2010

Peterson Hunting v. Labor Commission of Utah, Nicholas Jay Forhardt : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PETERSON HUNTING,

Respondents/Appellants,

vs.

LABOR COMMISSION OF UTAH, and NICHOLAS JAY FROHARDT,

Petitioners/Appellees.

Utah Appellate Case No. 20100577

Labor Commission No. 09-0501

BRIEF OF APPELLEE

Appeal from the Utah Labor Commission

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this action pursuant to U. C. A. § 34A-2-801(8).

STATEMENT OF ISSUES PRESENTED

Issues: 1) Under U. C. A. § 34A-2-103(5)(a)(iii)(c)(i), did the Administrative Law Judge make a proper factual finding that Peterson Hunting exceeded the $8,000.00 payroll threshold when finding the payroll to be $8,215.19; 2) Under U. C. A. § 34A-2-103(5) and U. C. A. § 35A-4-206, did the Utah Labor Commission and Administrative Law Judge properly apply the statute to the evidence in determining that Peterson Hunting was not an agricultural employer exempt from providing workers compensation benefits when finding the operation was for hunting, sport, trophy and adventure.

Standard of Review: Questions concerning the Utah Labor Commission's application of the Workers Compensation Act are reviewed for reasonableness under an abuse of discretion standard.

Supporting Authority: The Legislature has granted the Labor Commission "the duty and the full power, jurisdiction, and authority to determine the facts and apply the law" as found in U. C. A. § 34A-1-301. The Court of Appeals has made clear that; "When the Legislature has granted an agency discretion to determine an issue, we review the agency's action for reasonableness," and "the Commission has been given broad

discretion to determine the facts and apply the law." *Caporoz v. Labor Comm'n,* 945 P.2d 141, 143 (Utah Ct. App. 1997). The Court of Appeals must uphold the Commission's determination, "unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion." *AE Clevite, Inc. v. Labor Comm'n*, 2000 UT App 35, ¶ 7, 996 P.2d 1072. Moreover, "compensation statutes should be liberally construed in favor of recovery." *Smith's Food and Drug, Inc., v. Labor Comm'n*, 2011 UT App 67, ¶ 15, (2011 WL 817223); (*quoting Kaiser Steel Corp. v. Monfredi,* 631 P.2d 888, 892 (Utah 1981)). The Court of Appeals has held that "any doubt respecting the right of compensation will be resolved in favor of an injured employee." *Drake v. Industrial Comm'n,* 939 P.2d 177, 182 (Utah1997).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 34A-1-301 (See Addendum A)

Utah Code Ann. § 34A-2-103 (See Addendum A)

Utah Code Ann. § 35A-4-206 (See Addendum A)

Utah Admin. Code § R994-206-101 (See Addendum A)

Utah Rule of Appellate Procedure 18 (See Addendum A)

Utah Rule of Appellate Procedure 24(a)(9) (See Addendum A)

STATEMENT OF THE CASE

Nature of the Case

On September 18, 2008, while in the employ of Appellant Peterson Hunting, a recreational and sport hunting operation, and while guiding a recreational and sport

hunter, Appellee Frohardt was shot in his right leg necessitating a below the knee amputation of his right leg. Appellee Frohardt filed an Application for Hearing for workers compensation benefits. In Answer to the Appellee Frohardt's Application for Hearing, Appellant Peterson Hunting alleged that Appellee Frohardt was a casual employee. At the hearing, Appellant Peterson Hunting conceded that Appellee Frohardt was injured while in the employ as a hunting guide, and under the control of Appellant Peterson Hunting. Peterson Hunting also unsuccessfully argued it was an agricultural employer and not a recreational and sport hunting employer excluding it as an employer under U. C. A. §34A-2-103. The ALJ and the Labor Commission easily found this argument without merit for two reasons. First, Appellant Peterson Hunting's payroll for 2007 exceeded $8,000 to non-immediate family member employees; and second, its operation was for recreation, sport and not agricultural. Peterson Hunting now appeals from this decision.

Course of the Proceedings

On June 19, 2009, Nicholas Jay Frohardt ("Appellee") filed an Application for Hearing with the Utah Labor Commission to claim Workers Compensation benefits arising out of a work related accident, which occurred on September 18, 2008, while he was in the employ of Peterson Hunting ("Appellant") (R. 144).

On June 16, 2009, the Commission issued a Notice of Formal Adjudicative Proceedings and Order for Answer. (R. 144). On July 14, 2009 Appellant Peterson Hunting, filed an Answer asserting it was exempt from the Workers Compensation Act.

(R. 144). Peterson Hunting averred that Appellee Frohardt's employment qualified as agricultural labor, and that because it paid less than $8,000.00 in payroll in 2007, Appellant qualified for the agricultural employer exception under the Act. (R.144). Appellant Peterson Hunting also asserted that Appellee Frohardt was not an employee under contract. (R. 145).

On July 15, 2009, the Unemployed Employers Fund filed an Answer and asserted that Appellant Peterson Hunting was solvent and able to pay Appellee Frohardt's workers compensation benefits. (R. 145)

On November 18, 2009, a hearing was held before Administrative Law Judge Holly of the Utah Labor Commission. (R. 144). During the hearing, Appellee Frohardt testified, as did Kurtley Peterson, the owner of Appellant Peterson Hunting. (R. 205). Richard Tim Anderson (land owner), Reece Potter (another employee), and Gary Eckardt (hunter) also testified (R. 205).

On February 9, 2010, the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order awarding Appellee Frohardt compensation for medical expenses, future medical expenses, temporary total disability compensation and permanent partial disability compensation, as well as travel reimbursement and attorney fees. (R. 152-153). The parties had stipulated that Appellant Peterson Hunting employed Appellee Frohardt as a hunting guide on the date of the accident. Also, it was undisputed that the accident occurred during work related duties and that Appellee Frohardt was paid for his services. (R. 145). The parties stipulated that all of Appellee Frohardt's injuries

were medically and legally caused by the September 18, 2008 injury, and Administrative Law Judge Holley entered this finding. (R. 146).

In the Order, the Administrative Law Judge found Appellant Peterson Hunting was not exempt from providing workers compensation benefits under the agricultural employer exemption from the Utah Workers Compensation Act. (R. 146-149). The Administrative Law Judge specifically found as a fact that that Appellant Peterson Hunting exceeded the $8,000.00 threshold for wages under the Act when its payroll for 2007 amounted to $8,215.19. The Administrative Law Judge also found that Appellant Peterson Hunting did not conduct agricultural labor in its operations and was thus not an agricultural employer for the purposes of the Act. (R. 146-149).

On March 11, 2010, Appellant Peterson Hunting filed a Motion for Review. (R. 161). On March 31, 2010, Appellee Frohardt filed a Response to the Motion for Review. (R. 184). On April 12, 2010, Appellant Peterson Hunting filed a Reply to Appellee Frohardt's Response to Motion for Review. (R. 197).

On June 22, 2010, the Utah Labor Commission entered an Order affirming Administrative Law Judge's decision. (R. 200). The Commission concurred with the Administrative Law Judge's conclusion that Appellant Peterson Hunting was not an agricultural employer for the purposes of the Worker's Compensation Act, and therefore was not exempt from liability. (R. 201). Thus, the Commission found Appellee Frohardt was entitled to workers compensation benefits for his work related right leg injuries. (R. 201). Because the Commission found that Appellant Peterson Hunting was not an

agricultural employer, it did not find it necessary to address the fact that Peterson Hunting exceeded the wage threshold for agricultural employers under the Act, which would also disqualify it from claiming the exemption. (R. 201).

On August 4, 2010, Appellant Peterson Hunting filed a Docketing Statement with the Utah Court of Appeals after having filed a Petition for Review of the Order Affirming ALJ's Decision. On April 21, 2011, Appellant Peterson Hunting filed its Brief of Appellant seeking review of the Utah Labor Commission's decision in the Utah Court of Appeals. To date, Appellant Peterson Hunting has not paid Appellee Frohardt for any of his medical expenses or for any other compensation or benefits following his injury.

Disposition of the Commission

On February 9, 2010, the Administrative Law Judge entered Findings of Fact, Conclusions of Law and Order awarding Appellee Frohardt compensation for medical expenses, future medical expenses, temporary total disability compensation and permanent partial disability compensation, as well as travel reimbursement and attorney fees. (R. 152-153). The ALJ found that Appellant Peterson Hunting was not exempt from providing workers compensation benefits under the agricultural employer exemption from the Utah Workers Compensation Act in that Appellant did not conduct agricultural labor and was not an agricultural employer and that Appellant exceeded the $8,000.00 threshold for wages under the Act. (R. 146-149).

On June 22, 2010, the Utah Labor Commission entered an Order affirming Administrative Law Judge's decision. (R. 200). The Commission concurred with the

Administrative Law Judge's conclusion that Appellant Peterson Hunting was not exempt from liability under the Worker's Compensation Act and that Appellee Frohardt was entitled to benefits for his work related right leg injuries. (R. 201).

STATEMENT OF RELEVANT FACTS

In 2007, Nicholas Jay Frohardt ("Appellee"), began working for Peterson Hunting ("Appellant"). (Tr. 29: 13-23). Frohardt had met Kurtley Peterson through mutual friends while in college. (Tr. 28:6-14). In the fall of 2007, Frohardt was employed by Peterson Hunting as a hunting guide on the Boobe Hole Mountain. (Tr. 29-30). Appellee Frohardt returned to work for Mr. Peterson (Peterson Hunting) again in 2008.

