) of the Wyoming Constitution.[7] Kendig went to trial on an ordinary negligence theory, and the jury awarded her a $330,000 verdict.[8]

On appeal, the Wyoming Supreme Court reversed the lower court and held that the co-employee immunity statute did not deprive Kendig of equal protection of the law[9] or due process[10] under the Wyoming Constitution. More importantly, the court did not find that the co-employee immunity statute violated the constitutional provision which authorized the creation of a worker's compensation system, article 10, section 4 of the Wyoming Constitution.[11] This Note will examine these constitutional rulings with a particular emphasis on the practical and theoretical considerations raised by the court's approval of co-employee immunity under article 10, section 4.[12]

WORKER'S COMPENSATION HISTORY AND THEORY

Worker's compensation in its present form was born shortly after the turn of the century from a desire to ease the problems caused by rapid industrialization and a century of judicial decisions motivated by a laissez faire economic

7. WYO. CONST. art. I, § 34, states: "[A]ll laws of a general nature shall have a uniform operation."
WYO. CONST. art. III, § 27 states in part: "The legislature shall not pass local or special laws in any of the following enumerated cases . . . for limitation of civil actions . . . granting . . . to any individual . . . any special or exclusive privilege, immunity or franchise . . . ."
WYO. CONST. art. X, § 4 states in part:

> 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. As to all extrahazardous employments 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 . . . . 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 . . . .

8. Brief for Appellee, *supra* note 6, at 5.
9. 641 P.2d 1235, 1240 (Wyo. 1982).
10. *Id.* at 1241.
11. *Id.* at 1239.
12. Kendig also argued that the co-employee statute violated article 9, section 4 of the Wyoming Constitution. Neither Kendig nor the court gave this provision, which relates only to mining operations, much attention. This note will focus primarily on article 10, section 4 because it is unique to Wyoming and presents an excellent opportunity to examine co-employee immunity statutes in light of worker's compensation theory. Due process and equal protection arguments are treated in other cases involving immunity statutes. *See infra* cases cited at notes 50 and 55.

philosophy.[13] Industrial enterprises such as railroads and mining were involving growing numbers of workers in highly dangerous occupations. As more and more workers were being seriously injured or killed, nineteenth century common law courts were simultaneously placing obstacles between the injured worker and his ability to recover from his employer in tort. Court-created doctrines such as assumption of risk, contributory negligence and the fellow servant doctrine[14] combined to effectively shield an employer from much of his possible tort liability.[15] To compound the problem, employees were often required to waive their right to sue as a condition of employment,[16] and rarely could the rest afford to finance litigation or obtain personal injury insurance.[17] By the time mass production began to emerge in the industrial economy, it was apparent that traditional tort recovery mechanisms were not meeting the needs of the industrial worker.[18]

Worker's compensation was the solution. Originally adopted from the German system of social insurance,[19] which required both the employer and the employee to contribute to a state administered fund, worker's compensation was adopted by the state of New York in 1910 and spread quickly throughout the nation.[20] Although worker's compensation as enacted in this country differed significantly from the social insur-

13. 1 LARSON, WORKMEN'S COMPENSATION LAW §§ 4.30, 4.40 (1978) [hereinafter cited as LARSON]. For a lucid and brief discussion of worker's compensation history and theory, see 1 LARSON, §§ 1.00-5.30.

14. *Id.* at §§ 4.30, 4.40. The fellow servant doctrine allowed an employer to allege that the negligence of another employee was responsible for the injury to the worker, thus reducing or eliminating the employer's liability. *See* Bennett v. Messick, 76 Wash. 2d 474, 457 P.2d 609, 610 (1969).

15. 1 LARSON, *supra* note 13, at § 4.40.

16. JOURNAL AND DEBATES OF THE WYOMING CONSTITUTIONAL CONVENTION, 443-54, 614-16 (1889). *See infra* note 92.

17. The Washington Supreme Court has stated, for example, that: "To win only after litigation, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than to get nothing." Stertz v. Indus. Ins. Comm'n, 91 Wash. 588, 158 P. 256, 258 (1916).

