TOO CLEVER BY HALF?
10TH CIRCUIT ISSUES IMPORTANT CHOICE-OF-LAW DECISION IN CASE ARGUED BY MWL ATTORNEY, RYAN L. WOODY

***Anderson, Shon v. Commerce Construction Services, Inc.*, 2008 WL 2599823, 07-3128 (10th Cir., July 2, 2008)**

On March 3, 2004, Shon Anderson, suffered catastrophic and permanent injuries while working on a construction job site in Towanda, Kansas, that was being operated by Commerce Construction Services ("Commerce Construction"). Commerce Construction is a Kansas corporation located in Wichita, Kansas. Commerce Construction had bid on and been awarded a contract to demolish and remodel Circle High School in Towanda, Kansas. At the time of the accident, Mr. Anderson, who was not a Kansas resident, was directly employed by Midwest Environmental ("Midwest"), which is a Nebraska corporation with its principal place of business located in Lincoln, Nebraska. Midwest had been retained by Commerce Construction as a subcontractor to perform demolition of the Circle High School auditorium walls. At the time of suit, the workers' compensation carrier for Midwest had paid in excess of $325,000 in workers' compensation benefits to or on behalf of Mr. Anderson pursuant to Nebraska law.

MWL filed suit on behalf of Shon Anderson and the workers' compensation carrier against Commerce Construction in the United States District Court for the District of Kansas. MWL alleged that Commerce Construction's negligence resulted in the misidentification of a non-reinforced CMU wall that ultimately fell on Mr. Anderson causing his permanent injuries. Commerce Construction denied liability and alleged as an affirmative defense that under Kansas law, Mr. Anderson was a statutory employee of the defendant and that his action was barred by the exclusive remedy doctrine of Kansas.

Commerce Construction filed its motion for summary judgment with the district court, and argued that Kansas' exclusive remedy rule applied to the case under the *lex loci delecti* choice-of-law analysis. MWL argued that the suit was not barred and that under Kansas' choice-of-law rules, Nebraska's exclusive remedy rule would apply to the underlying case. The district court granted Commerce Construction's motion for Summary Judgment in a Memorandum and Order that applied the Kansas exclusive remedy rule and found that Commerce Construction was immune from suit as a statutory employer under the Kansas Worker's Compensation Act. MWL appealed the decision to the 10th Circuit Court of Appeals in Denver.

On July 2, 2008, the 10th Circuit issued its opinion, affirming the district court's decision. The decision will be published and can currently be cited as *Anderson v. Commerce Const. Services, Inc.*, 2008 WL 2599823, 07-3128 (10th Cir., July 2, 2008). Although we knew we had an uphill battle to win the case, the court of appeals issued a very well-reasoned opinion involving the complex subject of extra-territorial workers' compensation subrogation.

The crux of the decision came down to whether the 10th Circuit would apply Kansas' long-standing *lex loci delecti* or "place of the wrong" choice-of-law rule or the law of the state where workers' compensation benefits were paid. MWL argued that under the *Restatement* §185 and the *Larson* Rule, a Kansas court should not focus on the location of the accident, but instead on the Act of the state under which benefits were paid. In support of §185, MWL cited to *Miller v. Dorr*, 262 F. Supp.2d 1233 (D. Kan.

2003), a recent Kansas district court opinion applying §185 to the allocation of settlement proceeds. However, the 10th Circuit held that because the issue was whether the plaintiff could sue Commerce Construction, who was a statutory employer under Kansas law, rather than who was entitled to a recovery which had already been effected by the injured employee, *Restatement* §184, rather than §185, applies to conflicting exclusive remedy rules, while §185 applies to conflicting subrogation (right of reimbursement) rules. The court also read into the *Larson* Rule the ability of a court to apply the exclusive remedy rule of any state which would be "liable" for benefits – which it interpreted not to mean the state under whose laws benefits were "paid", but any state under whose laws benefits "could be paid."

The 10th Circuit acknowledged that Nebraska had an interest in applying its workers' compensation scheme, but also emphasized the importance of Kansas' own interests in this particular case. It wrote:

> *Like Nebraska's scheme, the Kansas workers' compensation system also reflects a carefully crafted statutory compromise between employees and employers. Under this system, statutory employers such as Commerce are required to provide mandatory coverage to subcontractor employees such as Anderson. In exchange for extending mandatory coverage and paying into the state system, employers are protected from common law claims for workplace injuries. If a court applied Nebraska's exclusive remedy law and permitted Anderson's suit, the court would be disrupting this legislative compromise between Kansas employers and employees.* Id. at p. 12.

Although it applies the immunity provisions of the defendant's home state, the decision recognizes the dichotomy between a foreign worker's right to sue and a forum defendant's right not to be sued. This decision will certainly help subrogation practitioners in other extra-territorial workers' compensation cases. The 10th Circuit avoided the trap of applying a §145 significant contact analysis, which is meant to apply to issues of general tort law. Instead, the court correctly sought out *Restatement* §§ 184 and 185 specifically dealing with workers' compensation, and, probably correctly, applied §184 to the facts of this case. The only critique is the court's analysis of the interplay between §184, §185 and the *Larson* Rule. There is clearly a conflict between these choice-of-law rules that results in the application of two workers' compensation schemes to the same case. While §184 will apply the immunity provisions of the defendant's state, §185 will apply the subrogation provisions of the plaintiff's state resulting in a piecemeal application not contemplated by the legislatures of either state. However, such is the case with most extra-territorial workers' compensation matter.

Should you have any questions or comments about this decision or wish to obtain a copy of the decision itself, please feel free to contact Attorney Ryan Woody at 262-673-7850 or at **rwoody@mwl-law.com**.