Appellant Peterson Hunting operates a recreational hunting business for sport, adventure, and trophy near Richfield, Utah guiding trophy hunters on the Boobe Hole Mountain. (Tr. 41:16-20; R. 146). Peterson Hunting operates its recreational hunting on land owned by Tim Anderson and Scotty Rickenbaugh. (Tr. 166-67). Appellee Frohardt was injured while guiding a hunter on Mr. Anderson's land, consisting of 3,000 acres. (Tr. 58:12-16). The only use for Mr. Anderson's mountain land is for his 110 head of cattle and his nephew's 25 head of cattle. (Tr. 58-59).

While in the employ of Peterson Hunting, in both 2007 and 2008, Appellee Frohardt 's responsibilities included:

a. guide the sport hunters;

b. follow Kurtley Peterson's instructions;

c. prepare breakfast, lunch and dinner for the sport hunters;

d. clean up after meals;

e. clean the campsite and tents;

f. feed and take care of the horses and mules;

g. set up, build and take down camp

h. haul supplies to and from camp;

i. clear trails;

j. pump water to the camp;

k. chop firewood; and

l. assist the hunters with anything to make their experience safe and more enjoyable. (Tr. 35:12 - 37:20; 30:14-23).

On September 18, 2008, while in the employ of Appellant Peterson Hunting and in the scope of his employment duties, Appellee Frohardt was injured after being shot in the right leg. (Tr. 44-46). When the medical decision was made by medical providers that Appellee Frohardt 's right leg could not be saved, the procedure to amputate the his right leg below the knee was performed. (Tr. 48).

The parties stipulated on the record at the hearing, that Peterson Hunting employed Appellee Frohardt as a hunting guide on September 18, 2008, and he was in the control of Peterson Hunting on the date of his injury. (R. 144). The parties stipulated on the record that Appellee Frohardt was injured in the course and scope of his employment. (R. 144). The parties stipulated that all of Appellee Frohardt's injuries were medically and legally caused by the September 18, 2008 injury, and Judge Holley entered this finding. (R. 146).

To date, Appellant Peterson Hunting has not paid Appellee Frohardt for any of his medical expenses or for any other compensation or benefits following his injury.

A. Appellant Peterson Hunting's Payroll Exceeded $8,000.00 in 2007.

The ALJ found that Peterson Hunting's payroll exceeded $8,000.00 in 2007 to non-immediate family member employees, totaling $8,215.19. (R. 147-48).

Peterson Hunting's payroll or wages exceeded $10,000.00 in 2007, when including room and board and other supplies. (Tr. 40-44) Appellee Frohardt was paid $5,265.19 in cash, check, or wire transfer. (Tr. 33). Appellee Frohardt, as well as the other employees, also received room and board in 2007. Appellee Frohardt testified that for meals alone, for him, the total was $19.500 per day, or $1,007.00 for the 53 days he was on the mountain. (Tr. 43-44). Appellee Frohardt was also provided clothing and supplies that he was not expected to return. (Tr. 40).

Reece Potter, another non-immediate family employee, spent a great deal of time on the mountain and was paid $3,000.00 by cash, check, or wire transfer. Reece Potter testified that he also received room and board in 2007 for the time he was on the mountain. (Tr. 74:10-14). Also, Gary Pestorious, Cole Pestorious, Chris Miller, Ryan Miller, and Steve Eckardt all assisted with the hunting operation on Boobe Hole Mountain in 2007 receiving no monetary compensation. (Tr. 159-60).

Appellee Frohardt received the $5,265.19 in 2007 from Appellant Peterson Hunting in three installments. (Tr. 33). Between August 12, 2007, and September 1, 2007, after Appellee Frohardt had already been working for some time, he received

$500.00 cash directly from Kurtley Peterson, owner of Appellant Peterson Hunting. Appellee Frohardt used $50.00 of that payment to pay for personal expenses in the form of gasoline and food. (Tr. 31:11-18; 92:20-93:8). Appellee Frohardt kept the remaining money and never used it for personal or business expenses as he considered it to be wages. (*Id.*) There was no agreement that the $500.00 was to be used for expenses. (Tr. 157:11-24) (*Id.*) Appellee Frohardt was never asked by Kurtley Peterson or Peterson Hunting to return the balance of the $500.00. Appellee Frohardt did not claim the $500.00 on his taxes as he had simply forgot. (Tr. 96:11-19). Appellee Frohardt testified that he was never required to use $500.00 for business expenses. (Tr. 31:11-18; 92:20-93:8). Kurtley Peterson testified that he never **asked or expected** for the $500.00 or the remaining balance of the $500.00 to be returned. (Tr. 157:11-24). Appellant Peterson Hunting even concedes that $500.00 was paid to Appellee Frohardt and that Frohardt was not responsible for the repayment of $500.00. (*Id.*)

Later in the fall of 2007, Appellee Frohardt received a $4,000.00 check from Peterson Hunting. (Tr. 33). Peterson Hunting also transferred $765.19 for Appellee Frohardt's Ethanol Investment Loan. (Tr. 33). ALJ Holley found that Appellee Frohardt's wages were $5,215.19 ($5,265.19 - $50.00) in 2007. (R. 145).

Pursuant to the Appellant Peterson Hunting 's 2007 US Income Tax Return, admitted as Exhibit R-1, Appellant also paid Reece Potter wages in the amount of $3,000.00. (Tr. 74). ALJ Holley found that the total amount of payroll actually paid in 2007 amounted to $8,215.19. (R. 148).

In 2008, Appellee Frohardt worked 25 days and was paid $4,200.00 equating to $167.00 per day. (Tr. 34-35).

B. Peterson Hunting does not Qualify as an Agricultural Employer under the Act.

Kurtley Peterson, owner of Appellant Peterson Hunting, owns and operates a farm approximately 30 miles away from the entrance to Mr. Anderson's land on the Boobe Hole Mountain. (Tr. 137:1-7). Mr. Anderson's operation is separate and apart from Peterson Hunting's operation. (Tr. 58-59). Mr. Peterson's farming operation is separate and apart from Peterson Hunting's operations. (Tr. 137:1-3).

The owner of the land on which Appellant Peterson Hunting conducted its recreational hunting operation, Tim Anderson, testified that there are no farming uses for the land. (Tr. 59:6-7). The land is only used for cattle (one head per 22.22 acres) and Peterson Hunting's operation. (Tr. 58-60). The only use made by Mr. Anderson's on the mountain is for his 110 head of cattle and his nephew's 25 head of cattle. (Tr. 58-59). Mr. Anderson testified that he receives 50% of the profit from the hunting operation. (Tr. 59:12).

Kurtley Peterson, owner of Appellant Peterson Hunting, testified that he does not breed elk. (Tr. 145:17-20). Kurtley Peterson does not raise elk. (Tr. 145:17-20). ALJ Holley found that "Peterson Hunting has not shown that it raises, feeds and cares for the deer and elk population on the Boobe Hole Mountain." (R. 148). Mr. Peterson testified that he did not purchase the elk or deer. The elk and deer come and go freely on the mountain. (Tr. 145:12-16). Mr. Peterson testified that he did not breed the elk or deer

that freely come and go on the mountain. (Tr. 145:17-20). Mr. Peterson testified that he did not feed or care for the elk or deer population that freely come and go on the mountain, other than placing salt licks which are secondarily used by the elk or deer. (Tr. 145:212-25). Although there is a minimal and low fence on parts of the mountain, the elk and deer population on the mountain are not enclosed or restricted access and come and go freely onto or off the mountain. (Tr. 14:12-8). Mr. Peterson never testified that he intended to fence them in and to prevent the elk or deer to move from place to place, in fact, the elk or deer can easily leap any fence on the mountain. (Tr. 146:8).

Appellee Frohardt testified that he ran water pipe from a natural spring up to the camp to provide water for the mules used as transportation and not for any wildlife. This water was not intended for, or used by, the use of elk or deer. Appellee Frohardt also testified that he did not run irrigation pipe for any purpose other than to water the mules. (Tr. 37:5-20).

Mr. Peterson testified that the Utah Department of Wildlife regulated the dates in which the hunting of the elk and deer takes place. (Tr. 146:11-17). Mr. Peterson testified that the Utah Department of Wildlife regulates the times of day that the hunting takes place. (Tr.147:9-145). Appellant Peterson Hunting testified that the Utah Department of Wildlife determines which permits the hunters need to hunt. (Tr.148:1-11). Peterson Hunting testified that the Utah Department of Wildlife makes the decision as to how many permits Peterson Hunting receives each year. (Tr.148:5-6). Mr. Peterson testified that in 2007 and 2008 he received 14 Elk permits of the 500 elk (2.8%) on the land and 18

Deer permits of the 150 deer (12%) on the land. Mr. Peterson never offered any evidence concerning any paperwork, documents or applications, provided to any Utah Department or any other written information concerning the alleged management he conducts. (Tr. 184 – 85).

Appellant Peterson Hunting does not place any restrictions on which elk the hunters may shoot. (Tr. 178:11-18). The ALJ asked Mr. Peterson "So if somebody comes to you and you guide them on a hunt, and if they pulled a tag for a bull, would you specifically point out the bull that you wanted them to shoot, or if they were able to scope any bull, would they be allowed to shoot that bull? Mr. Peterson answered: "**They can shoot anything they want**." (Tr. 178: 11-18) (emphasis added). The ALJ found that "Peterson Hunting did not force hunters to shoot these unevenly pointed animals. Hunters were allowed to shoot any bull elk or buck they saw. As a result, Peterson Hunting did not manage genetic lines as much as encourage them." (R. 148).

