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Silkwood v. Kerr-McGee Corp.: Workers' Compensation and Federal Preemption Rescue the Nuclear Tortfeasor

Cheryl Scott

SILKWOOD V. KERR-MCGEE CORP.: WORKERS' COMPENSATION AND FEDERAL PREEMPTION RESCUE THE NUCLEAR TORTFEASOR

INTRODUCTION

One of the most widely publicized and controversial cases in recent history, *Silkwood v. Kerr-McGee Corp.*,[1] came before the Tenth Circuit Court of Appeals in 1981.[2] Karen Silkwood, a Kerr-McGee employee, had suffered from plutonium contamination.[3] An action brought by her estate in the District Court for the Western District of Oklahoma resulted in a significant award for compensatory and punitive damages.[4]

The lower court ruling was reversed on appeal. In a split decision, the Tenth Circuit court determined Silkwood's exposure to plutonium was job-related, and compensatory damages for personal injuries were therefore limited to amounts recoverable under Oklahoma's Workers' Compensation Act.[5] The appellate court also ruled punitive damages could not be awarded because such an award constituted an intrusion into the federally controlled nuclear regulatory scheme.[6]

This comment will focus on two issues: applicability of workers' compensation law and the extent of federal occupation in nuclear incident disputes. A review of the factual and legal background of the case, an examination of the Tenth Circuit court's reasoning, and a discussion of legal and social implications of the decision will follow.

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1. 667 F.2d 908 (10th Cir. 1981), *cert. granted*, 103 S. Ct. 721 (1983).

2. This was the second time the parties had been before the Tenth Circuit Court of Appeals. The original petition had alleged a conspiracy by Kerr-McGee to prevent Silkwood and others from organizing a labor union and asserted first amendment, due process, and equal protection violations by Kerr-McGee. The Tenth Circuit court affirmed the trial court's dismissal of these claims in Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

3. 667 F.2d at 913.

4. Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), *rev'd*, 667 F.2d 908 (10th Cir. 1981), *cert. granted*, 103 S. Ct. 721 (1983). The jury awarded $500,000 for personal injuries, $5,000 for property damages, and $10 million in punitive damages. For a discussion of the district court decision, see Note, *Federal Preemption: State Law Principles of Strict Liability in a Nuclear Accident—A Preemption Problem in Light of the Price-Anderson Act?*—Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), 6 U. DAYTON L. REV. 279 (1981).

5. 667 F.2d at 920. The Oklahoma Workers' Compensation Act is found at OKLA. STAT. ANN. tit. 85, §§ 1-180 (West 1970 & Supp. 1981-82).

6. 667 F.2d at 923. In addition to the workers' compensation and preemption issues, Kerr-McGee argued the verdict was excessive and contrary to the weight of the evidence, the trial court had erred in rulings and instructions on strict liability and negligence, and it was denied a fair trial because of prejudicial publicity, misconduct of opposing counsel, and errors in the court's rulings on evidence and instructions to the jury. Brief of Appellants at 20-30, Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981), *cert. granted*, 103 S. Ct. 721 (1983).

I. THE FACTUAL SETTING AND THE DISTRICT COURT'S OPINION

Kerr-McGee Nuclear Corporation[7] operated a nuclear fuels processing plant in Cimmaron, Oklahoma where plutonium was processed for reactor fuel.[8] Karen Silkwood, a laboratory analyst at the Cimmaron plant, belonged to the Oil, Chemical and Atomic Workers Union (OCAW) and was a member of the union negotiating team.[9] In September of 1974, Silkwood and other union members presented charges to the Atomic Energy Commission (AEC),[10] alleging health and safety violations by Kerr-McGee. The task of gathering required documentation of the charges was assigned to Silkwood.[11]

On November 5, 6, and 7, 1974, Silkwood was contaminated by plutonium,[12] but little direct evidence of the contaminations was produced. The inferences drawn from the circumstantial evidence, however, were pivotal to the conclusions of both the district court and the Tenth Circuit Court of Appeals with respect to whether Silkwood's injuries arose out of her employment.

While at work on November 5, Silkwood monitored herself with plutonium detecting devices before and after a break, but found no contamination.[13] Shortly thereafter, she began working in two glove boxes[14] which contained plutonium, and about three hours later she detected contamination.[15] Further checks of the laboratory revealed contamination inside the gloves and in the glove boxes where Silkwood had been working. Silkwood's left hand, right wrist, upper arm, neck, face, hair, and nostrils registered contamination.[16] She was immediately decontaminated and required to submit five days' urine and fecal samples which were to be sent to the

7. Suit was brought against both Kerr-McGee Nuclear Corp. and its parent, Kerr-McGee Corp. The jury found Kerr-McGee Nuclear Corp. to be a mere instrumentality of the parent corporation, thus making Kerr-McGee Corp. liable. *See Silkwood*, 485 F. Supp. at 601 app.

