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ARE WORKMEN'S COMPENSATION PROCEEDINGS  
PRECLUDED IN NEBRASKA WHERE PRIOR  
PAYMENTS WERE RECEIVED UNDER  
ANOTHER STATE'S ACT?

Ronald L. Sluyter\*

I. INTRODUCTION

The question whether an employee is precluded from bringing a workmen's compensation action in one state, because he has previously received payments under another state's statute arises where an injury or an employment relationship has ties with two or more states. This is a common problem because of existing differences in the various state compensation acts, and it is intensified because of increasing multi-state business activities.<sup>1</sup> The problem most frequently presented to the courts is whether the forum state will award second payments under its act when it authorizes a greater amount of compensation than the first state. Other facets of the problem have also been presented to the courts. For example, what happens when the employee has been denied compensation in the prior state;<sup>2</sup> or when statutory differences exist relating to the employee's rights to bring actions outside the compensation act?<sup>3</sup> The current importance of the question of applicability of Nebraska's act after prior payments have been received is pointed up by the following facts. The effect of receiving prior payments

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<sup>1</sup> 2 LARSON, WORKMEN'S COMPENSATION LAW § 84.10 (1952).

<sup>2</sup> *La Rue v. El Paso Natural Gas Co.*, 57 N.M. 93, 254 P.2d 1059 (1953); see 2 LARSON, WORKMEN'S COMPENSATION LAW 365, n. 23 (1952).

<sup>3</sup> The constitution may allow the forum state to grant an employee supplemental recovery outside its compensation act though the employee has recovered compensation payments under another state's act. *Carroll v. Lanza*, 349 U.S. 408 (1955). Generally, however, the courts do not allow such recovery. The situation is distinguished from the supplemental compensation award because of different choice of law rules. Generally, in the common-law tort action, the local law of the place of injury is applied. Thus, if the local law of the state of injury does not create a cause of action, the forum court will generally not allow the action although authorized by its compensation act. *Johnson v. Catlett*, 246 N.C. 341, 98 S.E.2d 458 (1957); *Jonathan Woodner Co. v. Mather*, 210 F.2d 868 (D.C. Cir. 1954); *Tucker v. Texas Co.*, 203 F.2d 918 (5th Cir. 1953); *Willingham v. Eastern Airlines*, 199 F.2d 623 (2d Cir. 1952); *McLendon v. Kissik*, 363 Mo. 264, 250 S.W.2d 489 (1952).

under another state's act is not specifically provided for in Nebraska's act. Nor has the effect of receiving prior payments been decided by the Nebraska Supreme Court. The decisions of other courts are, to some extent, in conflict; and the practice of the Nebraska Workmen's Compensation Court is contrary to the result of recent cases decided by other state courts.

## II. CONFLICTS OF LAW AND WORKMEN'S COMPENSATION

Several differences exist in the area of workmen's compensation as compared to other types of personal injury actions. These differences exist in the choice of law rules as well as full faith and credit rules applicable to statutes and awards. In a common law personal injury action, the forum court often applies the local substantive law of some other state.<sup>4</sup> On the other hand, workmen's compensation acts usually grant the forum court jurisdiction to apply the provisions of its local statute.<sup>5</sup> In certain areas of the law, where states have created statutory rights of action, the United States Supreme Court has required other states to recognize and enforce the rights created by the foreign state's statute.<sup>6</sup> In the area of workmen's compensation, however, two states may have concurrent jurisdiction to apply the provisions of their local statutes without denying full faith and credit to the acts of other states which may also have jurisdiction to compensate for the injury.<sup>7</sup>

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<sup>4</sup> For example, in common-law tort cases the general rule is that the local law of the place of injury controls creation of liability. RESTATEMENT, CONFLICT OF LAWS § 378 (1934); GOODRICH, CONFLICT OF LAWS § 92 (1949).