Appellant Peterson Hunting operates a recreational hunting business for sport, adventure, and trophy near Richfield, Utah guiding trophy hunters on the Boobe Hole Mountain. (Tr. 41:16-20; R. 146). Customer hunters want to shoot the biggest and best elk. In fact, the hunters paid $14,000.00 to obtain a permit for one elk from Peterson Hunting. (Tr. 168-69). $14,000.00 per tag times 14 tags is $196,000 just for the elk tags without adding in the deer tags.

SUMMARY OF THE ARGUMENT

The Labor Commissioner's Order Affirming ALJ's Decision holding Appellant

Peterson Hunting responsible to pay and awarding workers compensation benefits to Appellee Frohardt, should be affirmed by this Court. Appellant Peterson Hunting clearly does not qualify as an agricultural employer under the Workers Compensation Act. The Commission's ruling is based on the evidence presented in the case, and the correct application of the law. There was no abuse of discretion by the Commission that can be established or that can even be argued. The award of compensatory benefits to Appellee Frohardt should therefore be upheld.

Under the Act, Peterson Hunting cannot prove either of the two dispositive issues. First, not even including room and board, Appellant Peterson Hunting's payroll in 2007 was specifically found to exceed the $8,000.00 minimum threshold under the Act, disqualifying it from claiming the agricultural employer exemption from providing workers compensation benefits to Appellee Frohardt. Under Utah Code Ann. § 34A-2-103(5)(a)(iii)(c)(i) "an agricultural employer is not considered an employer of a non-immediate family employee if for the previous calendar year the agricultural employer's total annual payroll for all non-immediate family employees was less than $8,000.00" The ALJ found that that Peterson Hunting's payroll was $8,215.19, exceeding the $8,000.00 threshold. This was undisputed and actual money that Peterson Hunting paid to its non-immediate family employees. On this issue alone, Appellee Frohardt prevails.

As the payroll exceeded $8,000.00 in 2007, the Court need not consider whether Peterson Hunting's operation is agricultural in nature. Notwithstanding, the evidence

(and the previous orders) clearly shows that Peterson Hunting was a recreational hunting business conducted for sport, trophy and adventure. Appellee Frohardt was injured while in the course of guiding a recreational hunter or sportsman. Under Utah Code Ann. § 35A-4-206(1)(a), agricultural labor means any remunerated service on a farm..."in the employ of any person in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife." Peterson Hunting's operations did not include the raising, caring, feeding, breeding, managing, or harvesting of any agricultural commodity as defined by statue. Furthermore, the work duties Appellee Frohardt completed for Peterson Hunting cannot even be remotely defined as agricultural labor. Appellant Peterson Hunting cannot cite to any case law, statute, or other source that supports their position that their recreational and sport hunting operation exempts them under the statute. The operation was to provide the hunter with the biggest kill and best trophy for the pricey $14,000 tag.

ARGUMENT

In order to affirm the Labor Commission's Order the Court need only decide if the Commission rationally applied the statutes in question to its factual determination that Appellant Peterson Hunting was not an agricultural employer and did not have a sufficiently low payroll, in concluding that Appellant was not entitled to exemption from providing workers compensation benefits. This Court need not even consider

Appellant's arguments in that they have failed to marshal the evidence as required by Utah R. App. P. 24(a)(9).

Appellant Peterson Hunting's payroll was specifically found to exceed the $8,000.00 threshold set in the Act. Appellant has not included any evidence or case law in support of their position that the payroll should have been found to be under $8,000.00. The evidence in the case also clearly showed that Peterson Hunting was a recreational hunting business whose operations, including employee Frohardt's duties, did not include the care, management, or harvesting of any agricultural commodity. Appellant has only cited one case supporting their argument that they are an agricultural employer, and that case is not on point. The Labor Commission correctly determined that Peterson Hunting is not an agricultural employer and must provide workers compensation benefits. The decision to uphold the award of benefits to Appellee Frohardt was supported by the evidence and made pursuant to the express directions of the statue.

I. THIS COURT MUST GIVE DEFERENCE TO THE LABOR COMMISSION'S DETERMINATIONS CONCERNING AN AWARD OF WORKERS COMPENSATION BENEFITS AND RESOLVE ANY QUESTIONS IN FAVOR OF RECOVERY FOR AN INJURED EMPLOYEE.

The Legislature has specifically granted the Labor Commission broad discretion to determine facts and apply the law under U. C. A. § 34A-1-301. "The time honored rule of law is that the construction of statutes by governmental agencies charged with their administration should be given considerable weight." *McPhie v. Industrial Commission,* 567 P.2d 153, 155 (Utah, 1977). "A further equally recognized rule of construction

resolves any doubt respecting the right of compensation in favor of the injured employee or his dependents, as the case may be, and the compensation statutes should be liberally construed in favor of recovery." *Id.* Both of these long recognized rules of law were followed by the Court of Appeals as recently as March 10, 2011. *See Smith's Food and Drug, Inc., v. Labor Comm'n*, 2011 UT App. 67, ¶ 15, (2011 WL 817223).

Therefore, questions concerning the Utah Labor Commission's interpretation of the Workers Compensation Act are reviewed for reasonableness, under an abuse of discretion standard, which requires great deference to the Labor Commission's determination, especially when that decision is in favor of extending benefits; contrary to Appellant's representation that a correction-of-error standard is applicable to this case. *Id.*

II. APPELLANT PETERSON HUNTING'S APPEAL SHOULD BE DISMISSED FOR APPELLANT'S FAILURE TO PROPERLY MARSHAL THE EVIDENCE AS REQUIRED BY THE UTAH RULES OF APPELLATE PROCEDURE.

Pursuant to Utah R. App. P. 24(a)(9), "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding" for its Appeal to even be considered. Rule 24 applies to the review and enforcement of orders of administrative commissions pursuant to Utah R. App. P. 18. "In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence.

The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Furthermore, "[t]he process of marshalling the evidence is fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and not attempt to construe the evidence in a light favorable to the party's own case." *Child v. Child,* 2008 UT App. 338, ¶ 2, 194 P.3d 205; (*citing Chen v. Stewart*, 2004 UT 82, ¶ 78, 100 P.3d 1177). Accordingly, "[t]o successfully attack findings of fact, an appellant must first marshal all of the evidence supporting the findings and then demonstrate that even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the finding." *Turnbaugh for Benefits of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 941 (Utah Ct. App. 1998).

In that Appellant Peterson Hunting has failed to fully comply with the requirement to marshal the evidence, this Court is required to assume that the findings of the labor commission are correct, and this appeal will therefore fail. *See Valcarce v. Fitzgerald,* 961 P.2d 305, 312 (Utah 1998). Appellant Peterson Hunting, in its Statement of Facts included in the Brief of Appellant, has not properly set forth the findings of fact which supported the Labor Commission's decision. It contains only a limited number of statements, many inaccurate or a mischaracterization of the transcript, and most do not even have citations to the record. These do not adequately represent the evidence presented in the case in favor of the Commission's determination.

Instead of marshaling the evidence, Appellant has attempted to highlight evidence presented at the hearing which the Commission did not find persuasive when determining that Peterson Hunting was not an agricultural employer. Appellant Peterson Hunting has also improperly included argument in its statement of facts, intending support its position on appeal, while leaving out essential facts supporting the Labor Commission's Order. Importantly, the Commission found "the evidence shows that Peterson merely provided a guide to individuals seeking to hunt deer and elk. There is no indication that Peterson actually raised, fed or cared for the deer and elk to be hunted." (R. 201).

Essential facts supporting the Commission's Order showing that Appellant Peterson Hunting has failed to marshal include: that Peterson Hunting operated a recreational hunting business for sport, adventure, and trophy (Tr. 41:16-20; R. 146); that the purpose of Appellee Frohardt's work responsibilities as the hunting guide, were to do anything and everything necessary to assist the hunters with anything to make their stay more enjoyable on their hunting trip to get a kill (Tr. 30:14-23, 35:12 - 37:20); that Appellant's operation is separate from any farming operation (Tr. 58-59, 137:1-3); that the mountain is only used for cattle (135 cattle on the entire 3,000 acres or one head per 22.22 acres) and Peterson Hunting's operation (Tr. 58-60); that Appellant's operation does not include purchasing, raising, breeding, feeding, feeding or caring for the deer or elk, and that the game animals come and go freely on the mountain (Tr. 145:12-20) (R. 148); that Appellee Frohardt ran water to camp to provide for the mules, not the use of elk or deer (Tr. 37:5-20) (Appellants have mis-characterized the testimony and have included

no citation that this was for the use of elk or deer); that the Utah Department of Wildlife makes the decision as to how many permits Peterson Hunting receives each year and in 2007 and 2008 they received 14 Elk permits of the 500 elk (2.8%) on the land and 18 Deer permits of the 150 deer (12%) on the land (Tr.148:5-6); that the state regulates hunting in Utah (Tr. 172:25 – 173:2); that hunters paid $14,000 to obtain a permit for one elk (Tr. 168-69); that Appellant does not regulate or determine which animals the hunters may kill (Tr. 178: 11-18); that the hunters can shoot any elk they want (Tr. 178:11-18); and that Appellant never offered any evidence concerning any paperwork, documents or applications, provided to or from any Utah Department or any other written information concerning the alleged management they conducts. (Tr. 184 – 85).