8. Plutonium is a man-made radioactive element used in nuclear weapons and fuels. It emits alpha particles which, although dependent on the size and amount of energy in the radiation, constitute the major hazard associated with plutonium. Damage may occur when alpha particles strike living cells; however, the particles cannot penetrate human skin, and small quantities of plutonium on skin or clothing are not dangerous. It is the internal deposition of plutonium which might occur, for example, by inhalation that makes plutonium one of the most carcinogenic substances known. When internally deposited, alpha particles can damage bone and internal organs. Brief of Appellants at 5-6, *Silkwood*. *See* Note, *Nuclear Torts: The Price-Anderson Act and the Potential for Uncompensated Injury*, 11 NEW ENG. L. REV. 111, 113 (1975).

9. Silkwood was elected to this position and was responsible for health and safety matters. Brief of Appellee at 8, Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981), *cert. granted*, 103 S. Ct. 721 (1983).

10. The AEC is now the Nuclear Regulatory Commission, but it will be referred to throughout this comment as the AEC.

11. Silkwood's investigative role spawned media speculation after her death on whether the contamination was intentionally inflicted by Kerr-McGee. Plaintiff contended at trial that Silkwood's evidence-gathering activities provided a motive for an intentional contamination by Kerr-McGee operatives. *See* Brief of Appellee at 42 n.21, *Silkwood*.

12. 667 F.2d at 913.

13. *Id.*

14. "A glove box is an impervious box surrounding the plutonium and processing equipment; it has glove holes so a worker can operate the equipment or manipulate the material from outside the box." Brief of Appellants at 7, *Silkwood*.

15. 667 F.2d at 913.

16. *Id.*

United States Testing Laboratory for analysis.[17] Later AEC tests did not find any leaks inside the glove boxes, nor any significant airborne contamination in the laboratory.[18]

On November 6, Silkwood did not work with plutonium, but did paperwork for a short time before she left for a union meeting.[19] Upon leaving, she detected contamination on her hands and fixed contamination on her right forearm.[20] Her hands were decontaminated, and since the forearm contamination was fixed, she was permitted to attend the meeting.[21] Later that day, a survey showed external contamination on her right forearm, neck, and face which was not fixed,[22] and a nasal smear also indicated contamination.[23] At her request, Silkwood's car and locker were tested, but no contamination was found.[24]

When Silkwood reported to the health-physics office on the morning of November 7, contamination was again found on various parts of her body,[25] and the nasal smear taken that morning was again positive.[26] The urine and fecal samples that Silkwood brought were also contaminated, however, the urine samples had been "spiked," i.e., they contained plutonium which was not naturally excreted.[27] Plutonium contamination was also found in Silkwood's apartment, making it necessary for Kerr-McGee to decontaminate the apartment and dispose of many of Silkwood's possessions.[28] The highest concentrations of plutonium were found in the bathroom and on a bologna package in the refrigerator.[29]

Very little direct evidence was presented at trial to support inferences of the location or method of Silkwood's contamination. Certain hearsay evidence was admitted which purportedly indicated her state of mind, which was relevant to the issue of whether she had intentionally removed plutonium from the plant.[30] Silkwood was reported to have stated that she spilled her urine sample in her bathroom early in the morning on November 7 and that at the time, a package of bologna was on top of the toilet where she had placed it before preparing her lunch.[31]

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17. *Id.*
18. *Id.* at 913-14.
19. *Id.* at 914.
20. *Id.* Contamination that is "fixed" is not eliminated by scrubbing with soap and water. Brief of Appellee at 11, *Silkwood*.
21. 667 F.2d at 914.
22. *Id.*
23. Brief of Appellee at 12, *Silkwood*.
24. 667 F.2d at 914.
25. *Id.*
26. Brief of Appellee at 13, *Silkwood*.
27. 667 F.2d at 914.
28. *Id.*
29. *Id.*
30. *Id.* *See infra* note 41.
31. 667 F.2d at 914. Silkwood's roommate was also a Kerr-McGee employee. Contamination was found on her hands and buttocks after she had used the bathroom at home, but no contamination was detected on her body at work, in her automobile, or in the refrigerator where she kept her lunch at the plant. *Id.*

Contamination was not found on Silkwood's boyfriend who had spent the night of November 6 in her apartment, nor was contamination found in his car or residence. *Id.*

Three days later, Silkwood was sent to the Los Alamos Scientific Laboratory in New Mexico where she underwent whole body and chest count procedures.[32] She returned to work on November 13 and was assigned to a job not involving plutonium.[33] On that day, she met with AEC inspectors concerning her contamination and later with other union members in a strategy session.[34] That evening while on her way to meet with a *New York Times* reporter and an OCAW leader regarding the information she had been gathering, Silkwood was killed in an automobile accident.[35] At the time of her death, Silkwood's body contained twenty-five to fifty percent of the AEC allowable lifetime body burden for plutonium workers.[36]

Both Kerr-McGee and the AEC investigated Silkwood's contaminations of November 5 and 6, but neither identified the exact manner by which she became contaminated.[37] Evidence surrounding the apartment contamination of November 7 indicated that it probably occurred in the bathroom,[38] but how Silkwood's urine sample kits became spiked is not known.