18. In the first Wyoming case challenging the worker's compensation plan, the court noted that "[t]he need for a change from the old unsatisfactory system was felt by all. . . ." Zancanelli v. Central Coal & Coke Co., 25 Wyo. 511, 173 P. 981, 991 (1918).

19. 1 LARSON, *supra* note 13, at § 5.10.

20. *Id.* at § 5.20.

ance systems in Germany and Great Britain,[21] it nevertheless represented an entirely new form of compensation for the injured employee. Tort recovery, with its elements of fault, causation, proof and defenses, was completely replaced with a form of industrial accident insurance.[22] Under the new system, the employer agreed to pay the injured worker benefits regardless of fault, and the employee agreed to forego common law tort actions against the employer, sparing the employer large damage judgments.[23]

This exchange of one right for another gives the compensation system many of the characteristics of a contractual relationship.[24] In some states, for example, the employee has the option of electing worker's compensation coverage or retaining his common law cause of action against his employer.[25] These contract features illustrate some of the conceptual difficulties that arise when legislatures extend immunity to co-employees. Most worker's compensation systems as enacted addressed only the exchange of rights between employer and employee. The relationship between employees was therefore not part of the original "contract" between employer and employee.[26]

Worker's compensation was designed to establish a system which would guarantee an injured worker at least a part of his regular income.[27] Employers would contribute

21. Unlike the German and British systems, American worker's compensation plans are financed by contributions from employers only, thus making the American system a form of private industrial insurance. *See* 1 LARSON, *supra* note 13, at § 3.10.
22. *Id.* at § 2.00; Meyer v. Kendig, 641 P.2d at 1238.
23. Zancanelli v. Central Coal & Coke Co., 25 Wyo. 511, 173 P. at 989 (1918).
24. Markle v. Williamson, 518 P.2d 621, 624 (Wyo. 1974). The *Markle* court stated: "To say that workmen's compensation in Wyoming is in the nature of insurance is to say it stems from contract." *Id.*
25. *See* Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972).
26. Article 10, section 4 of the Wyoming Constitution, for example, does not mention the relationship between employees. It is sometimes argued, however, that co-employees should be granted immunity for reasons similar to third party beneficiaries:

> The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his common law right to verdicts. This reasoning can be extended to the tortfeasor coemployee; he, too, is involved in this compromise of rights. Perhaps, so the argument runs, one of the things he is entitled to expect in return for what he has given up is freedom from common law suits based on industrial accidents in which he is at fault.

2A LARSON, *supra* note 13, at § 72.22.
27. 1 LARSON, *supra* note 13, at § 2.20.

to the fund and pass the cost to the consumer. This compensation system, it was hoped, would at least keep the wolf from the worker's door without the necessity of carrying an injured worker on the public dole.[28]

Two features of the worker's compensation system highlight the differences between traditional tort recovery and the compensation system. First, the income-replacing objective of the fixed schedule of benefits is not meant to serve the same function as tort damages. Worker's compensation is not designed to make the injured worker whole, or in any way redress him for pain and suffering.[29] Second, worker's compensation eliminates fault from influencing the worker's right to recover. Unlike tort law, which requires a degree of actionable fault in order for the worker to recover, worker's compensation pays a fixed amount of benefits whenever a worker is disabled, regardless of the "cause" of the worker's injury.[30] This elimination of fault goes to the heart of the contract between employer and employee—the employee gives up damage recoveries in return for certain compensation.

Worker's compensation was a novel and progressive innovation designed to alleviate many of the problems which accompanied traditional tort recoveries. Damages and concerns with fault were discarded and replaced with a form of accident insurance. The distinct theoretical differences between worker's compensation and the law of tort has not, however, prevented considerable legislative and judicial confusion.[31] Tort concepts continue to haunt worker's compensation law as lawmakers and judges remain unwilling to part with a well-known friend.[32] *Meyer v. Kendig* reflects many of the problems created when courts and lawmakers abandon the effort to maintain the theoretical integrity of worker's compensation and allow notions of tort to invade the system.