<sup>5</sup> *E.g.*, The Nebraska Workmen's Compensation Court "shall have authority to administer and enforce all of the provisions of the Nebraska Workmen's Compensation Act." NEB. REV. STAT. § 48-152 (Reissue 1960). RESTATEMENT, CONFLICT OF LAWS, Introductory Note 485 (1934); Note, 11 MINN. L. REV. 329 (1927).

<sup>6</sup> See, *e.g.*, wrongful death acts. See first *Nat'l Bank of Chicago v. United Air Lines*, 343 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951).

<sup>7</sup> There are two distinct problems here. First, certain limitations are imposed by the federal constitution; and second, the self-imposed state limitations on jurisdiction within those constitutional limits. Constitutional problems include both due process and full faith and credit questions. See *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932). The problems and cases are discussed in the following: GOODRICH, CONFLICT OF LAWS § 100 (1949); Notes, 34 ILL. L. REV. 226 (1939), 39 COLUM. L. REV. 1024 (1939). See also *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947). On the limits of state self-imposed jurisdictional requirements see 2 LARSON, *op. cit. supra* note 2, §§ 87.00-15; *id.* at 520; Annot., 90 A.L.R. 119 (1934).

The question of whether Nebraska's compensation act will apply

Similarly, differences exist in the effect of an award in a common-law personal injury action as compared to an award under a workman's compensation statute. Clearly, in the ordinary personal injury case, once the extent of liability has been determined in a court of competent jurisdiction the parties to that judgment are

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where some elements of the employment occur in other states has received considerable attention. See *Notes*, 3 *NEB. L. BULL.* 295 (1924); 12 *NEB. L. BULL.* 275 (1932); 17 *NEB. L. BULL.* 386 (1938). The legislature did anticipate application of the Nebraska act to some injuries occurring outside the state, *NEB. REV. STAT.* § 48-186 (Reissue 1960); but did not specifically provide when the act should apply to such injuries. Prior to 1957, Nebraska's statute applied "to every employer in this state." *Neb. Laws* 1945, ch. 111, § 1 at 356. The court utilized a test of whether the injury was incident to industry being carried on in Nebraska. The factors which the court has considered, in order of importance, are: the employer's principal place of business, business headquarters or place of residence, the state where the employment contract was entered into, and the employee's place of residence. No distinction was made whether the injury occurred in Nebraska or outside the state. However, if the injury occurred in Nebraska, the court easily found that the employer fell within the statutory definition, and the burden was then on the employer to prove the absence of Nebraska industry if application of the Nebraska act was to be avoided. *Solomon v. A. W. Farny, Inc.*, 130 *Neb.* 484, 265 *N.W.* 724 (1936); *Esau v. Smith Bros.*, 124 *Neb.* 217, 241 *N.W.* 230 (1933); *Radford v. Smith Bros.*, 123 *Neb.* 13, 241 *N.W.* 753 (1932). Where the injury occurred outside Nebraska, the court would apply the Nebraska act: *McRae v. Ulrich*, 147 *Neb.* 214, 22 *N.W.* 2d 697 (1946); *Penwell v. Anderson*, 125 *Neb.* 449, 250 *N.W.* 665 (1933); *Stone v. Thompson*, 124 *Neb.* 181, 245 *N.W.* 600 (1932); *Skelly Oil Co. v. Gaugenbaugh*, 119 *Neb.* 698, 230 *N.W.* 688 (1930). However, the court was more hesitant to apply Nebraska's act to out-of-state injuries, and the burden was upon the employee to show that his injury was incident to Nebraska industry: *Rigg v. Atlantic, Pac. & Gulf Oil Co.*, 129 *Neb.* 412, 261 *N.W.* 900 (1935); *Watts v. Long*, 116 *Neb.* 656, 218 *N.W.* 410 (1928).