Over the course of the eleven-week trial, the jury was presented with conflicting theories regarding the nature and extent of Silkwood's injuries, and the inferences to be drawn from circumstantial evidence surrounding the contaminations.[39] Kerr-McGee claimed that Silkwood had intentionally removed plutonium from the plant,[40] but alternatively argued that the contaminations were work-related, and thus subject to Oklahoma's workers' compensation law and the exclusive jurisdiction of the industrial court.[41]

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32. Brief of Appellee at 16-17, *Silkwood*.

33. *Id.* at 17.

34. Evidence was introduced at trial that at the union meeting, Silkwood had shown another OCAW member "a special notebook and brown manila folder and said she had proof of falsification of records and samples of bad fuel welds which had been shipped." Brief of Appellee at 18, *Silkwood* (citations to transcripts omitted). These documents, however, were never recovered. *Id.*

35. Silkwood died as a result of injuries she sustained when her car ran off the road and hit a culvert. Brief of Appellants at 16, *Silkwood*.

36. Expert testimony concerning the level of Silkwood's plutonium contamination was discrepant. Kerr-McGee and AEC consultants who investigated the contaminations estimated the level to be near the low end of the allowable range, while Silkwood's experts cited reasons and data suggesting that the actual levels were higher. Brief of Appellee at 75 n.44, *Silkwood*.

The "allowable lifetime body burden" does not represent a tolerance level below which injury never occurs; instead, it is a risk-balancing effort between industrial participation and the level which would probably produce harmful affects. *See L. Taylor, Radiation Exposure as a Reasonable Calculated Risk, reprinted in Hearings Before the Subcomm. on Research and Development of the Joint Comm. on Atomic Energy on Employee Radiation Hazards and Workmens' Compensation*, 86th Cong., 1st Sess. 21 (1959); Hallmark, *Radiation Protection Standards and the Administrative Decisionmaking Process*, 8 ENVTL. L. 785 (1978).

37. Brief of Appellant at 8 n.1, *Silkwood*.

38. 667 F.2d at 914.

39. Kerr-McGee contended that physical injury would not result if contamination levels were below those established by the AEC as the allowable burden. Further, it contended that damages could not be awarded for mental anguish absent evidence of a substantial physical injury. Brief of Appellants at 73-76, *Silkwood*. Plaintiff contended that Silkwood had sustained physical injuries, even if only at the cellular level, and mental anguish resulted from Silkwood's knowledge of such injuries. *Id.* at 75-79.

40. The argument was that Silkwood had removed plutonium in an effort to discredit and embarrass Kerr-McGee. *Id.* at 72.

41. A finding that Silkwood had intentionally removed plutonium would have absolved Kerr-McGee from common law and workers' compensation liability. 667 F.2d at 919.

The jury found that Silkwood had not intentionally removed plutonium from the plant,[42] although a formal instruction on whether the injuries were sustained in the course of employment was not submitted for jury consideration.[43] The district court did instruct the jury that if it found that Silkwood had not intentionally removed plutonium, Kerr-McGee's participation in an ultrahazardous activity made it strictly liable for any injuries or damage which the activity caused.[44] The jury returned a verdict for compensatory damages totaling $505,000, of which $500,000 was awarded for Silkwood's personal injuries and $5,000 for the damage to her property from the November 7 contamination.

The district court also allowed the jury to determine whether Kerr-McGee had behaved in an intentional or reckless manner toward Silkwood, thereby making possible a verdict for punitive damages.[45] Kerr-McGee argued that since it had not violated any AEC regulation, it could not have behaved recklessly.[46] Nevertheless, the court instructed the jury that substantial compliance with regulations, although probative, was not necessarily conclusive on the issue of due care.[47] The jury returned an unprecedented $10,000,000 punitive damages verdict and the district court entered judgment, stating that such damages were not shown to be excessive.[48]

II. BACKGROUND

A. *Workers' Compensation*

At common law, an employee was required to prove negligence on the part of his employer in order to recover damages for personal injuries suffered on the job.[49] Even if he were able to show negligence, the employee might be faced with the employer's defenses of assumption of risk, contributory negligence, and the fellow-servant rule.[50] Consequently, recovery by injured employees was rare, often inadequate, and only available after prolonged and costly litigation.[51]

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42. 485 F. Supp. at 576.

43. It was the Court's determination that a formal workmen's compensation issue could not be presented to the jury without an involved dissertation on the nature and purpose of compensation laws, their difference from traditional common law tort claims, and the real possibility such an instruction would confuse the jury and thwart the process of justice. Actual submission was made to the jury by submission of the specific factual issue of whether Silkwood intentionally took plutonium to her apartment. . . . The evidence that Silkwood might have accidentally taken the plutonium home on her person or clothing was weak, speculative, and contradicted by virtually all defendants' own evidence. The Court could not properly submit a question with no evidentiary foundation to the jury. Nothing more was required to avoid the defense that compensation laws barred the instant claim.

Id. at 588.

44. *Id.* at 597 app.

45. *Id.* at 603 app.

46. *Id.* at 587.

47. *Id.* at 606-07 app.

48. *Id.* at 589-91.

