

1993

Jeff Kofoed v. Board of Review of the Industrial Commission of Utah, State of Utah Department of Corrections and Workers Compensation Fund of Utah : Brief of Respondent

Utah Court of Appeals

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Robert Breeze; Attorney for Applicant/Petitioner.

Richard G. Sumsion; Workers Compensation Fund of Utah; Sharon J. Eblen; Industrial Commission of Utah; Ralph Adams; Special Assistant Attorney General; Department of Corrections; Attorneys for Defendants/Respondents.

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IN THE UTAH COURT OF APPEALS

JEFF KOFOED, :
Applicant/Petitioner, :
v. : Case No. 93-0201 CA
BOARD OF REVIEW OF THE : Priority No. 7
INDUSTRIAL COMMISSION OF :
UTAH, STATE OF UTAH :
DEPARTMENT OF CORRECTIONS :
AND WORKERS COMPENSATION :
FUND OF UTAH, :
Respondent/Defendant. :

BRIEF OF RESPONDENT

Response to Petition by Applicant for Review of an
Order of the Industrial Commission of Utah
Denying Workers' Compensation Benefits

UTAH COURT OF APPEALS
CLERK

Richard G. Sumsion
Workers Compensation
Fund of Utah
392 East 6400 South
P.O. Box 57929
Salt Lake City, Utah 84157

Sharon J. Eblen
Industrial Commission of Utah
160 East 300 South, Third
Floor
P.O. Box 146600
Salt Lake City, Utah 84114-
6600

Ralph Adams
Special Assistant
Attorney General
Department of Corrections
6100 South Fashion Place Blvd.
Murray, Utah 84107

Robert Breeze
Attorney for Petitioner
211 East Broadway, Suite 215
Salt Lake City, Utah 84111

Attorney for
Applicant/Petitioner

Attorneys for
Defendants/Respondents

OCT 29 1993

Adams

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Robert Breeze
Attorney for Petitioner
211 East Broadway, Suite 215
Salt Lake City, Utah 84111

Attorney for
Applicant/Petitioner

Richard G. Sumsion
Workers Compensation
Fund of Utah
392 East 6400 South
P.O. Box 57929
Salt Lake City, Utah 84157

Sharon J. Eblen
Industrial Commission of Utah
160 East 300 South, Third
Floor
P.O. Box 146600
Salt Lake City, Utah 84114-
6600

Ralph Adams
Special Assistant
Attorney General
Department of Corrections
6100 South Fashion Place Blvd.
Murray, Utah 84107

Attorneys for
Defendants/Respondents

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UTAH, STATE OF UTAH DEPARTMENT OF :
CORRECTIONS and WORKERS :
COMPENSATION FUND OF UTAH, :
Respondent/Defendant. :

BRIEF OF RESPONDENT

I.

JURISDICTION

This court has jurisdiction to hear this matter under *Utah Code Annotated*, § 35-1-82.53 (1988), 63-46b-16 (1988) and 78-2a-3(2)(a) (1988).

II.

STATEMENT OF THE ISSUES

Did the Legislature intend to confer upon inmates of penal institutions the status of "employee" as it pertains to coverage under the Workers Compensation Act.

III.

STANDARD OF REVIEW

These proceedings were commenced after January 1, 1988. Therefore, review of this case is appropriate under the Utah Administrative Procedures Act ("UAPA"), Utah Code Ann.

§§ 63-46b-1 et seq. Because the applicable statute grants discretion to the Industrial Commission in the interpretation and application of the statutory language at issue, the Commission's determination is reviewed for abuse of discretion under Utah Code Ann. § 63-46b-16(4)(h)(i).

IV.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. *Utah Code Annotated*, Section 35-1-16.
2. *Utah Code Annotated*, Section 35-1-24.
3. *Utah Code Annotated*, Section 35-1-43.
4. *Utah Code Annotated*, Section 35-1-45.
5. *Utah Code Annotated*, Section 35-1-82.53.
6. *Utah Code Annotated*, Section 63-46b-16(4)(h)(i).
7. *Utah Code Annotated*, Section 64-13-6.
8. *Utah Code Annotated*, Section 64-13-16.
9. *Utah Code Annotated*, Section 64-13-19.
10. *Utah Code Annotated*, Section 64-13a-2.
11. *Utah Code Annotated*, Section 78-2a-3(2)(a).
12. *Utah Attorney General's Opinion*, No. 79-90.

V.

STATEMENT OF THE CASE

A. Nature of the Case.

This petition is an appeal from a decision by the Industrial Commission determining that inmates employed at the Utah State

Prison in various work programs, under Section 64-13-16, U.C.A., are not employees entitled to benefits under the Workers Compensation Act of this state.