Again, while failing to marshal the evidence, in its Statement of Facts Appellant Peterson Hunting also attempts to include evidence challenging the Administrative Law Judge's finding that Appellant's annual payroll for 2007 was over $8,000.00. Appellant asserts that a $500.00 amount given from Peterson Hunting to Appellee Frohardt should not be included as payroll, in direct contradiction to the ALJ's correct finding that the $500.00 payment bestowed a personal benefit and that this specific payment was counted as wages. Appellant does not provide the most important facts: that Appellant Peterson Hunting never asked, insisted or insisted the return of the balance of $500.00; Appellee Frohardt did not consider the $500.00 anything but wages; Appellee Frohardt testified that he was never required to use $500.00 for business expenses. (Tr. 31:11-18; 92:20-93:8). (R. 145, 148); and that Appellee also received room and board and other

materials, supplies, and equipment. (Tr. 40-44).

Upon reviewing Appellant's brief, it is clear that Peterson Hunting has not given the Court "a basis from which to conduct a meaningful review of the facts challenged on appeal," therefore this Court shall "show no reluctance to affirm when the Appellant fails to adequately marshal the evidence." *West Valley City v. Majestic Inv. Co.,* 818 P.2d at 1313. When marshalling the evidence on appeal, appellants cannot merely present carefully selected facts and excerpts from the record in support of their position, nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. *See Burton Lumber & Hardware Co. v. Graham,* 2008 UT App 207, ¶¶ 12-13, 186 P.3d 1012. Therefore, this Court has full discretion to affirm the Commission's finding and dismiss the appeal on these grounds alone, without considering Appellant's arguments further.

III. APPELLANT PETERSON HUNTING'S PAYROLL EXCEEDED $8,000.00 IN 2007, AND AS SUCH CANNOT NOT CLAIM ANY EXEMPTION AND APPELLEE FROHARDT WAS ENTITLED TO WORKERS COMPENSATION BENEFITS.

The ALJ and the Labor Commission correctly found that Nicholas Frohardt is entitled to workers compensation benefits. As the payroll was found to exceed $8,000.00, without consideration of room, board, and other benefits, it was unnecessary for the ALJ to include these wages in the calculation. However, these benefits received by Appellee Frohardt from Appellant Peterson Hunting are wages under the law and should be considered as such, if ALJ Holley's findings of fact are questioned. ALJ

Holley's findings of fact were clear on the matter of calculating $8,215.19 as payroll and she did not need to consider further amounts such as room, board, and other in kind payroll or wages, which exceeded $10,000.00 to go beyond the $8,000.00 threshold. (R. 144-153)

Moreover, the finding that Peterson Hunting's payroll exceeded $8,000.00 is dispositive, and this Court need not consider the issue of whether Peterson Hunting is an agricultural employer if the ALJ's findings of fact on this matter are upheld. However, if the Court decides to consider Appellant's further argument, as did the ALJ, this Court will find the same; that Peterson Hunting is not an agricultural employer. **It is also important to note that Appellant's offer no support, statutory or case law, in support of their argument.**

U. C. A. § 34A-2-103 states, "For purpose of this chapter, an agricultural employer is not considered an employer of a non-immediate family employee if: "(i) for the previous calendar year the agricultural employer's total annual payroll for all non-immediate family employees was less than $8,000.00."

ALJ Holley's findings of fact on concerning the payroll are reasonable, supported by the evidence, and should be accepted by this Court as proper. Appellee Frohardt was injured in 2008. ALJ Holley found that Peterson Hunting's payroll for the previous calendar year, 2007, was $8,215.19. (R. 147-148) Appellee Frohardt was paid $5,265.19 ($50.00 of which Appellee Frohardt used for gas and food) for his labor during the year of 2007. (RR. 31:11-18; 92:20-93:8) Another hunting guide, Reece Potter was paid

$3,000.00. This totals $8,215.19, which exceeds the $8,000.00 threshold and makes Appellant Peterson Hunting exempt from any benefits afforded agricultural employers under the Act. (R. 144-153)

Appellee Frohardt received three separate payments for wages ($500.00, $4,000.00, and $756.19). (Tr. 33) He testified that he received $500.00 **for wages** directly from Kurtley Peterson, owner of Appellant Peterson Hunting in August of 2007, after he had been an employee for two to three weeks. Appellee Frohardt testified that he considered this payment to be wages. Contrary to Appellant's mischaracterization, this payment came without any terms, conditions or agreement for repayment. Kurtley Peterson also testified and admitted that he never requested, demanded, or even intended for the repayment or return of the $500.00 paid to Appellee Frohardt in August of 2007. (Tr. 157:11-24) Appellee Frohardt testified that he spent $50.00 of the $500.00 on personal expenses for gasoline and food. Appellee Frohardt did not spend any further money from that $500.00 on expenses. He was never requested to, and never gave, an accounting of how this money was used.

If Peterson Hunting expected the $500.00 to be used solely as a reimbursement for business expenses, Mr. Peterson would have demanded the return of any excess amount of money and an accounting of how that money was spent. That payment was never intended to be returned to Peterson Hunting, was thus retained by Appellee Frohardt, and therefore it can be nothing other than simple wages. The money was not used for expenses but given as a personal benefit that bestowed an economic gain. In referring to

the $450.00 cash, after any arguable expenses, that the Appellee Frohardt kept, ALJ Holley correctly found that "Petitioner received the personal benefit and the money may be counted as wages." (R. 148).

Moreover, if this Court is going to consider this matter further, room and board, and other in kind materials and equipment were also provided by Appellant Peterson Hunting to Appellee Frohardt and other employees. These benefits should be considered wages under the law, which when included in the payroll calculation well exceeds $10,000.00. The Utah State Legislature has given the Commission broad authority to determine the wage of an employee seeking workers compensation benefits. *Blake Stevens Construction v. Henion*, 697 P.2d 230 (Utah 1985). The Court in *Blake Stevens Construction* recognized that a subsistence allowance which is not spent constitutes a real economic gain and is therefore wages. *Id.* The Court went on to state "we hold that the commission did not abuse its authority in opting to follow the real economic gain rule since it is a rational method that will fairly determine the employee's average weekly wage and that will fairly meet the purposes of the statute." *Id.* (Internal citations omitted). There is simply no evidence to support that this additional assistance could be anything other than a personal real economic gain for Appellee Frohardt.

Peterson Hunting's payroll easily exceeded $10,000.00 in 2007. Appellee Frohardt and Reece Potter received room and board, which was not included in the calculation by ALJ Holley, but under the law, should be considered wages. In 2007, while in the employ of Peterson Hunting, Appellee Frohardt testified that he was provided

three meals a day, equaling approximately $19.50 per day, or $1,007.00 for 53 days. (Tr. 43-44) Appellee Frohardt also received lodging, transportation to and from the mountain, clothing, hunting equipment, and other items and supplies from Appellant Peterson Hunting. (Tr. 40)

According to *Larson's Workers' Compensation Law*, §93.01(2)(a), "In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee." (internal citations omitted). *Larson's Workers' Compensation Law* also states in §65.03 [1], "The element of payment, to satisfy the requirement of a contract of hire, need not be in money, but may be in anything of value. Board, room, and training, such as might be furnished... are treated as the equivalent of wages." (internal citations omitted).

The Court in *Blake Stevens Construction v. Henion*, 697 P.2d 230 (Utah 1985), relied on *Matlock v. Industrial Commission*, 215 P.2d 612 (Arizona 1950), which held that extra benefits provided by the employer to meet ordinary day-to-day requirements for food and lodging, which remained unchanged whether he was employed or not, constitute wages. *Id.* The court in *Blake Stevens Construction* further stated that allowances can be considered wages when they "are more than sufficient to reimburse the employee for the work related expenses so that in effect the excess can be considered as extra compensation to the workman for his services performed."

The Court also in *Blake Stevens Construction* recognized that "most courts that have considered the question have included as part of the employee's wages living quarters and food, which are provided to the employee who does not travel out of time in his employment." *Id.* Similarly, in *Matlock,* the ranch hand employee was provided house, utilities, milk and meat and all of which the court considered that to be wages. 215 P.2d 612 (Ariz. 1950).

In this case, Appellee Frohardt moved to Utah for his employment. He is not considered to have traveled out of town for a short term in his employment duties. His was not a temporary type of position, but more of a long term position wherein he was provided room and board while on the mountain for the entire season. Appellee Frohardt testified that he was provided three meals a day, equaling approximately $19.50 per day, or $1,007.00 for 53 days. (Tr. 43-44) Appellee Frohardt also received lodging, transportation to and from the mountain, clothing, hunting equipment, and other items and supplies from Appellant Peterson Hunting.

Reece Potter testified that he had also received, among other things, room and board, including three meals a day, lodging and transportation. (Tr. 70:10-14) ALJ Holley could have used this factual evidence, which is undisputed in the record, to further support the finding that wages exceeding the $8,000.00 threshold. The wages paid ($8,265.19), as well as room and board and other benefits Appellee Frohardt received from Peterson Hunting easily exceeded $10,000.00. Appellee Frohardt is entitled to workers compensation benefits as Appellant Peterson Hunting does not qualify for the

agricultural employer's exemption under the Act as its total payroll exceeds the threshold.

The Labor Commission correctly affirmed the ALJ's finding with respect to Peterson Hunting's payroll exceeding $8,000.00 to non-immediate family employees. Although Appellant Peterson Hunting does not fit under the exception for an agricultural employer, if it did, with the payroll to non-immediate family member employees exceeding $8,000.00, Appellee Frohardt would still be entitled to benefits.