49. W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1179 (6th ed. 1976) [hereinafter cited as TORTS].

50. *Id.*

51. *Id.*

The dismal failure of the common law to protect the injured worker prompted legislatures throughout the United States to enact workers' compensation laws.[52] Based on the theory that the cost of the employer's product should reflect the financial risk of employee injuries,[53] the hallmark of all workers' compensation laws is employer liability for work-related injury, regardless of fault.[54] The compromise achieved by workers' compensation statutes is that the employee is relieved of the burden of proving negligence and assured of compensation, while the employer is protected against unlimited common law liability by the statutorily prescribed compensation limits.[55]

Oklahoma's Workers' Compensation Act (Act) is typical of the legislation enacted in most states.[56] It requires an employer to pay compensation according to the schedules provided by statute for an employee's work-related disability or death, regardless of fault.[57] Exclusive employer liability is established under the Act, thereby barring any common law action for personal injury.[58] Even where statutory compensation in a particular case is grossly inadequate, the employee may not bring a common law suit for recovery of damages in excess of the compensation limits.[59]

The Oklahoma Workers' Compensation Act includes a provision which creates a rebuttable presumption that an injured employee is covered by the Act.[60] In construing this provision, the Oklahoma Supreme Court established that an injured employee can meet his burden of proof to show that the injury was work-related by presenting circumstantial evidence.[61]

In *Silkwood*, the question of whether this presumption of coverage by the Act may also be used to the advantage of the employer was presented.[62] Kerr-McGee argued that in asserting workers' compensation as a defense to the plaintiff's common law claim, it was entitled to the presumption of coverage by the Act.[63]

B. *Federal Preemption*

The doctrine of preemption is based on the supremacy clause of the

52. Riesenfeld, *Forty Years of American Workmen's Compensation*, 35 MINN. L. REV. 525, 527 (1951).

53. *See* TORTS, *supra* note 49, at 1180.

54. *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.10 (1972).

55. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971).

56. *See* A. LARSON, *supra* note 54, at § 1.10.

57. OKLA. STAT. ANN. tit. 85, § 11 (West 1970 & Supp. 1981-82).

58. *Id.* § 12.

59. *See, e.g.*, Smith v. Baker, 157 Okla. 155, 11 P.2d 132 (1932). *See also* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.20 (1972); W. PROSSER, *supra* note 55, at 531-32.

60. OKLA. STAT. ANN. tit. 85, § 27 (West 1970 & Supp. 1981-82).

61. *In re* May, 586 P.2d 738, 740-41 (Okla. 1978). *See generally* Wilcox Oil Co. v. Fuqua, 203 Okla. 391, 224 P.2d 255 (1950) (holding that even an unexplained or unwitnessed injury is compensable under the statute if there is a "strong possibility" that the injury is work-related).

62. Related issues were addressed in Harter Concrete Prod., Inc. v. Harris, 592 P.2d 526, 528 (Okla. 1979) (noting reciprocity of not requiring employee to prove negligence and limiting liability of employer) and Fox v. Dunning, 124 Okla. 228, 255 P. 582 (1927) (stating that the Act was reciprocal in eliminating common law right).

63. Brief of Appellants at 38-41, *Silkwood*.

United States Constitution.[64] Under the doctrine, in order to effectuate total congressional control over a particular field, state regulation that conflicts with federal legislation is rendered void.[65] Federal intent to occupy a field is strictly scrutinized.[66] Federal supremacy is upheld where Congress has explicitly prohibited state regulation or where intent to preempt can be inferred from either the nature or subject matter of the federal regulatory scheme. State interests are otherwise protected by a presumption of validity of state law.[67]

Tort remedies represent a field historically left to state authority; therefore, congressional intent to preempt state tort law is not readily inferred.[68] Prior to the enactment of federal legislation governing nuclear accidents, all questions of tort liability for radiation injuries were determined according to the common law of the state. In 1957, Congress adopted the Price-Anderson Act (Act),[69] a response to the finding of the Joint Committee on Atomic Energy that "the problem of possible liability in connection with the operation of reactors [was] a major deterrent to further industrial participation in the [development of nuclear power]."[70]

One of the purposes of the Act was to assure that compensation would be made to claimants injured in a "nuclear incident."[71] The Act required all licensees of the AEC to purchase the maximum amount of privately available insurance. It also established a governmental indemnity fund to provide compensation in the event that claims exceeded the amount of the private insurance maximum liability.[72] Federal interference, according to

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64. The supremacy clause states that "[t]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

65. *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

A determination of preemption is not a matter governed by clear-cut rules. "The fact that Congress has spoken in an area of state regulation does not necessarily preclude all state regulation; and the fact that there is no explicit federal-state conflict or no explicit congressional statement of intent to bar state authority does not bar a finding of preemption." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 344 (10th ed. 1980).

66. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975).

67. "[T]he presumption operates in favor of the validity of the state law; courts are not to seek out conflicts between state and federal regulation where none clearly exist." Pacific Legal Found. v. State Energy Resources Comm'n, 659 F.2d 903, 919 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2959 (1982).