B. Course of Proceedings.

Petitioner filed a claim for benefits under the Utah Workers Compensation Act claiming he was an employee at the time of his accident in 1986. Following a hearing to determine the threshold question of employee status, the administrative law judge determined the petitioner was an employee. On motion for review, the Industrial Commission reversed this decision holding petitioner was not an employee. A petition was then filed for review by this court.

C. Statement of Facts.¹

The petitioner did not request a transcript of the hearing of this matter, but elected instead to rely upon the Findings of Fact entered by the Administrative Law Judge. Although there is little controversy as to the facts of this case, most of the facts enumerated by the Petitioner in his Brief are irrelevant to the issue presented for review. Furthermore, the Industrial Commission in its Grant of Motion for Review, dated February 26,

¹ Taken verbatim from the Administrative Law Judge's Findings of Fact and the Industrial Commission's Grant of Motion for Review, but excluding therefrom those facts which are irrelevant to the sole issue presented in this case. (R. 18-25, 47-53) Because the hearing before the Commission's Administrative Law Judge was limited to the single issue of determining claimant's employee status, individual "facts" as found by the ALJ are still subject to dispute by Defendants and are provided only as general background information.

1993, specifically stated "the findings of fact, conclusions of law and order of the ALJ are therefore reversed, and we substitute our findings, conclusions and order." (R. p.53) This is consistent with well-established case law that indicates the Commission is the ultimate finder of fact, even though in this case, it probably makes little difference, because the relevant facts are not in dispute.

1. Applicant herein, Jeff Kofoed, was and is an inmate of the Utah State Prison. On or about July 20, 1986, he became a fire fighter at the Utah State Prison. The applicant was allowed to volunteer and as an inmate sign up for the Conservation Camp at the Utah State Prison based on his conduct. The purpose of the Conservation Camp was to perform conservation and fire suppression activities, both in the state of Utah and throughout the West. The program, which the applicant was involved in, was a joint program between the Department of Corrections and the Division of State Lands and Forestry, according to the testimony of the deputy warden. That program consists of the Lone Peak State Nursery and the Conservation Camp, which are located at the prison. The Conservation Camp program was not housed with the regular prison population, but rather, was housed at the Lone Peak facility.

2. As part of the Conservation Camp Resident's Agreement, the applicant agreed that he would remain in the program for a minimum of one year. The Agreement [See Addendum p. 43] also noted that the applicant's "Participation in the Conservation

Camp is purely voluntary." In addition, the Agreement required that applicant satisfactorily complete the "Fire Fighting training program and Advanced First Aid by the American Red Cross, and other training as needed or assigned." As a result, the applicant received his training, and fought approximately 30 fires during the summer of 1986. In late August of 1986, the applicant had been fighting fires in Oregon, when he was assigned to a fire in Idaho.

3. On August 25, 1986, the applicant was traveling in a van to the scene of a fire on public land in Idaho. As he was traveling in the van, the van went off a cliff [actually off the road into rough terrain]. The applicant sustained injuries to his low back. The Applicant was given pain medication, and was hospitalized for three days. He was then returned to the Utah State Prison.

4. Between 1987 and 1990, the applicant was paroled a total of approximately 18 months.

5. In January of 1990, the applicant returned to the fire fighting program and stayed in that program until November 1990, when he was again paroled.

6. In June 1991, the applicant was returned to the Utah State Prison because of a revoked parole. Shortly thereafter, the applicant was paroled on March 10, 1992. In June 1992, the applicant was returned to Utah State Prison for failing a drug screening test.

7. The Deputy Warden testified that the Division of State

Lands and Forestry invoices the fire fighting inmate services at \$6.00 - \$6.50 per hour. He testified that the Utah State prison, however, only received the cost of the inmate wage [stipend] of \$3.50 per hour and the Division of State Lands and Forestry pockets the remainder. The Division of State Lands and Forestry also provides the equipment that the inmates need in addition to the wage. The prison's Director of Support Services [Mr. Leatham] testified that there is no withholding from the funds paid to the prisoners, because the prison has concluded that those payments are a "Stipend," and are not "Wages" since the prison had no intent to pay wages. However, Mr. Leatham did indicate that the prison does pay workers compensation premiums on some of its Utah Correctional Industries employees because of federal law requirements.

VI.

SUMMARY OF ARGUMENT

Convicts and prisoners working in prison sponsored rehabilitation programs are not employees in the ordinary sense as that term is used in Section 35-1-43, *U.C.A.* Injuries sustained by such individuals in prison sponsored rehabilitation programs are not covered under the Workers Compensation Act. This has been the long standing policy of the Department of Corrections. The policy has been consistently upheld by the Industrial Commission and that policy has now been clarified by statute in both the Workers Compensation Act, Section 43, and the

legislation pertaining to inmate employment in Sections 64-13-16 and 64-13-19. These changes are a clarification of the law, not a change in the law.