28. *Id.* at § 3.10.
29. *Id.* at § 2.50.
30. *Id.* at § 2.10.
31. *Id.* at § 120.
32. *Id.*

CO-EMPLOYEES UNDER PRIOR WYOMING LAW

Wyoming's Worker's Compensation Act has always permitted an injured worker to pursue his "adequate remedy at law" against any third-party tortfeasor.[33] Until *In Re Byrne*[34] was decided in 1939, the tort liability of co-employees was apparently never addressed in Wyoming. Considering the question, the *Byrne* court looked to the history of worker's compensation in Wyoming and held that the enactment of the system eliminated the fellow servant rule, and, because it did so, the legislature could not have intended that co-employees be subject to suit.[35] The *Byrne* decision apparently held the stage until 1974, when the Wyoming Supreme Court in *Markle v. Williamson*[36] expressly found that co-employees were "third parties" and thus subject to negligence actions brought by fellow employees.[37]

The *Markle* court's resurrection of the employee's common law right to sue a co-employee prompted a swift response from the state legislature. In 1975 the statute was amended to extend immunity to co-employees unless they were "grossly" negligent.[38] In 1977 the statute was again amended to replace the "gross" requirement with "culpable."[39] The response of the Wyoming legislature to the *Markle* decision was similar to actions taken by state lawmakers around the country following similar judicial decisions, and probably reflects a widespread belief that co-employees should enjoy tort immunity.[40]

33. This right was first codified in the original Wyoming Worker's Compensation Act, 1915 WYO. SESS. LAWS Ch. 124., § 8. This right is now codified at WYO. STAT. § 27-12-104 (1977).
34. 53 Wyo. 519, 86 P.2d 1095 (1939).
35. *Id.* at 1101-02.
36. 518 P.2d 621 (Wyo. 1974). The *Markle* court squarely addressed the question of whether co-employees were third parties and thus subject to suit. The court apparently did not overrule *Byrne*, but the decision ran counter to *Byrne*. For a discussion of these two cases, see Note, *Liability of Fellow Employees Under the Wyoming Workmen's Compensation Law*, 10 LAND & WATER L. REV. 263 (1975).
37. 518 P.2d at 625.
38. 1975 WYO. SESS. LAWS Ch. 149., § 1.
39. WYO. STAT. § 27-12-103(a) (1977). *See supra* note 5.
40. *See, e.g.*, Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972), followed by the enactment of ARIZ. REV. STAT. ANN. § 23-1022 (Supp. 1981). *See also* Meyer v. Kendig, 641 P.2d at 1238 n.11 (Wyo. 1982).

MEYER V. KENDIG

The bulk of Kendig's challenge to Section 27-12-103(a), Wyoming's co-employee immunity statute, was predicated on three constitutional provisions that Kendig argued must prohibit a co-employee immunity statute.[41] Essentially, Kendig contended that the statute violated equal protection and due process guarantees, and, more specifically, exceeded the power granted by the constitutional provision creating a worker's compensation system, article 10, section 4. Equal protection and due process challenges have been successful in other jurisdictions,[42] but *Meyer v. Kendig* is unique because it involves a constitutional provision that contains all the theoretical elements of a worker's compensation scheme. Because worker's compensation in Wyoming is therefore not a statutory right, Kendig urged the court to consider article 10, section 4 as an explicit statement of the components of worker's compensation, beyond which the legislature could not go.[43]

Equal Protection

The immunity granted co-employees, in Kendig's view, amounted to a special classification, a "status immunity" that had no rational relationship to a legitimate state interest.[44] She pointed out that co-employees, unlike employers, had not contributed to the fund and therefore had done nothing to deserve special treatment. The classification, therefore, was arbitrary.[45] Kendig also advanced the policy argument that co-employees would, given their immunity, be less careful on the job. Further, negligent co-employees by their torts would create a drain on the fund which would not be replaced if the injured worker could not recover.[46]

41. Brief for Appellee, *supra* note 6, at 27. Kendig's due proces argument was based on WYO. CONST. art. I, § 8, which states in part: "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. . . ." *See supra* note 3 and accompanying text.
42. *See infra* notes 49 and 54.
43. Brief for Appellee, *supra* note 6, at 17.
44. *Id.* at 21-26.
45. *Id.* at 25-26.
46. *Id.* at 25.