IV. THE LABOR COMMISSION CORRECTLY CONCLUDED THAT PETERSON HUNTING IS NOT AN AGRICULTURAL EMPLOYER WHEN FINDING IT OPERATED A RECREATIONAL HUNTING BUSINESS FOR SPORT AND TROPHY.

Peterson Hunting continues to ignore the overwhelming evidence in this case and argue that it meets the very narrow agricultural employer exception, when it clearly does not. Again, this exception is only applicable if Peterson Hunting's payroll to non-immediate family member employees was less than $8,000.00. Conversely, if Appellant Peterson Hunting is not an agricultural employer under the Act than its total amount of payroll need not be considered as this issue is independently dispositive as well.

The Labor Commission correctly applied the facts to the code when concluding that Peterson Hunting was not an agricultural employer under U. C. A. §34A-2-103(5)(a)(1)(A) and §35A-4-206(1)(a). The ALJ was able to see, hear, examine, question, and observe each and every witness in making her findings. Despite Appellant's continuing arguments that Peterson Hunting's operation qualifies as

agricultural, the Commission, after being fully advised in Peterson Hunting's Motion for Review, stated it was "not persuaded by Peterson's argument that serving as a hunting guide is agricultural labor." (R. 201). The Commission thus correctly found "that Peterson is not an agricultural employer for the purposes of the Workers Compensation Act" and that "Peterson is not exempt from liability and Mr. Frohardt is entitled to workers compensation benefits for his work-related right leg injuries." (R. 201).

The Labor Commission based its reasonable application of the law on the factual determination established in the case. The Order Affirming ALJ's Decision states; "the evidence shows that Peterson merely provided a guide to individuals seeking to hunt deer and elk. There is no indication that Peterson actually raised or cared for the deer and elk to be hunted and no indication that Peterson was involved in selling the deer and elk to the public, which is a hallmark of wildlife as a commodity." (R. 201). Peterson Hunting's current contention that Appellee Frohardt was responsible for raising the animals in question is directly contrary to the evidence and specific factual findings from the hearing.

Appellant Peterson Hunting, by filing an appeal, is asking this Court to ignore the conclusions of the Commission that were based on the overwhelming evidence presented by Peterson Hunting's owner at the November 18, 2009 hearing. Appellant's operation is not akin to a farming or agricultural operation. In fact, it is not agricultural at all. Peterson Hunting's business is entirely recreational and carried out for sport, adventure, and trophy. Hunters paid $14,000.00 to Peterson Hunting to shoot bull elk. (Tr.

168-169) To subscribe to Appellant Peterson Hunting's arguments would wrongfully deny benefits to an injured employee, well beyond the narrowly carved out exception for farm labor in the Act.

The limited agricultural employer exception is meant for small family run farms that need to employ a non-immediate family member for a limited occasion, such as extra help during a crop harvest. Essentially, a decision based on Peterson Hunting's arguments, would allow a similar defense to extend to every tour guide, hunting guide, camping guide, river rafting guide, fishing guide, and every other employer that is remotely associated with an animal to claim that they provide agricultural services in order to avoid liability for workers compensation. To subscribe to such a broad interpretation of this narrow exception designed only for small actual agricultural operations is not supported by statute, legislative interpretation, case law, treatise, or public policy. Appellant Peterson Hunting is attempting to sneak past this very limited exception (despite two decisive rulings), to justify its unlawful failure to provide Appellee with worker's compensation benefits.

Utah Code Ann. §35A-4-206(1) is clear when defining agricultural labor as "on a farm, in the employ of any person in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, sharing, feeding, caring for, training and management of livestock, bees, poultry and fur bearing animals and wildlife."

First, the statute and case-law interpreting it, dictate that the agricultural labor must

occur on a farm or ranch to qualify. Here, the large tract of land used for the hunting trips consisted of a mountain, separate and apart from any nearby farming and ranching. It is 30 miles away from Mr. Peterson's own farm, and has nothing to do with his farm. So although 135 cattle were present on some of the land (roughly one cattle per 22.22 acres), some of the time, the land used for hunting was primarily a mountain and not a farm or ranch. (Tr. 58-60)

Second, the actual work duties of the employee in question must be conducted in connection with cultivating soil or in connection with the raising or harvesting of an agricultural or horticultural commodity for the exemption to apply. (Utah Code Ann. §35A-4-206(1)). In this case, **none** of Appellee Frohardt's work duties concerned with raising or harvesting agricultural commodities but rather 100% of his time was spent acting as a guide facilitating an enjoyable experience for recreational hunters. Appellee Frohardt's responsibilities, while in the employ of Peterson Hunting, were to: guide the sport hunters on the tour; prepare breakfast, lunch and dinner for the sport hunters; clean up after meals; clean the campsite and tents; take care of the horses and mules used as transportation on the tour; set up and take down camp; haul supplies to and from camp; clear trails; pump water to the camp; chop firewood; and, to assist the hunters in making their experience safe and more enjoyable. (Tr. 35:12-37:30; 30:14-23) It is clear that these work duties do not include in any way the: raising, feeding, caring for, training or management of any livestock, fur bearing animals, or wildlife in order to raise or harvest any agricultural commodity.

The Utah Administrative Code further discusses these issues by carefully limiting the definitions of "raising and harvesting." Appellant Peterson Hunting's business on Boobe Hole Mountain fails to be agricultural under this definition as well. Under Utah Administrative Code R994-206-101, for labor to be considered agricultural in must include services in connection with the raising or harvesting of an agricultural commodity. "Raising" and "Harvesting" are defined therein as: "In regard to livestock, bees, poultry, fur-bearing animal and wildlife, raising includes caring for, feeding, shearing, breeding, training and management... Harvesting includes picking, cutting, threshing, shucking corn, bailing hay, and hulling nuts."

With regard to "raising," there is no dispute that Peterson Hunting does not "raise" the elk or deer that came and went freely onto the mountain. Peterson concedes such. (Tr. 145-146). It does not breed elk or deer, care for elk or deer, provide for all of the needs for elk or deer, feed elk or deer or train elk or deer. (Id.)

Although Peterson Hunting has argued that it "managed" the wildlife (despite its lack of breeding, raising, caring providing for or feeding the elk or deer), it is undisputed that Peterson Hunting did not determine which elk or deer the hunters shot. (Tr. 178:11-18) Mr. Peterson testified that there are no restrictions on which individual elk or deer are hunted. (Id.) The elk and deer come and go freely onto the mountain. One cannot argue that it manages the population without specifically limiting and enforcing which animals may be shot. (Id.) Peterson Hunting's alleged "encouragement" is suspect at best. The reality is that the hunters, after spending $14,000.00 sought the best elk or

deer to kill for trophy. (Tr. 168-169) This does not qualify as management to be considered as raising or harvesting.

It is undisputed that Peterson's Hunters only killed 14 of the 500 elk or 2.8% of the elk population that comes and goes on the land freely and 18 of the 150 deer or 12% of the deer population that are not restrained to the land by Appellant in any way. (Tr. 184-185) This is too limited to argue that this constitutes management without being disingenuous. Also, placing salt licks which are secondarily used by the elk or deer does not constitute feeding or caring for the needs of the elk or deer. They cannot stop the elk or deer from using the salt licks. Certainly, elk, deer or even cattle cannot live on salt licks alone. The salt licks are used to attract the elk or deer for the excitement of the sport and not to raise, feed, or care for the deer. Peterson Hunting does not provide in any meaningful way for the animals' needs, which is a hallmark of agricultural employment. 14 elk permits at $14,000.00 apiece totals $196,000.00. This total amount does not even include the amount for the deer tags. Certainly this is nothing less than a trophy business for extreme profits.

Moreover, 22.22 acres is much more than sufficient space and food for one head of cattle. Peterson Hunting cannot argue in good faith that killing 14 elk and 18 deer (of the total 650 elk and deer) enhances in any meaningful way the amount or space or abundance of necessary food for the cattle that sometimes roam the mountain. Even more illogical is the argument that hunting the elk with mismatched antlers assists in providing necessary space and food for the cattle that sometimes roam the mountain.

(See Appellant's Brief, pp. 15-16). It only increases the trophy so that Mr. Peterson could make more profits. In reality, Peterson Hunting's business and Appellee Frohardt's responsibilities had nothing to do with the livestock. It was a business for profit and trophy.

"Harvesting," under the Utah Administrative Code, is not defined so as to include wildlife. (Utah Admin. Code R994-206-101). In fact, harvesting can only include those commodities that are actually grown in the soil. "Harvesting includes picking, cutting, threshing, shucking corn, bailing hay, and hulling nuts." Had the legislature intended to include wildlife in harvesting, it would have expressly done so. It is clear, that any "harvesting" comes after the growing of an agricultural commodity.

The definitions of "raising" and "harvesting" and therefore the Labor Commission's determination are well grounded in the law. The learned treatise, much relied upon for workers compensation decisions titled *Larson's Workers' Compensation Law*, also supports the findings in this case. In fact, Appellant Peterson Hunting cites to no Utah case, or any other cases for that matter, that stand for the proposition that a recreational, sport, and trophy hunting operation is an "agricultural employer" or that an employer who does not raise, feed and care for wildlife is an agricultural employer under U. C. A. §34A-2-103.