VII.

ARGUMENT

POINT I

REVIEW FOR ABUSE OF DISCRETION IS THE PROPER STANDARD OF REVIEW UNDER UTAH CODE ANN. § 63-46b-16(4)(h)(i).

This Court considered standards of review for agency action extensively in King v. Industrial Commission of Utah, 850 P.2d 1281 (Utah App. 1993). The King case establishes the analytical model to be applied in review of agency action. As noted by the Court, "This model applies in all UAPA cases dealing with either the interpretation or application of agency-specific law by an agency. First, we determine whether the legislature explicitly granted discretion to the agency to interpret or apply statutory language at issue." King, 850 P.2d at 1291. If such a grant is found, review is appropriate under Utah Code Ann.

§ 63-46b-(4)(h)(i) for abuse of discretion, giving some discretion to the agency and determining "whether its action is within the bounds of reasonableness." Id. If no explicit grant of discretion is found, the King model requires an examination of the statute and its context for an implicit grant. An implicit grant of discretion, like an explicit grant, triggers review under subsection (4)(h)(i) for reasonableness and abuse of

discretion. Only if no grant of discretion is found and the language is unambiguous and susceptible to construction through traditional interpretive methods does the Court review for correction of error.

It is clear from the commission's Grant of Motion for Review (R. 47-53) that it was acting under the powers and duties explicitly conferred upon it by Utah Code Ann. §§ 35-1-16(1) and 35-1-24 (1988). Section 35-1-16(1) explicitly grants the Commission "full power, jurisdiction, and authority to: . . . (d) investigate, ascertain, and determine reasonable classifications of persons, employments, and places of employment as necessary to carry out the purposes of this title " Determining whether inmates performing labor for non-market wages are employees for purposes of workers' compensation is precisely the kind of reasonable classification of persons and employments that the statute explicitly commits to the Commission's particularized expertise. Therefore, the Commission's determination is to be reviewed under an abuse of discretion standard, giving some deference to the agency's interpretation and assessing whether its determination is within the bounds of reasonableness.

Even if there was no explicit grant of discretion, the breadth of the statutory definition of "employee" is subject to more than one interpretation. Under King, "[i]f the statutory language is broad and expansive or subject to numerous interpretations we will assume the legislature has chosen to defer the policy making expertise of the agency and review the

action under section 63-46b-16(h)(i) for abuse of discretion."

Utah Code Ann. § 35-1-43(1)(b) (Supp. 1993) defines "employee" as follows:

each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and minors, whether legally or illegally working for hire, but not including any person whose employment is casual and not in the usual course of the trade, business, or occupation of his employer.

This broad and expansive definition contains many factors that are subject to multiple interpretations; in fact, hearings before the Commission routinely involve the construction and application of such terms as "regularly", "contract of hire", "casual employment", and "usual course of business" to the determination of employee status for the purpose of receiving statutory benefits. These determinations depend on the factual specifics of the alleged employment relationship and cannot be resolved outside the relevant factual context. The necessity for individual consideration of employment status in fact-specific contexts strongly points to an implicit grant of discretion to the agency to interpret and apply statutory language, including the definition of "employee" for purposes of workers' compensation coverage. Because implicit, like explicit, grants of discretion trigger subsection (4)(h)(i) review, the reasonableness/abuse of discretion standard applied here.

POINT II

PETITIONER WAS NOT AN EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS ENTITLED TO WORKERS' COMPENSATION BENEFITS AT THE TIME OF INJURY.

Petitioner was working in a prison-sponsored work program at the time of his injury on October 25, 1986. Without an understanding of the prison work programs, one might incorrectly assume that he would be entitled to benefits under the Workers Compensation Act, Section 35-1-45, which provides as follows:

Every employee mentioned in Section 35-1-43 who is injured . . . by accident arising out of, or in the course of his employment . . . shall be paid compensation for loss sustained on account of the injury . . .

The relevant portions of Section 35-1-43, *U.C.A.*, read as follows:

- (1) As used in this chapter, "employee," "worker" or "workman" and "operative" mean:
 - (b) Each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied . . . (emphasis added)

Attempts by the petitioner to define or interpret the word "employee" or "employer" misdirects the courts attention from the real issue as to whether or not prisoners or convicts can be accorded the status of "employee" under any circumstances, other than by an express contract (such as is required of those inmates or prisoners working under programs sponsored by the federal

government in which a prevailing wage and workers compensation benefits are mandated as a condition of the employment).

Certainly prisoners and inmates involved in various rehabilitation work programs are working to the extent that they are rendering a service in the form of physical labor, but this in no way qualifies them as an employee under workers compensation statutes.