The court, however, did not agree. Article 1, section 34 and article 3, section 27, stated the court, require only that a statute operate alike on all persons similarly situated.[47] Moreover the statute was, in the court's opinion, entirely reasonable in light of the state's interest in preserving harmony among employees and in maintaining a financially sound worker's compensation fund.[48] Because the court felt that the statute was neither arbitrary in its classification nor unreasonable in its purpose, the statute did not deny Kendig equal protection under article 1, section 34 and article 3, section 27 of the Wyoming Constitution.[49]

Due Process

Kendig also contended that the co-employee immunity statute violated article 1, section 8 of the Wyoming Constitution, which states: "All courts shall be open and every person for an injury done to person, reputation, or property shall have justice administered without sale, denial or delay . . . ." Although Kendig did not characterize this provision as granting a due process protection,[50] provisions similar to this have been found to preserve common law causes of action.[51] Because the co-employee immunity statute essentially eliminates a common law cause of action, Kendig argued that it deprived her redress for an "injury done to person."[52]

The court declined to view article 1, section 8 as granting the due process guarantees sought by Kendig. The court

47. 641 P.2d at 1240.
48. *Id.* at 1239. *See infra* note 68.
49. 641 P.2d at 1240. For a case presenting an equal protection challenge to a co-employee immunity statute, see Perez v. Continental Casualty Co., 367 So. 2d 1284 (La. App. 1979), *cert. denied*, 369 So. 2d 157 (La. 1979).
50. Appellee characterized the provision as guaranteeing access to the courts. Because a cause of action is eliminated by the co-employee immunity statute, Kendig argued, she had lost her access to the court for that injury. Brief for Appellee, *supra* note 6, at 27. This is essentially an argument that this provision preserves common law causes of action, and therefore by eliminating a cause of action, the legislature has infringed on a substantive right. The court rejected this argument.
51. *See* Grantham v. Denke, 359 So. 2d 785 (Ala. 1978). *Grantham* involved a constitutional provision very similar to the one involved in *Meyer*, and the *Grantham* court ruled that this provision preserved common law causes of action.
52. WYO. CONST. art. I., § 8. *See supra* note 49; *infra* note 54.

held that article 1, section 8 did not preserve common law causes of action:

> The fact that the courts are required to be open and to afford justice for injury done does not mean that a party is assured of success in a legal action, or that standards cannot be set for, and limitations placed upon, causes of action—all in the interest of justice.[53]

The court thus considered the provision as a right of access, rather than a right of action, provision.[54] Because Kendig had access to the courts, the co-employee immunity statute did not violate article 1, section 8.

Article 10, section 4: worker's compensation enabling provision

Co-employee immunity statutes have been challenged primarly on due process and equal protection grounds, with limited success.[55] *Meyer v. Kendig*, however, offered the court a unique opportunity to examine co-employee immunity statutes in light of worker's compensation theory because it involved a specific constitutional provision which established a theoretical framework for the creation of a worker's compensation scheme.[56] This provision, article 10, section 4, as originally enacted stated:

> No law shall be enacted limiting the amount of damages to be recovered for causing the death or injury 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.[57]

53. 641 P.2d at 1241.
54. For cases mounting due process challenges, see Grantham v. Denke, 359 So. 2d 785 (Ala. 1978), Halenar v. Superior Court, 109 Ariz. 25, 504 P.2d 928 (1972).
55. *See supra* cases cited at notes 49 and 54.
56. The amendment to article 10, section 4, did more than merely authorize the creation of worker's compensation. It specifically indicated the form of the system and delineated the exchange of rights between employer and employee. Because it does so, the provision provides an excellent opportunity to examine worker's compensation legislation against the theoretical framework of the compensation system. *See infra* text accompanying note 59.
57. WYO. CONST. art. X, § 4.