68. C. ANTIEAU, MODERN CONSTITUTIONAL LAW 50 (1969).

69. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.).

70. S. REP. NO. 296, 85th Cong., 1st Sess. 9, *reprinted in* 1957 U.S. CODE CONG. & AD. NEWS 1803.

71. A "nuclear incident" is defined as:

> [a]ny occurrence, including an extraordinary nuclear occurrence, within the United States causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q) (1976). "Extraordinary nuclear occurrence" is defined *infra* at note 74.

72. 42 U.S.C. § 2210(a) (1976 & Supp. IV 1980).

the Senate Report, would be limited to situations where claims exceeded private insurance coverage. Payments would then be prorated at the federal level with proceeds available in the indemnity fund rather than issued through state courts.[73] The original Price-Anderson Act apparently contemplated that the liability standard (i.e., negligence or strict liability) for all nuclear incidents was to be determined by the individual state.

The Act was amended in 1966 to provide for the imposition of strict liability in cases involving an "extraordinary nuclear occurrence" (ENO).[74] In the event of an ENO, Congress explicitly stated that a strict liability standard should apply, thus relieving ENO victims of the burden of proving negligence in those states adhering to a negligence standard.[75] In those catastrophic situations, recovery may be limited to compensatory damages.[76]

The 1966 amendment left intact the authority of the individual states to set liability standards for nuclear incidents below the ENO level.[77] However, it is not specified in the Price-Anderson Act, nor is it apparent in its legislative history, that recovery in suits involving incidents below the ENO level is limited to compensatory damages. A congressional intention for state statutory and common law decision-making may thus be inferred except in catastrophic cases where liability would exceed the amount of available private insurance funds.

Both the Eighth and Ninth Circuit Courts of Appeals have dealt with the preemption issue in the context of express state regulation of nuclear facilities.[78] In those cases, specific state provisions regulating nuclear power plants were challenged as being in conflict with federal regulations. In *North-*

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73. [T]here is no interference with State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the Federal interference is limited to the prohibition of making payments through that state's courts and to prorating the proceeds available.

S. REP. NO. 296, *supra* note 70 at 1810.

74. Act of Oct. 13, 1966, Pub. L. No. 89-645, 80 Stat. 891 (codified as amended at 42 U.S.C. § 2014(j) (1976)).

The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the [AEC] determines to be substantial, and which . . . will probably result in substantial damages to persons offsite or property offsite.

42 U.S.C. § 2210(j) (1976).

75. "The question whether courts should apply legal principles akin to those of strict liability in the event of a serious nuclear incident seems to the committee to be free from dispute." S. REP. NO. 1605, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3209.

76. During the 1965 hearings, the Joint Committee on Atomic Energy recommended that, at the point where public liability exceeds the limit of liability, the federal judiciary prorate the proceeds available. Presumably, this would limit recovery to compensatory damages. *See id.* at 3216-17.

77. *See* S. REP. NO. 1605, *supra* note 75, at 3201. *See generally* Keyes & Howarth, *Approaches to Liability for Remote Causes: The Low-Level Radiation Example*, 56 IOWA L. REV. 531 (1971); Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act*, 6 RUT.-CAM. L. REV. 360 (1974); Comment, *The Irradiated Plaintiff: Tort Recovery Outside Price-Anderson*, 6 ENVTL. L. REV. 859 (1976).

78. *See* Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2959 (1982); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

ern States Power Co. v. Minnesota,[79] the Eighth Circuit held that a Minnesota statute which intended to regulate levels of radioactive effluents was preempted by a federal statute. The AEC was found to have exclusive authority to regulate construction and operation of nuclear power plants including authority to impose standards for radioactive discharge.[80]

In *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*,[81] a more recent decision, the Ninth Circuit noted that although a state law must be held invalid to the extent that it actually conflicts with federal law, the presumption operates in favor of the validity of state law.[82] Neither of the two California statutes at issue regulated an area explicitly reserved to the AEC, and neither impeded congressional goals; therefore, those state laws were not preempted.[83]

The Tenth Circuit was faced with a different question of preemption in *Silkwood*. State tort law rather than specific legislation was the arena of the asserted conflict. There was no statutory provision which conflicted with federal nuclear regulations, but the court found the common law interfered.

III. THE TENTH CIRCUIT DECISION

A. *The Presumption of Coverage by Workers' Compensation Is Reciprocal*

The Tenth Circuit majority in *Silkwood* adopted what the district court stated "would constitute a new horizon in the traditional field of tort litigation,"[84] i.e., that an employer asserting workers' compensation as a defense to an employee's common law action is entitled to the protection of the presumption that the employee's injury occurred on the job.[85] Traditionally, the presumption of job-relatedness has been asserted by the employee so that he would be assured of at least a limited compensation for personal injuries without the requisite proof of employer fault.[86] The Tenth Circuit ruling allows an employer to assert the presumption defensively to limit its potential liability. To recover more than the limited compensation under the Act, an employee must rebut the presumption with sufficient evidence that the injuries were not sustained on the job.[87] Writing for the majority, Judge Logan reasoned that the purpose of a liberal construction which supports jurisdiction of the industrial court is both to ensure the injured employee's protection under the Act and to protect the employer from excessive judgments.[88]