If the 1993 amendments to Section 35-1-43, 64-13-16 and 64-13-19 clarify the law rather than change the law, the Commission's determination must be upheld. In order to focus on this question, the statutory background, and legislative intent must be examined. Historically, confinement at hard labor was an accepted fact of prison life, with an emphasis on punishment. More recently, rehabilitation has become the objective.

Section 64-13-6 sets forth the primary purpose of the Department of Corrections to include the following:

- (3) provision of rehabilitation opportunities to assist the criminal offender in functioning as a law-abiding and productive member of society;

The foregoing provision was enacted by the Legislature in 1985. Also enacted in 1985 were Sections 64-13-16 and 64-13-19, which read as follows:

64-13-16. Unless incapable of employment because of sickness or other infirmity, or for security reasons, inmates shall be employed on a regular basis, as is practicable. No inmate may be employed on work which benefits any employee or officer of a department. A percentage of net earnings paid inmates, as determined by the department, may be withheld and credited to a

savings account in the inmate's name. Any interest earned on the account shall also be credited. The funds shall be paid to inmates upon discharge or sooner at the discretion of the department.

64-13-19. The department shall determine the types of labor to be pursued, and what kind, quality, and quantity of goods, materials and supplies shall be produced, manufactured, or repaired at the prisons. Contracts may be made for the labor of inmates, including contracts with any federal agency for a project affecting national defense. As many inmates as practicable may be employed to produce, manufacture or repair any goods, materials or supplies for the state or its political subdivisions. Prices for all goods, materials and supplies shall be fixed by the department.

Lastly, the Legislature specified further legislative intent in 64-13a-2 as follows:

It is the intent of the Legislature in this chapter to:

(1) Create a division of correctional industries which:

- a. is a self-supporting organization;
- b. is profit-oriented;
- c. generates revenue for its operations and capital investment;
- and
- d. assumes responsibility for training offenders in general work habits, work skills and specific training skills that increase their training prospects when released;

(2) Provide an environment for the operation of correctional industries that closely resembles the environment for the business operations of a private corporate entity;

In 1979, the Utah Attorney General rendered Opinion No. 79-90. In response to an inquiry whether prison inmates employed in prison industries programs were state employees, the opinion responded negatively. The opinion noted the general rule arising from case law in correlate jurisdictions denying inmates workers' compensation benefits. The opinion went on to note that the only three states to recognize a limited right of inmates to benefits did so expressly by statute. Although the Utah statutes governing inmate employment were changed in 1985, nothing in the 1985 enactments suggests any conceptual change pertaining to the issue of workers' compensation coverage. The Department of Corrections and the Industrial Commission therefore reasonably continued to rely on the opinion's unchallenged conclusion that inmates were not entitled to workers' compensation benefits.

The very nature of the agreement between the Department of Corrections and claimant here reinforces the rehabilitative element of prison work and belies a true employment relationship. The agreement refers to claimant's participation in the Conservation Camp Program, not a job. Prison programs are rehabilitative in purpose. Of significance is the claimant's explicit waiver of claims of liability against the prison for any injuries sustained in the course of the program as follows:

9. I release the Utah State Prison from any and all liability and responsibility for any injury received while in the Conservation Camp Program. Emergency treatment and proper medical attention will be provided or arranged for by the Utah State Prison Medical Department.

The general law in the area of convicts and prisoners is articulated by Professor Arthur Larson in Section 47.31(a), *Larson's Workers Compensation Law*, as follows:

Convicts and prisoners, by judicial decision, by statute, or sometimes by both, have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions (Note omitted). The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. The inducements which might be held out to him, in the form of extra food, or even money, are in no sense consideration for an enforceable contract of hire.

The trend of some administrative agencies and a few courts has been to carve out exceptions to the general rule in recent years, but the rule still remains the majority rule and a number of states, including Utah, have enacted legislation in the last few years to clarify the original legislative intent reflected by the majority rule. (See Larson § 47.31 ft. note 13)

Petitioner cites the case of Young v. Boundary County, 796 P.2d 516 (Idaho 1990) and Clark County v. State of Nevada, Industrial Commission, 669 P.2d 730 (Nev. 1983) as authority for establishing himself as an employee entitled to workers' compensation. These cases deal with "non-traditional employees" (a jury member and an election clerk) and are clearly distinguishable from those involving a prisoner or inmate. Similarly, the cases cited by petitioner in support of what he perceives as the key test of the employee-employer relationship, "control", are likewise irrelevant. While control is a

determinative element generally in analyzing an employee-employer relationship, it has no applicability with respect to prisoners who work in rehabilitative programs and other opportunities provided by the prison in compliance with the legislative intent.