In 1957, section 48-106 of the Nebraska statutes was amended and became applicable "to every employer in this state, including non-resident employers performing work in the State." Under the existing provision, where the injury occurs in Nebraska, apparently this element alone is sufficient to cause the Nebraska act to apply. *Rapp v. Hale*, 170 *Neb.* 620, 103 *N.W.* 2d 815 (1960). The question still remains whether the 1957 amendment changes the situation where the injury occurs outside Nebraska. The purpose of the amendment is to do away with any discrimination between resident and non-resident employers. See *LABOR AND PUBLIC WELFARE COMMITTEE REPORT ON L.B. 69*, (January 16, 1957). Before Nebraska can apply its act, however, it must have some substantial interest in allowing compensation. Thus, it seems that in the future a distinction will have to be drawn between in-state and out-state injuries. Where the injury occurs outside of Nebraska, the factors of the employer's principal place of business or residence, the state where the employment contract was entered into, the residence of the employee and the location of the industry will continue to be important in determining whether the Nebraska act applies.

bound both as to existence and to extent of liability.<sup>8</sup> Furthermore, the federal constitution requires that such proceedings be given full faith and credit in every other state.<sup>9</sup> In the workmen's compensation area, however, the existence of an award in one state having competent jurisdiction does not necessarily preclude a second state from granting a higher award if credit is given to the employer for amounts previously paid under the prior award.<sup>10</sup> Many states frequently allow such supplemental awards.<sup>11</sup>

<sup>8</sup> RESTATEMENT, JUDGEMENTS § 1 (1942); GOODRICH, CONFLICT OF LAWS § 206 (1949).

<sup>9</sup> U.S. CONST. art. IV, § 1; RESTATEMENT, CONFLICT OF LAWS § 446 (1934); GOODRICH, CONFLICT OF LAWS § 208 (1949).

<sup>10</sup> The early state rule was that supplemental awards were often granted by the forum state after giving credit for the amount of payments previously made by the employer under another state's act. See RESTATEMENT, CONFLICT OF LAWS § 403 (1934); Annot., 101 A.L.R. 1445 (1936). It then appeared that the Supreme Court would impose a constitutional rule that full faith and credit had to be given in the later forum state to a prior award of another state having jurisdiction: *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943). However, four years later, the Supreme Court restricted the *Magnolia* rule to its particular facts, and allowed a state to give a supplemental recovery after giving credit to payments made under the prior award. *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947). Although in *McCartin* the Court did not expressly overrule *Magnolia*, many writers have interpreted this to be the practical effect. See *Bowers v. American Bridge Co.*, 43 N.J. Super. 48, 64, 127 A.2d 580, 589 (App. Div. 1956), *aff'd*, 24 N.J. 390, 132 A.2d 28 (1957). Several authorities are collected in 2 LARSON, WORKMEN'S COMPENSATION LAW 360, n. 11 (1952). See also GOODRICH, CONFLICT OF LAWS § 292 (1949).

<sup>11</sup> An attempt has been made to examine all the cases deciding this question since *McCartin* was decided in 1947. The following cases specifically held that a supplemental award could be made to the employee though prior payments had been received under an award of another state. None of these cases, however, imposed double liability on the employer. *Industrial Indem. Exch. v. Industrial Acc. Comm'n*, 80 Cal. App. 2d 480, 182 P.2d 309 (1st Dist. Ct. App. 1947); *In re Laviorie*, 334 Mass. 403, 135 N.E.2d 750 (1956); *Cline v. Byrne Doors*, 324 Mich. 540, 37 N.W.2d 630 (1949); *Sorenson v. Standard Constr. Co.*, 238 Minn. 68, 55 N.W.2d 630 (1952); *Cook v. Minneapolis Bridge Constr. Co.*, 231 Minn. 433, 43 N.W.2d 792 (1950); *Hudson v. Kingston Contracting Co.*, 58 N.J. Super. 455, 156 A.2d 491 (Mercer County Ct. 1959); *Bowers v. American Bridge Co.*, 43 N.J. Super. 48, 127 A.2d 580 (App. Div. 1956); *Gehring v. Gehring Laces*, 286 App. Div. 382, 143 N.Y.S.2d 17 (3d Dep't 1955); *Gehring v. Nottingham Lace Works, Inc.*, 22 R.I. 190, 106 A.2d 923 (1954); *Standard Acc. Ins. Co. v. Skidmore*, 222 S.W.2d 344 (Tex. Civ. App. 1949); *Spietz v. Industrial Comm'n*, 251 Wis. 168, 28 N.W.2d 354 (1947); *cf. Buccheri v. Montgomery Ward & Co.*, 19 N.J. 594, 118 A.2d 21 (1955). Very few cases decided since 1947 have been found in which the supplemental award was not allowed. *Gasch v. Britton*, 202 F.2d 356 (D.C. Cir. 1953); *Bolton v. O'Conner*, 114 F. Supp. 273 (S.D. Miss. 1953). Cases prior to 1947 are collected Annot., *Award Under Workmen's Compensation Act*