Citing *Oklahoma Steel Casting Co. v. Banks*,[89] the court acknowledged that

79. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).
80. 447 F.2d at 1154.
81. 659 F.2d 903 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2959 (1982).
82. 659 F.2d at 919.
83. *Id.* at 928.
84. 485 F. Supp. at 588.
85. 667 F.2d at 917.
86. *See, e.g., In re* May, 586 P.2d 738, 740 (Okla. 1978); City of Nichols Hills v. Hill, 534 P.2d 931, 934 (Okla. 1975). *See* A. LARSON, *supra* note 54 and accompanying text.
87. *See Silkwood*, 667 F.2d at 918-19.
88. *Id.* at 916.
89. 181 Okla. 503, 74 P.2d 1168 (1937).

workers' compensation is an affirmative defense which the employer has the burden of proving.[90] The majority determined, however, that the method for proving that an injury arose out of employment would be the same whether offered by an employee or employer.[91] Therefore, circumstantial evidence which supports a reasonable inference of coverage is sufficient to sustain the burden of an employee attempting to prove a claim *or* an employer seeking to bar an action at common law.[92]

Admitting that the circumstantial evidence as to the time, place, and manner of Silkwood's contaminations was "thin at best,"[93] Judge Logan emphasized that a finding other than that the exposures were job-related was not supported by the evidence. The majority inferred that the contaminations occurred within the course of employment and found the plaintiff had not produced substantial evidence to rebut that inference.[94] Kerr-McGee thus established a prima facie case that the injury was within the protection of the workers' compensation law.[95] The Tenth Circuit therefore reversed the $500,000 personal injury judgment and remanded the case for determination under the Workers' Compensation Act.

B. *Strict Liability for Property Damages*

Because the Oklahoma workers' compensation statute applies only to personal injuries, the issue of compensation for the destruction of Silkwood's contaminated property was given separate consideration.[96] The court considered whether the federal regulatory scheme for the nuclear industry preempted the application of state tort law for Silkwood's property damage.[97] The court determined that, in this case, the imposition of the state standard of strict liability for the property damage would not constitute a significant interference with federal control of the Kerr-McGee plant.[98] Noting that provisions in the Price-Anderson Act for victim compensation only apply to extraordinary nuclear occurrences, the court concluded that liability for nuclear incidents below the ENO level is to be determined by state tort law.[99]

Accordingly, the Tenth Circuit court found that Oklahoma's law of strict liability for abnormally dangerous activities was applicable to off-site plutonium contamination.[100] Thus, the court affirmed the $5,000 judgment for Silkwood's property damage.

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90. 667 F.2d at 917.
91. *Id.*
92. *Id.*
93. *Id.* at 918.
94. *Id.* at 918-19.
95. *Id.* at 919.
96. *Id.* at 920; *see* OKLA. STAT. ANN. tit. 85, § 11 (West 1970 & Supp. 1981-82).
97. 667 F.2d at 920.
98. *Id.*
99. *Id.* at 921.
100. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 519 comment (e) (1977) (strict liability applies to "harm that is within the scope of the abnormal risk that is the basis of the liability")).

C. *Punitive Damages Prohibited*

The court acknowledged that the Price-Anderson Act and its legislative history are silent as to the types of damages a state may impose for injuries below the ENO level.[101] The court reasoned, however, that the deterrent or regulatory effect of punitive damages would compete substantially with federal control over the nuclear industry.[102] Judge Logan acknowledged that where a state's laws affect interests as vital to its citizens as those in *Silkwood*, a strong presumption against preemption would seem to be warranted.[103] Nevertheless, the court found that federal law preempted the imposition of punitive damages because the nuclear industry was initially developed by the federal government, is closely linked with national security, and is extensively regulated by a federal agency.[104] A judicial award of punitive damages, Judge Logan concluded, is no less intrusive to the federal scheme than direct legislative acts of the state.[105]

The Tenth Circuit consequently reversed the $10,000,000 punitive damages judgment. Judge Logan emphasized that a violation of AEC regulations by Kerr-McGee would not have resulted in a different decision: federal preemption prohibits punitive damage awards regardless of a finding of an actual violation of AEC regulations.[106] The court reasoned that the power of the AEC to license, investigate, enjoin, and seek civil and criminal sanctions where it regards practices as improper, precludes judicial imposition of punishment.[107]

IV. ANALYSIS OF THE COURT'S RATIONALE

A. *Applicability of Workers' Compensation Law*

1. The Reciprocal Presumption

The majority determined that since a statutory presumption operates in favor of workers' compensation coverage when an employee makes a claim for workers' compensation, a reciprocal presumption operates in favor of the employer asserting workers' compensation coverage as a defense to an employee's common law suit.[108] This reciprocal presumption thus requires an employee bringing a common law claim to rebut by "substantial evidence" the existence of his employer's affirmative defense of compensation coverage.[109] A question which the court failed to answer, however, is what consti-

101. *Id.* at 922.