POINT III

PRISONERS IN UTAH HAVE NEVER BEEN CONSIDERED EMPLOYEES UNDER UTAH LAW FOR PURPOSES OF WORKERS COMPENSATION

In 1993, the Utah legislature passed amendments to Sections 35-1-43, 64-13-16 and 64-13-19 to clarify the status of prisoners and inmates performing various types of labor while at correctional facilities. These amendments clarified the status of these individuals, but in no way changed their status as contended by petitioner. There has been a recent trend in this jurisdiction and in other jurisdictions to carve out exceptions to the traditional rule or policy of denying workers' compensation coverage to convicts and prisoners. The majority of jurisdictions continues to deny such benefits, and other jurisdictions, including Utah, have taken recent steps to clarify existing law or reverse conflicting judicial decisions, as the case may be. Other states have acted to provide specific limited benefits following a prisoners release. It is clearly within the province of the legislature to do so, but no benefits are conferred without such direction.

Petitioner raises as Point II of his Argument that prisoners were not made non-employees until 1993. These amendments became effective May 3, 1993. There significance was raised for the

first time in Petitioner's Brief. Accordingly, Respondents are entitled to address this issue and relevant legislative history.

The Utah Supreme Court recently stated:

When interpreting an ambiguous statute, we first try to discover the underlying intent of the legislature, guided by the purpose of the statute as a whole and the legislative history. Hansen v. Salt Lake County, 794 P.2d 838 841 (Utah 1990).

In the instant case, the statute is not so much ambiguous as it is unclear as to whether it was ever intended to cover inmates. This court summarized the law relative to subsequent amendments in Kennecott Corporation v. Industrial Commission, 740 P.2d 385 (Utah App. 1987) as follows:

In workers' compensation cases, rights and liabilities are determined as of the date the injury occurred. (Citations omitted.) Later statutes or amendments may not be applied retroactively to deprive a party of rights or improve greater liability unless the later statute or amendment clarifies or amplifies how the earlier law should have been understood. (Citations omitted.) (Emphasis added.)

Respondents believe that the three documents set forth in the addendum shed significant light on the legislature's intent in passing the 1993 amendments. These documents (addendum pp.) were prepared by the Department of Corrections and submitted to the legislative committees for background information. Among the multiple concerns expressed by the Department of Corrections in these documents was the following fiscal comment:

The fiscal impact of extending coverage to inmates would be substantial. Committing a large share of the state's scarce fiscal resources to a single cause requires a

careful balancing of competing social needs. Such social choices are best left to the discretion of the legislature, which is structurally responsive to public input from all elements of society. In the absence of clear legislative direction, leaving this decision to the courts inappropriately engages them in judicial policymaking.

The lack of economic need during incarceration, the distinctive objective of inmate employment, and the availability of alternative means to address extended disability all contend against extension of workers' compensation coverage to inmates.

By way of an historical note, the department wrote:

The eligibility of inmates for workers' compensation has been addressed in neither Utah statute nor Utah case law. Not until recently have any state jurisdictions applied workers' compensation, even in limited form, to inmate populations, and the position holding inmates eligible is still a minority one. Because inmates have historically been regarded as ineligible, it is unlikely that the Utah legislature, in enacting the workers' compensation statute, ever considered the issue of inmate coverage. The absence of explicit language regarding inmates in this historical context also suggests that the legislature did not intend inmate coverage.

Respondent urges the Court to take judicial notice of the background information submitted by the Department of Corrections as set forth in these documents.

VIII.

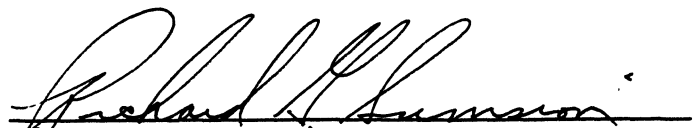
CONCLUSION

The petitioner does not meet the statutory criteria which must be satisfied in order to qualify as an employee for purposes of workers compensation coverage. The legislature has never

specifically provided for such coverage and the legislative amendments passed in 1993 do no more than clarify existing law.

This court should affirm the order of the Industrial Commission denying workers' compensation benefits to the petitioner, Jeff Kofoed, on the grounds that the current law clearly excludes prisoners and inmates from coverage under workers compensation and there is no evidence that the legislature ever intended coverage in the past under the Workers Compensation Act. A determination to the contrary would have far-reaching consequences, both as to the budgetary requirements of the Department of Corrections and other correctional facilities, and as to the successful accomplishment of rehabilitative and training opportunities at such correctional facilities. Such social and policy considerations are best left to the discretion of the legislature, whose obligation it is to balance the needs of society with the need to promote effectual rehabilitative and training opportunities at various correctional facilities.

RESPECTFULLY SUBMITTED this 29 day of October, 1993.