Thus, assuming each state may weigh the conflicting policies and choose the circumstances under which it will or will not apply the provisions of its act where prior payments have been made under another state's act, let us examine Nebraska's policy. The Nebraska Workmen's Compensation Act, like those of a majority of other states, merely provides that its schedule of payments shall control. It is silent as to whether receipt of prior payments made under another state's act will affect the applicability of Nebraska's act.<sup>12</sup> Apparently the legislature has either not anticipated the problem or has left it for the courts to decide. The Nebraska Supreme Court, however, has not yet decided these issues.<sup>13</sup> In the absence of specific statutory or court direction the compensation court has established the following policies. First, the court has a policy of taking jurisdiction and granting supplemental payments under the Nebraska act even though the employee has received prior payments under another state's act, if such payments have been voluntary.<sup>14</sup> Of course, credit is given to the employer for the amount of any prior payments.<sup>15</sup> On the other hand, if the

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*as Bar to or Ground For Reduction of Claim Under Act of Another State*, 101 A.L.R. 1445 (1936); 150 A.L.R. 431 (1944); 169 A.L.R. 1185 (1947).

<sup>12</sup> Section 48-109 provides that if both employee and employer are subject to the Nebraska act, they are bound by its schedule of compensation. Sections 48-136 and 48-140 provide that no settlement shall be binding unless in accord with the provisions of the Nebraska act. There are a few states which specifically provide by statute that the local compensation act will not apply if another state has awarded compensation though the act will be applied in absence of a prior award. See 2 LARSON, WORKMEN'S COMPENSATION LAW 362 n.16 (1952).

<sup>13</sup> The question of whether the employee was precluded from recovery under Nebraska's act because of receipt of prior payments under the Iowa act was presented in *Rigg v. Atlantic, Pac. & Gulf Oil Co.*, 129 Neb. 412, 415, 261 N.W. 900, 902 (1935), but this case was decided on other grounds. The question was specifically left undecided by the court and the Nebraska court has not been called upon to decide this issue since the *Rigg* case.

<sup>14</sup> The word "voluntary", in the sense it is used here, must be taken to mean voluntarily complying with a legal obligation. Judge Butzel, concurring in *Cline v. Byrne Doors*, 324 Mich. 540, 37 N.W.2d 630 (1949) pointed out that it was doubtful that the employer ever makes the payments voluntarily. He merely complied with the law which required him to make certain payments. These payments were only voluntary in so far as they are made without a specific order and formal proceedings before the compensation court.

<sup>15</sup> All authorities agree that double liability should not be imposed upon the employer. However, there is a diversity of views on the question of whether there should ever be double recovery for an employee. Although some authorities would permit supplemental awards to the

prior payments have been received by reason of a lump sum settlement or a prior award, the compensation court will not take jurisdiction.<sup>16</sup> As to the compensation court's policy regarding the effect of prior voluntary payments, the cases from other jurisdictions are in accord with this result.<sup>17</sup> The policy of refusing jurisdiction in cases of a prior outstate award, however, is contrary to the majority of cases deciding the question since 1947 when the United States Supreme Court decided *Industrial of Wis. v. McCartin*.<sup>18</sup> The Court held that Wisconsin could make a supplemental award under its own compensation act although payments had been received under a prior Illinois award.