This language was seen as prohibiting the enactment of a worker's compensation act.[58] In 1914, the people of Wyoming passed an amendment to the section, leaving the first two sentences intact and adding:

> As to all extra hazardous employments 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 . . . . 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 . . . .[59]

Because the language of the amendment contains the essential structure of a worker's compensation system, Kendig argued that the section must be viewed as setting forth the basic limits within which the legislature may enact laws affecting worker's compensation.[60] Because it is a constitutional provision, Kendig urged the court to recognize article 10, section 4 as an express limitation on the authority of the legislature.[61] If the section is indeed a limitation on the power of the legislature, contended Kendig, then the co-employee immunity statute was clearly unconstitutional because the language of the amendment grants immunity only to "any employer contributing." As the statute thus prevents an injured employee from receiving damages from a co-employee, Kendig reasoned that the statute amounted to an unconstitutional "limitation" on damages, in violation of the first sentence of the section.[62]

The court prefaced its analysis of the constitutional challenges made by Kendig by citing constitutional interpretation doctrines that require a court to resolve any doubt in

58. Markle v. Williamson, 518 P.2d at 625 (Wyo. 1974). The *Markle* court was looking at the language of the 1914 amendment (*see infra* text accompanying note 59) to determine if co-employees were intended to be covered by the immunity granted employers. Holding that co-employees were not to be given immunity, the court observed that "[t]he amendment being in 1914 when industrial suits were quite infrequent, it would appear the situation with respect to co-workers was not dealt with." 518 P.2d at 625.
59. WYO. CONST. art. X, § 4.
60. Brief for Appellee, *supra* note 6, at 16.
61. *Id.*
62. *Id.* For a case with similar reasoning, see Kilpatrick v. Superior Court,

favor of an interpretation which preserves constitutional validity.[63] Having determined to find an avenue which would protect the validity of the co-employee immunity statute, the court answered Kendig's arguments by noting the difference between limiting damages, as prohibited by the first sentence of the section,[64] and eliminating a cause of action altogether. The court reasoned:

> Section 27-12-103(a) does not limit the amount of damages to be recovered. It limits the cause of action available for a recovery. The fact that the first sentence of Art. 10, § 4 relates only to the amount of damages is exemplified by the second sentence which pertains to the "right to recover."[65]

Because the co-employee immunity statute merely eliminates a cause of action,[66] it does not fall within the prohibitions of the first sentence of article 10, section 4. This, said the court, was "determinative of the constitutionality of such section insofar as Art. 10, § 4 of the Wyoming Constitution is concerned."[67] The court went on to consider the policy arguments supporting co-employee immunity and concluded that to allow co-employees to be subject to suit "would subject the Worker's Compensation Act to a doubtful future."[68]

---

105 Ariz. 413, 466 P.2d 18 (1970).

63. 641 P.2d at 1239.
64. *Id.*
65. *Id.* The basic holding of the *Meyer* court with respect to article 10, section 4 is that the complete elimination of a cause of action, in this case the right to sue a co-employee for negligence, is not a limitation on damages. Thus, while the legislature cannot limit damages in a recognized action, it can eliminate the action altogether.
66. Unlike the constitutions of some states, the Wyoming Constitution apparently does not preserve common law causes of action. The common law is applicable only when it has not been changed or eliminated by statute. Snell v. Ruppert, 541 P.2d 1042, 1046 (Wyo. 1975).
67. 641 P.2d at 1239.
68. *Id.* The policy arguments for co-employee immunity advanced by the court include: harmony between employees, maintenance of a sound worker's compensation fund, prevention of "hundreds of legal actions" and the fear that a negligent employee would be required to pay some of the cost which would normally have been the employer's responsibliity. Because the employee must reimburse the fund with proceeds recovered from a third party, (*see infra* notes 73-76 and accompanying text) the negligent employee would thus indirectly be putting money back into the fund. If the co-employee was not subject to suit, the employer would not have the benefits reimbursed. Brief for Appellee, *supra* note 6, at 23.