Richard G. Sumsion
Attorney for Respondents,
Department of Corrections and
Workers Compensation Fund of Utah

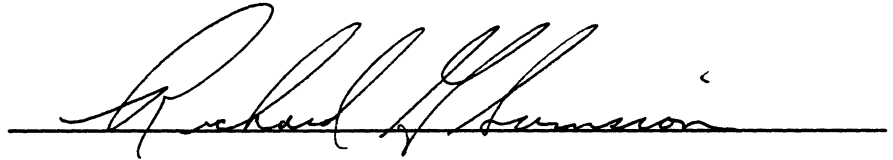
CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the foregoing Brief of Respondents were mailed, postage prepaid, or hand-delivered this 29 day of October, 1993, to the following:

Robert Breeze, Esq.
211 East Broadway, Suite 215
Salt Lake City, Utah 84111

Sharon J. Eblen, Esq.
Industrial Commission of Utah
160 East 300 South, Third Floor
Salt Lake City, Utah 84114

Ralph Adams, Esq.
Special Assistant Attorney General
Department of Corrections
6100 South Fashion Place Blvd.
Murray, Utah 84107

A handwritten signature in dark ink, appearing to read "Richard H. Harrison", is written over a horizontal line.

APPENDIX I

RECEIVED

NOV 13 1992

Workers Compensation Fund
Local Government

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 92000395

JEFF KOFOED,	*	
	*	
Applicant.	*	FINDINGS OF FACT
	*	
vs.	*	CONCLUSIONS OF LAW
	*	
DEPARTMENT OF CORRECTIONS and/or	*	AND ORDER
WORKERS COMPENSATION FUND	*	
OF UTAH,	*	
	*	
Defendants.	*	
	*	
* * * * *		

HEARING: Hearing Room 332, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on September 21, 1992, at 1:00 o'clock a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Presiding Administrative Law Judge.

APPEARANCES: Applicant was present and represented by John Preston Creer, Attorney at Law.

Defendants were represented by Richard G. Sumsion, Attorney at Law, Workers Compensation Fund of Utah, Ralph Adams, Attorney at Law, Department of Corrections.

At the conclusion of the evidentiary hearing, the Administrative Law Judge found and concluded that the applicant was an employee of the Department of Corrections on August 25, 1986. As required by law, I am prepared to enter the following

FINDINGS OF FACT:

The applicant herein, Jeff Kofoed, is and was an inmate of the Utah State Prison. In October of 1985, the applicant entered the

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Utah State Prison for a credit card violation. On or about July 20, 1986, he became a fire fighter at the Utah State Prison. The applicant was allowed to volunteer and as an inmate sign up for the Conservation Camp at the Utah State Prison based on his conduct. The purpose of the Conservation Camp was to perform conservation and fire suppression activities both in the state of Utah and throughout the West. The program which the applicant was involved in, was a joint program between the Department of Corrections and the Division of State Lands and Forestry, according to the testimony of the deputy warden. That program, consists of the Lone Peak State Nursery and the Conservation Camp, which are located at the prison. The Conservation Camp program was not housed with the regular prison population, but rather, was housed at the Lone Peak facility.

As part of the Conservation Camp Resident's Agreement, the applicant agreed that he would remain in the program for a minimum of one year. The Agreement also noted that the applicant's "Participation in the Conservation Camp is purely voluntary." In addition, that Agreement required that the applicant satisfactorily complete the "Fire Fighting training program and Advanced First Aid by the American Red Cross, and other training as needed or assigned." As a result, the applicant received his training, and fought approximately 30 fires during the summer of 1986. In late August of 1986, the applicant had been fighting fires in Oregon, when he was assigned to a fire in Idaho.

On August 25, 1986, the applicant was traveling in a van to the scene of a fire on public land in Idaho. As he was traveling in the van, the van went off a cliff. The applicant sustained injuries to his low back. He was treated in Boise, and received a low back x-ray and was informed that he had sustained a really bad bruise. The applicant was given pain medication, and was hospitalized for three days. He was then returned to the Utah State Prison.

The applicant had intermittent sharp stabbing pains which he reported to the Conservation Camp supervisor, Lieutenant Johnstun. The applicant had pain killing drugs prescribed for his condition, but pursuant to prison rules, he was unable to receive that medication. Instead, the applicant was given aspirin and anti-inflammatory medication. The applicant testified that his low back pain gradually worsened over the years. Between 1987 and 1990, the applicant was paroled a total of approximately 18 months. The applicant denied any low back injuries while on parole.

In December of 1988, the applicant was in a racial fight at the prison, and was struck on the cheek with a 2'x4' board. The

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applicant was rendered unconscious, and testified that he thought that he had fractured his cheek. The applicant testified that his back hurt but that he received no treatment for it.