### III. THE NEBRASKA POSITION

The reasons given by the Nebraska compensation court for its refusal to take jurisdiction are as follows:

- (1) A contrary rule would allow the employee to "forum shop."
- (2) The principles of *res judicata* should be applied to prevent repeated and prolonged litigation in order to allow the employer to know when the employee's claim is fully satisfied.
- (3) The principles of comity and full faith and credit should be applied, recognizing and giving effect to the finality and ex-

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maximum amount recoverable under any applicable statute, they argue that no recovery should be allowed which exceeds the maximum single award. See 1 SCHNEIDER, *WORKMEN'S COMPENSATION* 470 (3d ed. 1941); *In re Mizarhi*, 320 Mass. 733, 71 N.E.2d 383 (1947). On the other hand, there is the view that the employee may have double recovery as long as any single employer is not subjected to double liability. See *Gehring v. Nottingham Lace Works*, 22 R.I. 190, 106 A.2d 923 (1954); *Gehring v. Gehring Laces*, 286 App. Div. 382, 143 N.Y.S.2d 17 (3d Dep't 1955). See also NEB. REV. STAT. § 48-130 (Reissue 1960) which provides ". . . nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided, be considered in fixing compensation under this act." See also *Lincoln v. Steffensmeyer*, 134 Neb. 613, 279 N.W. 272 (1938) (employee allowed to recover both fireman's pension and workmen's compensation).

<sup>16</sup> These policies were orally expressed to the writer by judges of the Nebraska Workmen's Compensation Court in a personal interview, August 1961.

<sup>17</sup> Although the question has not often been litigated, all the decided cases on this point are to the effect that voluntary payments made under one state's act will not bar claims subsequently made under the compensation act of another state. *Franklin v. Geo. P. Livermore, Inc.*, 58 N.M. 349, 270 P.2d 983 (1954). The other cases are collected in Annot., 8 A.L.R.2d 628 (1949).

<sup>18</sup> 330 U.S. 622 (1947).

clusiveness which the first state gives to the prior proceedings within its own borders.

- (4) The employee has elected to recover under the prior state's act, and he has waived his rights under Nebraska's act.
- (5) The compensation court has not received any directions from either the compensation act or the Nebraska Supreme Court contrary to the present policy.

On the other hand, those who advocate a result contrary to that applied by our compensation court present the following arguments:

- (1) There is no constitutional requirement that Nebraska always give the same effect of finality to the first award as the other state gives within its own borders.<sup>19</sup>
- (2) Nebraska may have substantial and important interests of its own in compensating the employee to the full extent provided by its act because the injured employee or his dependents may become a burden on Nebraska taxpayers, or Nebraska citizens may have debts due arising from medical care of the injured employee.<sup>20</sup>
- (3) Sufficient faith and credit is given to the prior award, and no double liability is imposed on the employer since full credit is given for any prior payments paid by the employer.<sup>21</sup>
- (4) The res judicata principles of bar and merger applicable in ordinary transitory personal injury actions should not be uniformly applied to the separate causes of action created and limited by the different local compensation acts of two separate states.<sup>22</sup>
- (5) The employer cannot complain when he is only held to his statutory duty, since one who conducts business in more than

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<sup>19</sup> *Bowers v. American Bridge Co.*, 43 N.J. Super. 48, 64, 127 A.2d 580, 589 (App. Div. 1956); Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 177 (1949); see note 10 *supra*.

<sup>20</sup> 2 LARSON, WORKMEN'S COMPENSATION LAW 365 (1952); Note, 23 MINN. L. REV. 866, 868 (1939).

<sup>21</sup> HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 42 (1944); Cook v. Minneapolis Bridge Constr. Co., 231 Minn. 433, 443, 43 N.W.2d 792, 798 (1950).