102. The court noted that "punitive damages are 'awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.' " *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)). *See also* W. PROSSER, *supra* note 55, at 9.

103. 667 F.2d at 923.

104. *Id. See* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *see also* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 379-81 (1978).

105. 667 F.2d at 923.

106. *Id.*

107. *Id.*

108. *Id.* at 917.

109. *See* OKLA. STAT. ANN. tit. 85, § 27 (West 1970 & Supp. 1981-82).

tutes "substantial evidence." Interpreted from a traditional perspective, this requirement means evidence from which reasonable men could infer that the injury was not job-related. Arguably, the plaintiff in *Silkwood* did produce such circumstantial evidence.[110] Nevertheless, the Tenth Circuit concluded that the plaintiff had failed to rebut the defense of compensation coverage.[111] This conclusion suggests that an employee must produce direct evidence to rebut the presumption of job-relatedness.

2. Existence of a Jury Question

The court's analysis results in legal symmetry in that the presumption of compensation coverage is available to both the employer and the employee. However, where inferences to be drawn from facts may lead to reasonable differences of opinion, the issue of the applicability of workers' compensation is a jury question.[112] As Judge Doyle pointed out in his dissent,[113] investigations by Kerr-McGee and the AEC, expert testimony, and circumstantial evidence were all essentially inconclusive and susceptible of reasonable divergent inferences.[114] The question of whether Silkwood's injuries arose out of and in the course of her employment therefore was a factual issue which should have been submitted to the jury for resolution in accordance with prior Oklahoma law.

Another weakness of the court's decision is the possibility that the *Silkwood* jury awarded punitive damages based on a finding of intentional conduct on the part of Kerr-McGee, thus rendering workers' compensation inapplicable. Previous Oklahoma cases have held that where an employee is intentionally or willfully injured by his employer, he may sue the employer as if the workers' compensation law did not exist.[115] The district court's instruction in *Silkwood* that punitive damages could be awarded on the basis of either actual malice or inferred malice allowed the jury to award punitive damages on a finding of either intentional or reckless conduct.[116] If the jury did base its award on a finding of intentional conduct, the workers' compensation statute would not apply. Because of this possibility, the question of reckless or intentional conduct on the part of Kerr-McGee should have been remanded for a jury determination.

3. Legislative Intent

The holding that presumption of workers' compensation coverage is reciprocal may confound legislative intent. In cases where there is no question

110. As Judge Doyle noted, not only was there "substantial evidence showing that contamination occurred off the premises. . . . [but a] good deal of evidence was offered which was designed to show that Kerr-McGee had a motive for intentionally exposing [Silkwood] to contamination." 667 F.2d at 925 (Doyle, J., dissenting).

111. 667 F.2d at 919.

112. This issue was previously determined by the Oklahoma Supreme Court in Flick v. Crouch, 434 P.2d 256, 260-61 (Okla. 1967).

113. 667 F.2d at 923-25 (Doyle, J., dissenting).

114. *Id.* at 925.

115. *See, e.g.*, Hull v. Wolfe, 393 P.2d 491, 493 (Okla. 1964); Roberts v. Barclay, 369 P.2d 808, 809 (Okla. 1962).

116. 485 F. Supp. at 603 app.

whether an employee's injuries were job-related and no extenuating circumstances (e.g., intentional act of employer), it is consistent with the intent of workers' compensation law to limit the employer's liability to the statutory maximum. In cases such as *Silkwood*, however, where there is a reasonable doubt that the injuries were job-related, a court's denial of the plaintiff's right to common law damages is inconsistent with the purpose of workers' compensation laws. The overriding legislative intent of such laws is to protect the injured employee, not to provide a defense for the negligent tortfeasor.[117]

B. *Federal Preemption*

1. Property Damages

The Tenth Circuit's disposition of the *Silkwood* case creates new law on the issue of federal preemption in the nuclear regulatory field. The court determined that in this case the state law which allowed awards for property damage did not constitute an unreasonable intrusion into the federal nuclear regulatory scheme.[118] The opinion suggests that in determining awards for property damages in the nuclear tort area, courts must consider the issue of federal preemption on a case-by-case basis, even where the nuclear incident is below the ENO level. Such a position seems contrary to the apparent congressional intent to leave the liability determination to the states. By requiring courts to decide on an *ad hoc* basis whether imposition of compensatory property damages conflicts with federal control, the state's authority to develop its own tort law in this area is rendered virtually impotent.

2. Punitive Damages

The court determined that in all cases a punitive damages award against a federally regulated nuclear facility constituted an unacceptable intrusion and thus was prohibited.[119] This interpretation imposes an unnecessary infringement on state decision-making for injuries below the ENO level. More importantly, the holding carves out an unwarranted, indeed dangerous, exception to the preemption doctrine for the nuclear industry.