The policy arguments advanced by Kendig against co-employee immunity included theoretical inconsistency and removal of incentives for careful work. *Id.* For a discussion of the impact on insurance of co-employee suits, see Marks, *Erosion of the Exclusive Workers' Compensation Remedy: Suits Against Coemployees and Compensation Carriers*, 17 FORUM 395 (1981).

THE DISSENT

Chief Justice Rose filed a strong dissent. In his view:

> the majority of the court have "once again" ignored the original purpose of the Wyoming Worker's Compensation Act by reaffirming the power of the legislature to incorporate into the scheme elements that were clearly neither contemplated nor intended by the 1914 amendment to Art. 10, § 4.[69]

Justice Rose embraced the position advanced by Kendig that article 10, section 4 is an explicit limitation on the power of the legislature.[70] He would have analyzed the co-employee immunity statute's constitutionality by comparing the purpose of the statute with the theoretical underpinnings of worker's compenastion as outlined by article 10, section 4.[71] If the statute did not come within the scope of the original worker's compensation system, and if the statute is theoretically inconsistent with worker's compensation, Justice Rose would find the statute to be beyond the authority granted by article 10, section 4 and therefore unconstitutional.

Chief Justice Rose first outlined his views concerning worker's compensation legislation in *Stephenson v. Mitchell*,[72] a recent case examining the constitutionality of a statute which required an employee to reimburse the compensation fund out of the proceeds recovered from a third party tortfeasor.[73] The *Stephenson* court upheld the statute,[74] and Justice Rose dissented, contending that the language of article 10, section 4 and the worker's compensation system as originally enacted did not include the notion that an employee would end up contributing to the fund.[75] In his *Meyer* dissent, Justice Rose reasoned that requiring the employee to reimburse the fund "embrac[ed] a concept which says that the original benefits received from the fund were

69. 641 P.2d at 1244 (Rose, C.J., dissenting).
70. *Id.* at 1247 (Rose, C.J., dissenting).
71. *Id.* For a complete analysis of Justice Rose's approach, see his dissent in *Stephenson v. Mitchell*, 569 P.2d 95, 110-12 (Wyo. 1977).
72. 569 P.2d 95, 100-112 (Wyo. 1977) (Rose, C.J., dissenting).
73. WYO. STAT. § 27-54 (1957) (current version at WYO. STAT. § 27-12-104 (1977)).
74. 569 P.2d at 99.
75. *Id.* at 110 (Rose, C.J., dissenting).

in the nature of damages for a tortious injury, rather than for payment under a contract for insurance."[76]

In both *Stephenson* and *Meyer*, Justice Rose dissented because he perceived the statutes in question to be beyond the limits inherent in the language of article 10, section 4. In both cases, he argued, the statutes were theoretically inconsistent with worker's compensation and therefore they "incorporate[d] elements into the scheme"[77] which were improper under article 10, section 4.

In support of his contention that worker's compensation must be treated strictly as a form of industrial accident insurance,[78] Justice Rose pointed to the history of worker's compensation theory as developed in past Wyoming cases.[79] The constitutionality of worker's compensation was first addressed in Wyoming in *Zancanelli v. Central Coal and Coke Company.*[80] The *Zancanelli* court reviewed worker's compensation theory and observed that the tort system was a failure with respect to compensating injured industrial workers.[81] It was necessary, said the court, to institute an entirely new system in the form of insurance benefits:

> [Worker's compensation] is not intended to give compensation as damages, but is more in the nature of accident insurance . . . . In adopting the new system both employees and employers gave up something that they each might gain something else, and it was in the nature of a compromise . . . .[82]

Since *Zancanelli*, the Wyoming Supreme Court has consistently characterized worker's compensation as a form of industrial accident insurance.[83] In fact, the court has even gone so far as to ignore statutory provisions inconsistent with the industrial insurance concept. In *In Re Byrne*, the