<sup>22</sup> *Ogino v. Black*, 278 App. Div. 146, 150, 104 N.Y.S.2d 82, 86 (1st Dep't 1951); Cheatham, *Res Judicata and the Full Faith and Credit Clause*, 44 COLUM. L. REV. 330, 344 (1944); Spietz v. Industrial Comm'n, 251 Wis. 168, 179, 28 N.W.2d 354, 359 (1947); Cline v. Byrne Doors, 324 Mich. 540, 549, 37 N.W.2d 630, 634 (1949).

one state must comply with the multi-state legal requirements that result.<sup>23</sup>

- (6) Frequently the employer is in an advantageous economic or legal position compared to the employee, and can control which state will take jurisdiction in the first proceeding. In the first instance, the employee may not be represented by counsel, he may be hospitalized, he may not know he can recover higher compensation in the second state, or he may not have the financial resources required to proceed in the other state.<sup>24</sup>

Furthermore, it seems that the policy as presently applied by our compensation court tends to defeat an important purpose of the workmen's compensation acts. One purpose of these acts is to provide prompt limited payments of income and medical expenses to the employee during his time of greatest need. Thus, the employer who willingly complies with his statutory duty should be encouraged. Under the present policy, however, the recalcitrant employer is favored. The compensation court will take jurisdiction and frequently award supplemental payments under Nebraska's act if prior payments have been voluntarily made; but it refuses to take jurisdiction where the employer makes payments only under an award.

#### IV. CONCLUSION

The issue is open in Nebraska, and one may ask the following question: How should the Nebraska Supreme Court, if called upon, decide the question of whether jurisdiction under Nebraska's compensation act is affected by prior payments made under an award of another state?

In light of the authorities, the reasonableness of a rule which distinguishes between taking jurisdiction where payments are made voluntarily, and not taking jurisdiction where payments are made under an award of another state is questionable. Although such a rule may claim the virtue of certainty, an attempt should be made to formulate a rule which more clearly accomplishes the purposes of the act and lacks the arbitrary features of such a distinction. The compensation court should accept jurisdiction in all cases covered by the Nebraska compensation act, whether or not there have been prior

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<sup>23</sup> Walkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern*, 92 U. OF PA. L. REV. 401, 410 (1944).

<sup>24</sup> 2 LARSON, *WORKMEN'S COMPENSATION LAW* 365 (1952); HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 41 (1944); Bowers v. American Bridge Co., 43 N.J. Super. 48, 127 A.2d 580 (App. Div. 1956).

outstate proceedings. This rule requires elimination of the existing practice which flatly rejects taking jurisdiction in every case where a prior outstate award exists. Such a rule, however, would not necessarily result in additional compensation being awarded under the Nebraska act. If it appears that the employee is attempting to recover more than the maximum compensation allowed by either state, compensation under the Nebraska act should not be awarded. Where there is a reasonable explanation why the proceedings were not first undertaken in Nebraska, or where Nebraska's interests will be best served by allowing compensation, the employee or his dependents should be awarded the full compensation authorized by the Nebraska act. The same result should also follow where claims which relate to the injury are held by Nebraska citizens, or where the injured employee or his dependents may otherwise burden Nebraska taxpayers.

The Nebraska legislature has provided that the Nebraska Compensation Court has jurisdiction solely to apply the provisions of the Nebraska compensation act.<sup>25</sup> The Nebraska legislature has provided that where the injury comes within the coverage of the Nebraska act, compensation shall be made according to the schedule provided in the Nebraska act.<sup>26</sup> Certainly, where the Nebraska act covers the injury (and since Nebraska citizens must bear the burden of caring for their injured) the schedule of compensation payments provided by the legislature should be controlling. The compensation schedule established by the legislature of some remote state should not bind the parties to compensation proceedings in Nebraska. The Nebraska legislature has allocated the cost of compensating for employment injuries between the tax moneys and the cost of doing business. Thus, the Nebraska compensation schedule should control where Nebraska interests require.

Certainly, the full faith and credit provision of the federal constitution does not distinguish between another state's statutes as compared with judicial proceedings under those statutes.<sup>27</sup> The United States Supreme Court has held that, if there are sufficient minimal contacts with the employment relationship, a second state may apply its local compensation act and is not bound by another state's statute or prior award. Thus it seems clear that Nebraska could, if it so desired, apply its own compensation schedule notwithstanding the existence of an award in another state.