The court referred to an assumption implicit in the Price-Anderson Act that only compensatory damages will be awarded in ENO cases.[120] The court failed, however, to distinguish the *Silkwood* situation, where one individual was contaminated, from a catastrophic incident. The Price-Anderson Act's implicit limitation in ENO cases represents a congressional intention to provide the maximum recovery for the maximum number of people in the event of a nuclear catastrophe. In a major nuclear accident, awarding punitive damages to very few people could preclude others from any recovery whatsoever. Awarding reasonable punitive damages to an individual plaintiff in an isolated case, however, would probably not prevent subsequent re-

117. Baldwin v. Big X Drilling Co., 322 P.2d 647, 649 (Okla. 1958). *See also* Riesenfeld, *supra* note 52, at 527 and accompanying text.

118. 667 F.2d at 920.

119. *Id.* at 923.

120. *Id.* at 922. *See supra* note 76 and accompanying text.

covery by other plaintiffs nor would it impede compliance with federal regulations.

The court reasoned that imposition of punitive damages indirectly regulates the industry and must be prohibited in deference to federal occupation of the field.[121] Such indirect regulation of the industry ostensibly sets a standard which conflicts with federal standards. Under such an assumption, states that require proof of negligence for recovery in below-ENO-level cases may be compelled to adopt the federal regulations as a standard of care in order to avoid interfering with federal control. Only if the federal regulations were violated, could the defendant be found to have breached the standard of care. This result is contrary to legislative intent. Congress explicitly provided that states could adopt a strict liability standard for cases below the ENO level.[122] No proof of negligence or violation of a federal regulation is required for recovery under a strict liability standard. By allowing states to adopt either a strict liability or a negligence standard, Congress presumably intended that states would determine their own standards of care for noncatastrophic cases. State imposition of punitive damages should not be prohibited because of a concern for the possible regulatory or standard-setting effect of the damages. Indeed, Congress appears to have contemplated state involvement in the area by allowing states to choose their own liability standard.

The Tenth Circuit's preemption holding in *Silkwood* does not follow logically from the holdings in *Northern States Power Co. v. Minnesota*[123] and *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*.[124] In both *Northern States* and *Pacific Legal Foundation* the federal appellate courts were examining state laws which directly regulated the nuclear industry. In *Northern States* the Eighth Circuit found that the AEC's authority to regulate construction and operation included authority to impose discharge standards and thus preempted the state law.[125] In *Pacific Legal Foundation*, however, the Ninth Circuit refused to find preemption where the specific state laws at issue did not conflict with specific sections of the federal statute.[126] In *Silkwood*, the Tenth Circuit was not dealing with a specific state statute and yet the court found preemption even though 1) tort law is traditionally a state-occupied field,[127] 2) there is a presumption of validity of state law,[128] and 3) punitive damages awards only speculatively regulate the industry.[129]

The court's willingness to abdicate the states' authority to punish the nuclear tortfeasor to the AEC seems especially unjust in a case such as *Silkwood*. Because no regulations were shown to have been violated, AEC

121. 667 F.2d at 922-23.
122. *See supra* note 77 and accompanying text.
123. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).
124. 659 F.2d 903 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2959 (1982).
125. 447 F.2d at 1154.
126. 659 F.2d at 928.
127. *See supra* note 67 and accompanying text.
128. *Pacific Legal Found.*, 659 F.2d at 919.
129. Such an award may not have the contemplated deterrent effect. In the absence of a deterrent effect, there is no resulting regulation of the industry, and preemption is inapplicable.

"punishment" was not forthcoming; yet an individual suffered irreparable injuries and personal property was totally destroyed. Moreover, the court's prohibition of punitive damages regardless of compliance or non-compliance with AEC regulations[130] may produce some unexpected results. Under such a prohibition, even if a regulation were purposely and maliciously violated, punitive damages would not be allowed. In the case of an obvious violation, the AEC would intervene and impose sanctions. However, if no regulation were shown to have been violated, yet the defendant's behavior was willful and malicious, punitive damages would be unavailable. Such a result seems contrary to well-established expectations of social policy.

CONCLUSION

The Tenth Circuit's resolution of the workers' compensation issue presented in *Silkwood* may have far-reaching implications for future employee-litigants asserting common law claims against their employers. Unless the employee is able to produce evidence sufficient to rebut the presumption that his injury was not job-related, his employer is likely to escape all but statutory liability. Where only circumstantial evidence exists, the employee will have difficulty sustaining the burden of proof; indeed, a lack of direct evidence may preclude success in a common law action. Since this result seems to recreate the rather oppressive aspects of the common law scheme in which the plaintiff's recovery was inadequate and rare,[131] state legislatures may want to restructure their current workers' compensation systems to ameliorate this effect. Such reform should entitle the plaintiff to a jury determination of whether an injury was sustained in the course of employment.

Implications of the court's preemption holding may likewise be far-reaching. In an era of profound anti-nuclear sentiment and resistance to federal interference in local concerns, one could expect the *Silkwood* decision to be a catalyst for congressional reaction. It is likely that states would welcome explicit congressional reassurance that nuclear accidents below the ENO level are subject to state law. Indeed, the lack of that assurance may be a disincentive to the nuclear industry to exercise greater care than the minimum standards prescribed by federal regulations.

Cheryl Scott

130. 667 F.2d at 923.

131. *See supra* note 51 and accompanying text.