76. 641 P.2d at 1246 (Rose, C.J., dissenting).
77. *Id.* at 1244 (Rose, C.J., dissenting).
78. *Id.* at 1246 (Rose, C.J., dissenting).
79. *Id.* at 1245 n.3 (Rose, C.J., dissenting) (citing In Re Byrne, 53 Wyo. 519, 86 P.2d 1095 (1939), and Hotelling v. Fargo-Western Oil Co., 33 Wyo. 240, 238 P. 542 (1925)). *See supra* text accompanying note 34.
80. 25 Wyo. 511, 173 P. 981.
81. *Id.*, 173 P. at 989.
82. *Id.*
83. *See, e.g.*, Markle v. Williamson, 518 P.2d 621 (Wyo. 1974), In Re Byrne, 53 Wyo. 519, 86 P.2d 1095 (1931).

court examined a statute which provided that if an employee had an action against a third party tortfeasor, the worker could not receive compensation and was left solely to his remedy at law against the third party.[84] The statute effectively allowed an employer to raise the defense that he was not at "fault." The *Byrne* court held that this statute was completely inconsistent with worker's compensation theory, and refused to give it effect.[85]

Chief Justice Rose, like the court in *Byrne*, would have ruled that the co-employee immunity statute is outside the system established by article 10, section 4 and is therefore unconstitutional.[86] This result, he argued, is supported by Wyoming precedent, worker's compensation theory, and by the specific language of article 10, section 4.[87]

ANALYSIS OF THE COURT'S DECISION

By holding that the co-employee immunity statute is merely a legislative elimination of a common law cause of action, the *Meyer* court side-stepped the issue of whether or not article 10, section 4 is an express limitation on the power of the legislature to enact laws affecting worker's compensation. It is also significant that there is no language in the opinion addressing the co-employee immunity statute in light of worker's compensation theory. The court's decision to uphold the statute is particularly significant because it follows Justice Rose's *Stephenson* dissent.

Meyer v. Kendig, therefore, must be viewed as a determination by the court not to impose constitutional restrictions, under article 10, section 4, on the power of the legislature to enact laws which alter the basic components of Wyoming's worker's compensation system. It is not clear from the opinion if the court is deliberately abandoning efforts to maintain the theoretical integrity of the worker's compensation system, but the opportunity to reestablish theoretical consistency was clearly before the court and it declined to do

84. 1915 WYO. SESS. LAWS Ch. 124, § 8.
85. 53 Wyo. 519, 86 P.2d at 1002.
86. 641 P.2d at 1245, 1247 (Rose, C.J., dissenting).
87. *Id.* at 1244-47 (Rose, C.J., dissenting).

so. There are strong policy arguments both for and against co-employee immunity,[88] and the *Meyer* decision may therefore reflect a judicial reluctance to force a result contrary to the position taken by the legislature.

If the court's primary objective was to uphold the constitutionality of the statute, then the observation that the elimination of a cause of action is not a limitation on damages provides a facile means of saving the statute. The theoretical problem with the court's analysis, however, is that it ignores the contractual character of the industrial accident insurance concept. The original worker's compensation scheme represented an exchange of rights between employer and employee. The relationship between employees was not covered in the "compromise"[89] between employer and employee.

The theoretical inconsistency of co-employee immunity statutes is obvious in states that make worker's compensation coverage optional.[90] In such a state, for example, an employee might decide to elect compensation coverage with the understanding that he cannot sue his employer, but will be assured compensation if he is injured. If the state legislature then passes a statute granting co-employee immunity from suit, an element is added to the system that was not present when the worker contracted into compensation coverage.

The Wyoming worker does not have the option to elect compensation coverage. Far from making co-employee immunity statutes less theoretically anomalous, the lack of choice present in Wyoming's system should strengthen the argument that article 10, section 4 is a limitation on the legislature. Because the Wyoming worker does not have the option to select coverage, the court's refusal in *Meyer* to construe article 10, section 4 as a limitation leaves the worker

88. *See supra* note 68.
89. Zancanelli v. Central Coal & Coke Co., 25 Wyo. at 542, 173 P. at 989 (1918). The *Zancanelli* court noted: "In adopting the new system, both employés and employers gave up something that they each might gain something else, and it was in the nature of a compromise . . . ." *Id.*
90. *See, e.g.*, Halenar v. Superior Court, 109 Ariz. 27, 504 P.2d 928 (1972).

with almost no protection outside the political process. When the legislature acts to alter basic components of the scheme, the bargain between employer and employee is changed. With the co-employee immunity statute, for example, the worker loses a common law right without any reciprocal "consideration." Thus, the contractual character of worker's compensation is destroyed.