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<sup>25</sup> NEB. REV. STAT. § 48-152 (Reissue 1960).

<sup>26</sup> NEB. REV. STAT. §§ 48-110 to 48-121 (Reissue 1960).

<sup>27</sup> U.S. CONST. art. IV, § 1.

Under the existing choice of law rules, it is true an employee may have his choice of forum.<sup>28</sup> No serious problem, however, is created by an award under a second state's compensation act. A second state, to apply its act, must have legislative jurisdiction, viz., certain minimum contacts with the employment relationship, so that in every case the second state would have taken jurisdiction if the action had been brought there in the first instance.<sup>29</sup> Thus, where credit is given for amounts paid under a prior award, the payments will not be greater by reason of a second award than if the employee had originally brought his claim in the jurisdiction most favorable to him.

Authorities have pointed out that, to some extent, different causes of action are involved in compensation proceedings in two separate states. Recovery is limited in scope and amount to the provisions of the particular local statute of the jurisdiction. In return the employee must generally forego other methods of compensation in that jurisdiction.<sup>30</sup> However, if he later proceeds under a second state's act, on a different local cause of action, it is said that *res judicata* does not bar a higher award under the second state action.<sup>31</sup> Compensation causes may be distinguished from the ordinary negligence case because, in the latter case, the plaintiff may sue the defendant and have his entire cause of action conclusively adjudicated in any jurisdiction where the defendant may be found. Furthermore, in tort actions the courts frequently apply another state's internal law when the state taking jurisdiction does not have substantial contacts with the substantive issue being decided. Generally, this does not occur in workmen's compensation cases. Nearly always the court which takes jurisdiction is bound by substantive rules of its own local law. In compensation cases where there are not sufficient contacts to justify application of the local act, the court will not take jurisdiction.<sup>32</sup>

When an employee has received payments under a compensation award, it is sometimes stated that he has impliedly waived his rights to proceed under a second state's act, or that he has impliedly elected to recover only under the prior act. It should be recognized, however, that such statements do not express reasons why the second state should not take jurisdiction. Statements of implied

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<sup>28</sup> Horovitz, *op. cit. supra* note 24, at 39.

<sup>29</sup> See, e.g., *Spietz v. Industrial Comm'n*, 251 Wis. 168, 28 N.W.2d 354 (1947).

<sup>30</sup> See, e.g., NEB. REV. STAT. § 48-111 (Reissue 1960).

<sup>31</sup> See note 22 *supra*.

<sup>32</sup> See notes 5 and 6 *supra*.

waiver or election are only another way of stating a result. They do not help decide which result is most desirable. Rather than speaking in terms of implied elections and waivers, our attention should be directed to factors such as the policy of the compensation act, the fairness to the parties, the certainty and the sensibleness of the rule.

It is clear that it is not unfair to employers to eliminate present practice distinguishing between voluntary payments and payments made under an award of another state. The fact that the employer is subject to another state's compensation act as well as Nebraska's act does not eliminate the requirement of complying with Nebraska's act. Although the employer is subject to more than one compensation act, he can know when his liability is extinguished. He is held responsible only to the highest compensation schedule of those few states which have sufficient minimal contacts to take jurisdiction and apply their schedule to the particular injury. In fact, it may be said that not to hold an employer fully accountable under the Nebraska act merely because of existence of a prior award results in unwarranted discrimination between employers. Frequently, in these situations an employer can start the compensation proceedings, or control which state will take jurisdiction in the first instance. Yet other employers otherwise having identical employment activities operating only in Nebraska, or employers who make voluntary payments, are held subject to the full requirements of the Nebraska act. Furthermore, if Nebraska were to eliminate the distinction presently followed and take jurisdiction when its act is otherwise applicable regardless of whether there has been a prior award, the result will be in harmony with the decisions of every other state court which has decided this question throughout the past fifteen years.<sup>33</sup>

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<sup>33</sup> See note 11 *supra*.