Appellant Peterson Hunting cites to one Utah case from 1922 in support of its argument, and even that case does not support the position that a recreational, sport, and trophy hunting operation is "agricultural." In *Davis v. Industrial Commission of Utah*,

206 P.267 (Utah 1922), as cited by Appellant, the Court found that a sheepherder was an agricultural laborer. The Court made this determination after finding "if raising stock on a small farm is agricultural, raising stock on a large ranch is the same; and if raising and caring for sheep on the owners premises is agricultural the laborers avocation is not changed by the sheep being pastured and herded elsewhere whether on the public domain or not." *Id.* The central fact relied upon by the Court to reach its decision in that case was that sheep herders, **breed, raise, protect, maintain and care for all of the needs** of the sheep. In fact, the Court stated that it is "practically impossible to separate" crop farming from the traditional raising of livestock because they were "so intimately associated" when determining that agricultural labor included sheep herding. *Id.*

In *Davis*, sheep herding, the raising and caring for the sheep, is easily distinguishable from the case at hand. The work of performed by Appellee Frohardt as a hunting guide, and the operations of deer and elk hunting, are not remotely associated with actual agricultural labor and are entirely separated from activities or operations incident to sheep herding or conventional farming. According to *Larson*, **"[t]he exemption of farm labor is construed according to the character of the work regularly performed by the employee, not according to the nature of the employer's business."** *Larson's Workers' Compensation Law*, § 75.01 (emphasis added).

Here, it is undisputed in the record that Peterson Hunting does not raise, maintain and care for the needs of the deer, elk, or cattle. (Tr. 145-146) Peterson Hunting's operation is about trophy and the kill. The hunters pay $14,000.00 per trophy. (Tr.

108-109) The business exists only to provide opportunities for hunters. These hunters were not paying for wool, fleece, venison, elk meat, or mink fur, or other fur and none of these items were sold by Peterson Hunting to other customers. These hunters were paying for sport, adventure, and for a trophy to put on their wall. These hunters were able to shoot whichever elk or deer they desired. Again, it is undisputed that there was no management or restriction made by Peterson Hunting concerning which individual elk or deer could be hunted.

Furthermore, it is clear, even in Appellant Peterson Hunting's, two page recitation of the *Davis* case in their brief that the term "agricultural" is not broad enough to include the killing of elk or deer for sport. The case does not concern game animals such as deer or elk in any way. Deer and elk are not livestock, which are bred, cared for and raised on a farm. Here, the limited numbers of cattle mentioned in the case are not even owned by Peterson Hunting, but by the owner of the land. Sheep or cattle herders care for all of the needs of the sheep or cattle, and thus their efforts amount to "raising" the sheep or cattle. Appellant is not in the business of raising and caring for deer or elk. It is in the business of hunting deer or elk. Recreational, sport, and trophy hunting on a mountain is not incident to ordinary farming operations or work that is ordinarily performed the employees of a farmer. There is no logical connection between the two.

There is no Utah law that supports the proposition that an employer who simply arranges for the slaughter of game animals is exempt under the Workers Compensation Statute. Furthermore, *Larson's Workers' Compensation Law* does not carve out an

exception for the recreational, sport, and trophy hunting of deer or elk. *Larson* does not go so far as to consider recreational, sport, and trophy hunting as even one of its "Borderline 'Agricultural' Activities." In fact, its definition of "Borderline 'Agricultural' Activities" is very similar to Utah's Administrative Code, in that as one of the borderline activities, it includes "the rearing, feeding, and management or livestock, and poultry, but not the breeding and raising of hunting dogs or alligators." *Larson's Workers' Compensation Law*, § 75.03.

In order to even arguably fall under the "Borderline 'Agricultural' Activities" an employer must be in the business of raising, breeding and caring for the wildlife and not just killing the wildlife for trophy. In *Seley Farms v. Unemployment Compensation Board of Review*, 138 A.2d 174, 176 (Pa. 1958), a Pennsylvania court, applying a statute similar to Utah's, found that while raising, feeding, watering, and caring for all of the needs of pheasants on one's own farm constituted agricultural labor, but guiding hunters did not constitute agricultural labor.

In *O.L. Shafter Estate Co. V. Industrial Accident Commission of Cali.*, 166 P. 24 (Cali. 1917), a farmer owned a ranch where the farmer maintained cattle. A specific employee of the farm was hired to patrol the ranch to prevent poachers and at the same time was authorized to guide a hunter to secure a deer. That employee was found not to be engaged in agricultural labor as he was not in the employ of raising livestock and thus engaged in labor excepted under the statute. *Id.* at 25.

In *Space v. Division of Employment Sec., Dept of Labor and Industry*, 159 A.2d

131, 141-42 (NJ App. Div. 1960), a farmer with his own farm tilled his field, planted crops, and used some of these crops for his animals, including his minks on his farm. These farm operations were found to be so integrated with his "operation involving the breeding, raising and slaughtering of approximately 8,000 mink annually and the removing, drying and grading of their pelts" that it was found to constitute agricultural labor. The employees of the farmer worked indiscriminately in all of the farm's operations. *Id.* "It is an integrated labor effort and the fact that the end result is the production of mink and milk should not change the essential characterization of the totality of their effort." *Id.* The court also stated "Many authorities suggest that, as the exclusion is an employee occupational exclusion, the decisive question in determining what is agricultural labor is the **nature of the employee's employment rather than the nature of the employer's business**." *Id.* at 142.

However, other cases hold that even the raising, breeding, and caring for wildlife does not fall within the limited exception. *See, e.g., In re: Bridges*, 40 N.E. 2d. 648 (N.Y. 1942) (employer's farm in the business of raising foxes, mink and raccoon did not constitute farm labor.); *See also, Cedarburg Fox Farms, Inc. v. Industrial Comm'n*, 6 N.W.2d 687 (Wis. 1942) (The court found that feeding and caring for foxes raised on a ranch did not constitute agricultural labor as this was not a customary type of farm work.).

Here, Appellee's employment was not incident to ordinary farming operations or any other operations that could be considered borderline agricultural. It was only incident to ordinary sport and recreational hunting operations. Appellee Frohardt was

not employed to maintain the cattle. He was not employed to breed, raise or care for elk, deer or cattle. He was not employed to assist on a farm or ranch. The nature of employee's business was to guide trophy hunters for the adventure of the kill. *See Space*, 159 A.2d at 142. The totality of their efforts was for their hunters to have a good time and get a trophy. *See Id.* The pertinent circumstances of this case are not agricultural labor, employment, or operation and Appellant has offered no legal support that a sport and recreational hunting operation is agricultural.

The Labor Commission correctly found in favor of Appellee and properly awarded workers compensation benefits. Appellant Peterson Hunting's intent to broaden the limited definition of "agricultural employer" is certainly not supported by case law or contemplated by statute. If such an interpretation was followed, the statute would lose its intended purpose and any activity that occurred on any type of farm, ranch, mountain or other parcel of undeveloped land, or that concerned any kind of animal, could be considered agricultural in nature. Furthermore, on appeal in this case are not ambiguous legal interpretations of a statue, but simple factual findings, and the application of the statute to those findings, under a direct mandate of discretion from the Legislature to the Labor Commission. The Labor Commission's Order that confirmed the awarded benefits to Appellee Frohardt by the ALJ should be affirmed.

CONCLUSION

The evidence presented at the hearing clearly showed that Appellant Peterson Hunting conducts a recreational hunting business conducted for sport, trophy and

adventure disqualifying them from claiming the agricultural employer exemption from providing workers compensation benefits to Appellee Frohardt. Furthermore Peterson Hunting's payroll for 2007 was clearly found to exceed the threshold under the Act further disqualifying from exemption. The Commission's ruling was entirely proper in that it was based on the evidence presented in the case, and a correct application of the statute in favor of benefits. Therefore, Appellee Frohardt requests this Court uphold the award of compensatory benefits and affirm the Commission's Order Affirming ALJ's Decision.

DATED this 24 day of May, 2011.

C. Richard Henriksen, Jr.
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ADDENDUM A

Utah Code
Title 34A Utah Labor Code
Chapter 1 Labor Commission Act
Section 301 Commission jurisdiction and power.

34A-1-301. Commission jurisdiction and power.

The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.

Renumbered and Amended by Chapter 375, 1997 General Session
Download Code Section Zipped WordPerfect 34A01_030100.ZIP 1,553 Bytes

<< Previous Section (34A-1-205) Next Section (34A-1-302) >>

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Utah Code
Title 34A Utah Labor Code
Chapter 2 Workers' Compensation Act
Section 103 Employers enumerated and defined -- Regularly employed -- Statutory employers.

34A-2-103. Employers enumerated and defined -- Regularly employed -- Statutory employers.

(1) (a) The state, and each county, city, town, and school district in the state are considered employers under this chapter and Chapter 3, Utah Occupational Disease Act.

(b) For the purposes of the exclusive remedy in this chapter and Chapter 3, Utah Occupational Disease Act prescribed in Sections **34A-2-105** and **34A-3-102**, the state is considered to be a single employer and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

(2) (a) Except as provided in Subsection (4), each person, including each public utility and each independent contractor, who regularly employs one or more workers or operatives in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, is considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act.

(b) As used in this Subsection (2):

(i) "Independent contractor" means any person engaged in the performance of any work for another who, while so engaged, is:

(A) independent of the employer in all that pertains to the execution of the work;

(B) not subject to the routine rule or control of the employer;

(C) engaged only in the performance of a definite job or piece of work; and

(D) subordinate to the employer only in effecting a result in accordance with the employer's design.