Ironically, under the *Meyer* rationale, the 1914 amendment to article 10, section 4 was never necessary. The section, as noted above, was originally enacted to protect employees from signing away their tort rights as a condition of employment.[91] It was the framers' belief that a section prohibiting such contracts would stop the abuse of workers' rights. The clear implication of the debates over this provision is that it was concerned with tort actions and tort damages.

Worker's compensation benefits, however, are not tort damages. The fixed schedule of benefits is not designed to be compensation for damages, it is compensation for lost income. Worker's compensation is therefore not a limitation on *damages*, as that word is used in the first sentence of article 10, section 4 of the Wyoming Constitution.

The *Meyer* court held that the legislature, in enacting the co-employee immunity statute, simply eliminated a cause of action. If the 1914 legislature had used this rationale, it could have eliminated the employee's common law cause of action against his employer, then passed a worker's compensation act to take its place. This action would not have conflicted with article 10, section 4 because the benefits of

91. *Supra* note 16. Mr. Thomas Reed stated:

> As I understand this, this [article 10, section 4] is to reach what we originally call the old ironclad agreement. I can see the object of this because I have worked on all the railroads west of Chicago I might say, and they have all adopted a policy that this here touches upon. It was called the ironclad agreement, by which a man when he entered the employ of the company agreed to release the company from all liability for any accident that might occur to him, no matter whether the fault was directly traceable to the company or not.

JOURNAL OF THE DEBATES OF THE WYOMING CONSTITUTIONAL CONVENTION, *supra* note 16, at 447.

worker's compensation are not damages and the elimination of a cause of action is not a limitation on damages.

Issues are likely to arise in connection with worker's compensation that have not yet been addressed in Wyoming. Under Wyoming's comparative negligence system,[92] for example, each negligent party must be assigned a percentage of fault in a negligence action.[93] No doubt a third-party tortfeasor will someday attempt to require contribution from a negligent employer. The resolution of the problem would be clear if it is analyzed in light of worker's compensation theory. The employer has already contracted out of liability to the employee, so the basic requirement for contribution is not present.[94] Because the *Meyer* decision effectively grants the legislature a free hand, however, there might be no way to prevent the legislature from passing a law requiring an employer to make contribution. Article 10, section 4 has lost its teeth.

CONCLUSION

Following the *Meyer* and *Stephenson* decisions, article 10, section 4 of the Wyoming Constitution can no longer be viewed as a limitation of the authority of the legislature to enact laws affecting worker's compensation. The extension of immunity to co-employees eliminates a cause of action which would otherwise have been available. Ironically, the worker's compensation system was enacted because workers had been steadily losing their ability to recover in tort.

Even though the legislature is now free to alter worker's compensation as easily as if the system had been created by statute, the court should be sensitive to arguments urging theoretical consistency. Undoubtedly, issues concerning worker's compensation will arise which are not addressed in the

92. WYO. STAT. § 1-1-109 (1977).
93. Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1178-79 (Wyo. 1981).
94. For a discussion of indemnity and contribution problems involving worker's compensation, see Note, *Exclusivity Provisions of the Worker's Compensation Act as a Bar to Third-Party Actions Against Employers*, 14 LAND & WATER L. REV. 587 (1979); Note, *The Third Party's Right to Contribution from an Employer Covered by Workmen's Compensation*, 56 N.D.L. REV. 373 (1980).

statutes. In resolving these questions, the court should consider the theoretical parameters established by article 10, section 4 and, in doing so, the court can avoid the complete dissolution of worker's compensation as it was originally enacted.

PATRICK R. DAY