In January of 1990, the applicant returned to the fire fighting program and stayed in that program until November of 1990. The applicant testified that his job at that time was to drive one of the vans. While so engaged, the applicant noticed that his right leg was going numb. He reported his problem to the staff, but they concluded that the applicant was trying to get out of work on the first three occasions that he complained. Finally, a medical assistant examined the applicant and informed him that maybe he had an inflamed low back muscle. The applicant was paroled in November of 1990.

In January of 1991, the applicant started having increasing low back pain, which was increasing in both frequency and severity. The applicant thought that it was sore muscles, and testified that he had sustained no trauma during that time to his low back. While he was admitted to the Project Reality Program, the applicant complained of low back pain to the people there. In March or April of 1991, the applicant went to the St. Mark's Emergency Room, and was told at that facility that he would need a CT scan of his low back. However, the applicant did not have the \$800 cost and so he did not receive that diagnostic study. On May 6, 1991, the applicant reported to Dr. Hagen, for chiropractic evaluation. Dr. Hagen diagnosed an inflamed nerve in the applicant's back. In June of 1991, the applicant was returned to the Utah State Prison because of a revoked parole.

The applicant continued complaining of low back pain, a note in the prison medical records indicates that the applicant on August 22, 1991, had a request to work in the kitchen "Disapproved due to chronic low back pain." As indicated, the applicant kept complaining of low back pain, and would see the medical technician, whom he described as a "pill pusher", who would tell the applicant that he would give the doctor the applicant's notes requesting a visit with the doctor. The applicant noticed a pain down his right leg, and he kept filling out requests to see the doctor. Finally, the physician's assistant came out and gave the applicant an exam and gave him Naprosyn, and informed him that if his condition worsened, he should let the physician's assistant know. The applicant's condition did worsen, and on September 23, 1991, he was given a three day "lay-in" to see the doctor. Unfortunately, the doctor never appeared. After four days, the applicant returned to his teacher's assistant duties at the prison. On September 27, 1991, the doctor did see the applicant, and informed that he could not do anything for the applicant but give him medication. The applicant filed a grievance with the prison for the purpose of seeing a doctor and getting definitive medical treatment. In

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October of 1991, the applicant went to the doctor and the doctor recommended that the applicant have a CT scan. That CT scan was performed on November 8, 1991. That scan indicated that the applicant had herniated discs at L3-4 and L5-S1. On January 3, 1992, sometime after the CT scan of November 8, 1991, the applicant was told by prison staff that his low back problem was genetic. The applicant filed a grievance regarding his inability to get fair medical treatment. The applicant was informed by the prison that he was getting fair treatment.

In January of 1992, the applicant was informed that he was to see Dr. Reichman. The applicant did see Dr. Reichman on January 13, 1992, and Dr. Reichman informed the applicant that he had herniated discs, and that they were not the result of any genetic condition. He also informed the applicant that he would need surgery, and would schedule the same for March 4, 1992. However, the applicant was never informed of the surgical date, instead someone from the Utah State Prison called the doctor's office and canceled the surgery. Shortly thereafter, the applicant was paroled on March 10, 1992.

On April 8, 1992, the applicant had low back surgery performed by Dr. Reichman. Dr. Reichman performed microdiscectomy surgery at L5-S1. The applicant apparently had an uneventful recovery from his surgery.

In June of 1992, the applicant was returned to Utah State Prison for failing the drug screening test.

The Deputy Warden testified that the Division of State Lands and Forestry invoices the Fire Fighting inmates services at \$6.00 - \$6.50 per hour. He testified that the Utah State Prison, however, only receives the cost of the inmate wage of \$3.50 per hour, and the Division of State Lands and Forestry pockets the remainder. The Division of State Lands and Forestry also provides the equipment that the inmates need in addition to the wage. The prison's Director of Support Services testified that there is no withholding from the funds paid to the prisoners, because the prison has concluded that those payments are a "Stipend", and are not "Wages" since the prison had no intent to pay wages. However, Mr. Latham did indicate that the prison does pay workers compensation premiums on some of its Utah Correctional Industries employees, because of Federal law requirements.

In denying the applicant workers compensation benefits in this matter, the prison has raised a number of defenses. Initially, the prison indicated that the applicant should not receive workers compensation benefits, because he is a "volunteer". Apparently,

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the Utah State Prison has in mind the Volunteer Government Workers Act, Section 67-20-1 et seq., specifically, it would appear that the defendants are referring to Section 67-2-2 (sub(2)), which provides the following:

"Community service worker" means any person who has been convicted of a criminal offense, any youth who has been adjudged delinquent, or any person or youth who has been diverted from the criminal or juvenile justice system and who performs a public service for an agency as a condition of his sentence, diversion, probation or parole.

That definition is important, since Section 67-20-6, provides:

A community service worker is considered a government employee for purposes of receiving workers compensation benefits, which shall be the exclusive remedy for all injuries and occupational diseases as provided under Chapters 1 and 2, title 35.