(ii) "Regularly" includes all employments in the usual course of the trade, business, profession, or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

(3) (a) The client under a professional employer organization agreement regulated under Title 31A, Chapter 40, Professional Employer Organization Licensing Act:

(i) is considered the employer of a covered employee; and

(ii) subject to Section **31A-40-209**, shall secure workers' compensation benefits for a covered employee by complying with Subsection **34A-2-201**(1) or (2) and commission rules.

(b) The division shall promptly inform the Insurance Department if the division has reason to believe that a professional employer organization is not in compliance with Subsection **34A-2-201**(1) or (2) and commission rules.

(4) A domestic employer who does not employ one employee or more than one employee at least 40 hours per week is not considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act.

(5) (a) As used in this Subsection (5):

(i) (A) "agricultural employer" means a person who employs agricultural labor as defined in Subsections **35A-4-206**(1) and (2) and does not include employment as provided in Subsection **35A-4-206**(3); and

(B) notwithstanding Subsection (5)(a)(i)(A), only for purposes of determining who is a member of the employer's immediate family under Subsection (5)(a)(ii), if the agricultural employer is a corporation, partnership, or other business entity, "agricultural employer" means an officer, director, or partner of the business entity;

(ii) "employer's immediate family" means:

(A) an agricultural employer's:

(I) spouse;
(II) grandparent;
(III) parent;
(IV) sibling;
(V) child;
(VI) grandchild;
(VII) nephew; or
(VIII) niece;
(B) a spouse of any person provided in Subsection (5)(a)(ii)(A)(II) through (VIII); or
(C) an individual who is similar to those listed in Subsections (5)(a)(ii)(A) or (B) as defined by rules of the commission; and
(iii) "nonimmediate family" means a person who is not a member of the employer's immediate family.
(b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a member of the employer's immediate family.
(c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a nonimmediate family employee if:
(i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was less than $8,000; or
(ii) (A) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was equal to or greater than $8,000 but less than $50,000; and
(B) the agricultural employer maintains insurance that covers job-related injuries of the employer's nonimmediate family employees in at least the following amounts:
(I) $300,000 liability insurance, as defined in Section **31A-1-301**; and
(II) $5,000 for health care benefits similar to benefits under health care insurance as defined in Section **31A-1-301**.
(d) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is considered an employer of a nonimmediate family employee if:
(i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees is equal to or greater than $50,000; or
(ii) (A) for the previous year the agricultural employer's total payroll for nonimmediate family employees was equal to or exceeds $8,000 but is less than $50,000; and
(B) the agricultural employer fails to maintain the insurance required under Subsection (5)(c)(ii)(B).
(6) An employer of agricultural laborers or domestic servants who is not considered an employer under this chapter and Chapter 3, Utah Occupational Disease Act, may come under this chapter and Chapter 3, Utah Occupational Disease Act, by complying with:
(a) this chapter and Chapter 3, Utah Occupational Disease Act; and
(b) the rules of the commission.
(7) (a) (i) As used in this Subsection (7)(a), "employer" includes any of the following persons that procures work to be done by a contractor notwithstanding whether or not the person directly employs a person:
(A) a sole proprietorship;

(B) a corporation;
(C) a partnership;
(D) a limited liability company; or
(E) a person similar to one described in Subsections (7)(a)(i)(A) through (D).

(ii) If an employer procures any work to be done wholly or in part for the employer by a contractor over whose work the employer retains supervision or control, and this work is a part or process in the trade or business of the employer, the contractor, all persons employed by the contractor, all subcontractors under the contractor, and all persons employed by any of these subcontractors, are considered employees of the original employer for the purposes of this chapter and Chapter 3, Utah Occupational Disease Act.

(b) Any person who is engaged in constructing, improving, repairing, or remodelling a residence that the person owns or is in the process of acquiring as the person's personal residence may not be considered an employee or employer solely by operation of Subsection (7)(a).

(c) A partner in a partnership or an owner of a sole proprietorship is not considered an employee under Subsection (7)(a) if the employer who procures work to be done by the partnership or sole proprietorship obtains and relies on either:

(i) a valid certification of the partnership's or sole proprietorship's compliance with Section **34A-2-201** indicating that the partnership or sole proprietorship secured the payment of workers' compensation benefits pursuant to Section **34A-2-201**; or

(ii) if a partnership or sole proprietorship with no employees other than a partner of the partnership or owner of the sole proprietorship, a workers' compensation coverage waiver issued by an insurer pursuant to Part 10, Workers' Compensation Coverage Waivers Act, stating that:

(A) the partnership or sole proprietorship is customarily engaged in an independently established trade, occupation, profession, or business; and

(B) the partner or owner personally waives the partner's or owner's entitlement to the benefits of this chapter and Chapter 3, Utah Occupational Disease Act, in the operation of the partnership or sole proprietorship.

(d) A director or officer of a corporation is not considered an employee under Subsection (7)(a) if the director or officer is excluded from coverage under Subsection **34A-2-104**(4).

(e) A contractor or subcontractor is not an employee of the employer under Subsection (7)(a), if the employer who procures work to be done by the contractor or subcontractor obtains and relies on either:

(i) a valid certification of the contractor's or subcontractor's compliance with Section **34A-2-201**; or

(ii) if a partnership, corporation, or sole proprietorship with no employees other than a partner of the partnership, officer of the corporation, or owner of the sole proprietorship, a workers' compensation coverage waiver issued by an insurer pursuant to Part 10, Workers' Compensation Coverage Waivers Act, stating that:

(A) the partnership, corporation, or sole proprietorship is customarily engaged in an independently established trade, occupation, profession, or business; and

(B) the partner, corporate officer, or owner personally waives the partner's, corporate officer's, or owner's entitlement to the benefits of this chapter and Chapter 3, Utah Occupational Disease Act, in the operation of the partnership's, corporation's, or sole proprietorship's enterprise under a contract of hire for services.

(f) (i) For purposes of this Subsection (7)(f), "eligible employer" means a person who:

(A) is an employer; and

(B) procures work to be done wholly or in part for the employer by a contractor, including:

(I) all persons employed by the contractor;

(II) all subcontractors under the contractor; and

(III) all persons employed by any of these subcontractors.

(ii) Notwithstanding the other provisions in this Subsection (7), if the conditions of Subsection (7)(f)(iii) are met, an eligible employer is considered an employer for purposes of Section **34A-2-105** of the contractor, subcontractor, and all persons employed by the contractor or subcontractor described in Subsection (7)(f)(i)(B).

(iii) Subsection (7)(f)(ii) applies if the eligible employer:

(A) under Subsection (7)(a) is liable for and pays workers' compensation benefits as an original employer under Subsection (7)(a) because the contractor or subcontractor fails to comply with Section **34A-2-201**;

(B) (I) secures the payment of workers' compensation benefits for the contractor or subcontractor pursuant to Section **34A-2-201**;

(II) procures work to be done that is part or process of the trade or business of the eligible employer; and

(III) does the following with regard to a written workplace accident and injury reduction program that meets the requirements of Subsection **34A-2-111**(3)(d):

(Aa) adopts the workplace accident and injury reduction program;

(Bb) posts the workplace accident and injury reduction program at the work site at which the eligible employer procures work; and

(Cc) enforces the workplace accident and injury reduction program according to the terms of the workplace accident and injury reduction program; or

(C) (I) obtains and relies on:

(Aa) a valid certification described in Subsection (7)(c)(i) or (7)(e)(i);

(Bb) a workers' compensation coverage waiver described in Subsection (7)(c)(ii) or (7)(e)(ii); or

(Cc) proof that a director or officer is excluded from coverage under Subsection **34A-2-104**(4);

(II) is liable under Subsection (7)(a) for the payment of workers' compensation benefits if the contractor or subcontractor fails to comply with Section **34A-2-201**;

(III) procures work to be done that is part or process in the trade or business of the eligible employer; and

(IV) does the following with regard to a written workplace accident and injury reduction program that meets the requirements of Subsection **34A-2-111**(3)(d):

(Aa) adopts the workplace accident and injury reduction program;

(Bb) posts the workplace accident and injury reduction program at the work site at which the eligible employer procures work; and

(Cc) enforces the workplace accident and injury reduction program according to the terms of the workplace accident and injury reduction program.

(8) (a) For purposes of this Subsection (8), "unincorporated entity" means an entity organized or doing business in the state that is not:

(i) an individual;

(ii) a corporation; or

(iii) publicly traded.

(b) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an unincorporated entity that is required to be licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, is considered the employer of each individual who holds, directly or indirectly, an ownership interest in the unincorporated entity. Notwithstanding Subsection (7)(c) and Subsection **34A-2-104**(3), the unincorporated entity shall provide the individual who holds the ownership interest workers' compensation coverage under this chapter and Chapter 3, Utah Occupational Disease Act.

Amended by Chapter 328, 2011 General Session
Amended by Chapter 413, 2011 General Session
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<< Previous Section (34A-2-102) Next Section (34A-2-104) >>

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35A-4-206. Agricultural labor.

(1) "Agricultural labor" means any remunerated service performed after December 31, 1971:

(a) on a farm, in the employ of any person in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(b) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of the service is performed on a farm;

(c) in connection with:

(i) the production or harvesting of any commodity defined as an agricultural commodity in Subsection 15(g) of the Federal Agricultural Marketing Act, as amended, 46 Stat. 1550, Sec. 3; 12 U.S.C. 1141j;

(ii) the ginning of cotton; or

(iii) the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used primarily for supplying and storing water for farming purposes;

(d) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if the operator produced more than 1/2 of the commodity with respect to which the service is performed; or

(e) in the employ of a group of operators of farms, or a cooperative organization of which the operators are members, in the performance of service described in Subsection (1)(d), but only if the operators produced more than 1/2 of the commodity with respect to which the service is performed.

(2) (a) Subsections (1)(d) and (e) are not applicable with respect to service:

(i) performed in connection with commercial canning or commercial freezing;

(ii) in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(iii) on a farm operated for profit if the service is not in the course of the employer's trade or business.

(b) As used in Subsection (1), "farm" includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards.

(3) (a) Services performed by an individual in agricultural labor are considered employment when the service is performed for a person who:

(i) during any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor; or

(ii) for some portion of a day in each of 20 different calendar weeks, whether or not the weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment of time.

(b) For the purposes of this Subsection (3), any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person is treated as an employee of the crew leader:

(i) if the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act;

(ii) if substantially all the members of the crew operate or maintain tractors, mechanized harvesting, or crop dusting equipment, or any other mechanized equipment, that is provided by the crew leader; and

(iii) if the individual is not an employee of the other person within the meaning of Section **35A-4-204**.

(c) For the purposes of this Subsection (3), in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of the crew leader under Subsection (3)(b)(iii):

(i) the other person and not the crew leader is treated as the employer of the individual; and

(ii) the other person is treated as having paid cash remuneration to the individual in an amount equal to the amount of cash remuneration paid to the individual by the crew leader, either on the individual's own behalf or on behalf of the other person, for the service in agricultural labor performed for the other person.

(d) For the purposes of this Subsection (3), "crew leader" means an individual who:

(i) furnishes individuals to perform service in agricultural labor for any other person;

(ii) pays, either on the individual's own behalf or on behalf of the other person, the individuals so furnished by the individual's for the service in agricultural labor performed by them; and

(iii) has not entered into a written agreement with the other person under which the individual is designated as an employee of the other person.

Amended by Chapter 375, 1997 General Session
Download Code Section Zipped WordPerfect 35A04_020600.ZIP 4,062 Bytes

<< Previous Section (35A-4-205) Next Section (35A-4-207) >>

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R994. Workforce Services, Unemployment Insurance.
R994-206. Agricultural Labor.
R994-206-101. Definition of Agricultural Labor.

Agricultural labor is exempt under Subsection 35A-4-205(1)(e) of the Act unless it is covered under Subsection 35A-4-204(2)(j). Subsection 35A-4-204(2)(j) covers larger agricultural employers based on wages paid or number of workers employed.

(1) Definition of Agricultural Terms.

The terms used in Section R994-206-101 are defined as follows:

(a) Agricultural Commodities.

Agricultural commodities include livestock, bees, poultry, fur-bearing animals, wildlife and all crops such as fruits, nuts, vegetables, grains and other commodities grown in the soil or other growth mediums for use or profit.

(b) Horticultural Commodities.

Horticultural commodities are flowers and nursery products such as sod, fruit trees, shade trees, Christmas trees, ornamental plants and shrubs.

(c) Raising and Harvesting.

Raising includes planting the seeds, watering or irrigating, applying insecticide or fertilizer and otherwise caring for the commodity prior to harvesting. In regard to livestock, bees, poultry, fur-bearing animals and wildlife, raising includes caring for, feeding, shearing, breeding, training and management. Harvesting includes picking, cutting, threshing, shucking corn, baling hay, and hulling nuts. Horticultural commodities are harvested when they are made available for sale.

(d) Farm.

A farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes, such as display, storage, and fabrication of wreaths, corsages, and bouquets, do not constitute "farms".

(2) Agricultural Labor as Defined in Subsection 35A-4-206(1)(a).

(a) Agricultural labor includes services performed on a farm by a worker for any person in connection with any of the following activities:

(i) The cultivation of the soil;

(ii) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(iii) The raising or harvesting of any other agricultural or horticultural commodity.

(b) Services performed in connection with the production or harvesting of maple sap, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry constitute agricultural labor only if such services are performed on a farm. Thus, services performed in connection with the operation of a hatchery, if not operated as part of a poultry or other farm, do not constitute agricultural labor.

(3) Agricultural Labor as Defined in Subsection 35A-4-206(1)(b).

(a) Agricultural labor includes the following activities

performed by a worker in the employ of the owner or tenant or other operator of one or more farms, provided the major part, defined as 50% or more, of such services is performed on a farm:

(i) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any of such farms or its tools or equipment; or

(ii) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane, storm, flood, or other natural disaster.

(b) The services described in subparagraph (a)(i) of this section may include services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semi-skilled workers, which contribute in any way to the conduct of the farm or farms operated by the person employing them. Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, the term "agricultural labor" does not include services performed by workers of commercial concerns that contract with a farmer to repair, maintain, or renovate farm properties.

(4) Agricultural Labor as Defined in Subsection 35A-4-206(1)(c).

Agricultural labor includes the following activities performed by a worker in the employ of any person without regard to the place where such services are performed:

(a) the production or harvesting of agricultural commodities defined in the Federal Agricultural Marketing Act, 12 U.S.C. 1141j. These commodities are limited to crude gum, also known as oleoresin, from a living tree and gum spirits of turpentine and gum rosin processed from crude gum by the original producer of the crude gum; or

(b) the ginning of cotton; or

(c) the operation or maintenance of ditches, canals, reservoirs or water ways if not owned or operated for profit and used primarily for farming purposes.

(5) Agricultural Labor as defined in Section 35A-4-206(1)(d).

(a) Agricultural labor includes services performed by a worker in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity if:

(i) Such services are performed by the worker in the employ of an operator of a farm or in the employ of a group of operators of farms ,other than a cooperative organization; and

(ii) Such services are performed with respect to the commodity in its unmanufactured state; and

(iii) Such operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period.

(b) The term "operator of a farm" as used in this section means an owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.

(c) The services described in this paragraph do not constitute agricultural labor if performed in the employ of a cooperative organization. The term "organization" includes corporations, joint-stock companies, and associations which are treated as

corporations pursuant to section 7701(a)(3) of the Internal Revenue Code. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which the services involved are performed.

(d) Processing services which change the commodity from its raw or natural state do not constitute agricultural labor. For example, the extraction of juices from fruits or vegetables is a processing operation which changes the character of the fruits or vegetables from their raw or natural state and, therefore, does not constitute agricultural labor. Likewise, services performed in the processing of maple sap into maple syrup or maple sugar do not constitute agricultural labor. On the other hand, services rendered in the cutting and drying of fruits or vegetables are processing operations which do not change the character of the fruits or vegetables and, therefore, constitute agricultural labor, if the other requisite conditions are met. Services performed with respect to a commodity after its character has been changed from its raw or natural state by a processing operation do not constitute agricultural labor.

(e) The term "commodity" refers to a single agricultural or horticultural product, for example, all apples are to be treated as a single commodity, while apples and peaches are to be treated as two separate commodities. The services with respect to each such commodity are to be considered separately in determining whether the condition set forth in subparagraph (a)(iii) of this subsection has been satisfied. The portion of the commodity produced by an operator or group of operators with respect to which the services described in this paragraph are performed by a particular worker shall be determined on the basis of the pay period in which such services were performed by such worker.

(f) The services described in this paragraph do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the services described in this paragraph must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (3) of this section.

(6) Examples of the Application of the Definition of Agricultural Labor.

(a) Raising and Selling.

Services in connection with raising agricultural or horticultural commodities are agricultural labor. However, if this business also sells the commodity, the selling activity is not agricultural labor unless performed on the farm.

(b) Agricultural Labor Included and Excluded Services.

If the same worker performs both agricultural and nonagricultural

labor, the entire service will be considered to be agricultural labor if 50% or more of the time in a pay period was spent in agricultural labor. For reference see Subsection 35A-4-205(2).

(c) Poultry Hatchery.

Poultry hatchery services are agricultural labor provided they are performed on the farm or in the employ of a farm operator or group of operators who produced more than one-half the eggs. Services for a commercial hatchery that is not part of a farm that raises poultry are not agricultural labor.

(d) Raising Livestock.

Raising livestock and related activities performed on a farm are agricultural labor. Services in connection with livestock held, cared for and fed in a feed lot over an extended period of time to make an appreciable weight increase are agricultural labor. However, operating a stable or stud farm where no animals are raised is not agricultural labor. Services in connection with racing horses, using livestock in rodeos, exhibiting livestock and training livestock for these purposes are not agricultural labor when not performed on the farm where the animals were raised.

(e) Forestry, Lumbering and Landscaping.

Services performed in forestry, lumbering and landscaping are not agricultural labor.

(f) Brine Shrimp Harvesting.

Services performed in harvesting brine shrimp are not agricultural labor unless the services are performed on a farm.

KEY: unemployment compensation, employment tests
Date of Enactment or Last Substantive Amendment: July 1, 2007
Notice of Continuation: March 31, 2010
Authorizing, and Implemented or Interpreted Law: 35A-4-206

Rule 18. Applicability of other rules to review.

All provisions of these rules are applicable to review of decisions or orders of agencies, except that Rules 3 through 8 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner in proceedings to review the orders of an agency, commission, or board. The term "appellee" includes the respondent, which may be the agency, commission, or board. The term "clerk of the trial court" includes the chief executive officer of the agency, commission, or board or the officer's designee. The term "trial court" includes the agency, commission, or board.

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references. (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief

unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-

appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-

Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Notes

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of May, 2011, the foregoing **BRIEF OF APPELLEE,** was mailed, postage prepaid, to the following:

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