Based on the foregoing, the issue now arises as to whether or not the applicant is, in fact, a community service worker as contemplated by the Volunteer Workers Act. Section 2, quoted above provides that a community service worker is a person who has been convicted of a criminal offense, which obviously the applicant has. However, the applicant does not satisfy the other requirement of that section, which is that he must have "been diverted from the criminal or juvenile justice system. . . .".

There was no evidence offered at the time of the evidentiary hearing that the applicant was, in fact, diverted as that term is normally understood in the criminal justice parlance. As understood by the Administrative Law Judge, a diversion program is a program whereby a person charged with a crime rather than being incarcerated in a penal institution is instead "diverted" into a program where some community service is performed in lieu of incarceration in a penal institution. As indicated, there is no evidence that the applicant was in any kind of diversion program, and accordingly, he would not qualify for workers compensation benefits as a community service worker.

The defendants also contend that the applicant is not entitled to workers compensation benefits for the reason that there is no voluntary bilateral contract of hire. In relying on this defense, the defendants rely on the general rule in this area, as so ably

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articulated by the authority in this area, Professor Larsen in Section 47.31 (a) of his treatise, Larsen's Workmens Compensation Law. In that Section, Dr. Larsen states:

Convicts and prisoners by, judicial decision, by statute, or sometimes by both, have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions. (Note omitted) The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. The inducements which might be held out to him, in the form of extra food or even money, are in no sense consideration for an enforceable contract of hire.

Applying the foregoing to the situation involved in the case at bar, I must note that the Administrative Law Judge is aware of no judicial decision or statute which would forbid the awarding of workers compensation benefits to the claimant in this matter. As indicated by Dr. Larsen, the decisions and statutes have denied compensation to inmates who were injured while working within the prison. However, an important distinction must be made in this case, that distinction being that the applicant herein was not injured while working within the prison. In fact, the applicant herein was not even injured in the state of Utah. Therefore, an important distinction is present in this case.

As indicated, there being no Utah statute or case law on point, this case, thus, is one of first impression. As such, I will look to the generally accepted authority in this area, Dr. Larsen, for guidance in determining if the applicant's injury is compensable under the Utah Workers Compensation Act. In this regard, Dr. Larsen is especially helpful in Section 47.31 (d). In that section, Dr. Larsen sets forth the approach which should be taken in cases such as the instant one: "There has been a greater inclination to find employee status for prisoners when, instead of merely working within the prison, they have been lent to other state agencies or even private employers. (Note omitted) Larsen, Section 47.31 (d). It should be remembered that in this case, the applicant was lent to the Division of State Lands and Forestry for the purpose of fighting fires throughout Utah and the western United States. The Division of Lands received either \$6.00 or \$6.50 per hour for the applicant's fire fighting services, of which they paid the applicant, \$3.50 per hour.

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In the following passage, Dr. Larsen persuasively sets forth the policy reasons for granting compensation in cases such as the applicant's:

Although the basic rule denying compensation to prisoners seems to be a correct application of any statute requiring a "Contract of Hire", the result may in some circumstances be out of tune with the conditions of modern society. It is well known that many prisons nowadays operate elaborate factories making twine, license plates, clothing, furniture and other things. Prisoners are also lent to highway departments for road work in some states. All the external features and all the risks of ordinary employment are present. However, little value one may assign to the rights of a prisoner during his confinement, (note omitted), one should never forget that, in most instances, he will not always be a prisoner, and the permanent partial or total disability which he acquires in prison will create the same social problem after he returns to civil life as if the injury occurred while he was free. (Note omitted).

In view of the foregoing reasoning and considering the beneficent purpose of the Utah Workers Compensation Act and the case law directive that the Act is to be liberally construed in favor of coverage, I find that Jeff Kofoed was an employee of the Department of Corrections on August 25, 1986.

On the date of his industrial accident, the applicant was earning \$3.50 per hour. His Application for Hearing alleges that the applicant was working 55 - 60 hours per week. The answer to the claim filed by the Workers Compensation Fund of Utah did not specifically admit or deny the applicant's claim in that regard. Accordingly, the amount of the applicant's permanent partial impairment and temporary total compensation benefits is reserved pending submission of payroll records by the Utah State Prison to the Commission immediately.

The defendants have also challenged the medical causal connection between the applicant's industrial injury of August 25, 1986, and his surgery of April 8, 1992. Accordingly, upon resolution of the legal issues in this matter, the applicant will be referred to the medical panel for its evaluation. Specifically, the medical panel will be asked if the surgery of April 8, 1992,

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was a result of the industrial accident, and what period of temporary total disability resulted from that industrial injury and also, the extent of the permanent impairment resulting from the industrial accident.

CONCLUSIONS OF LAW:

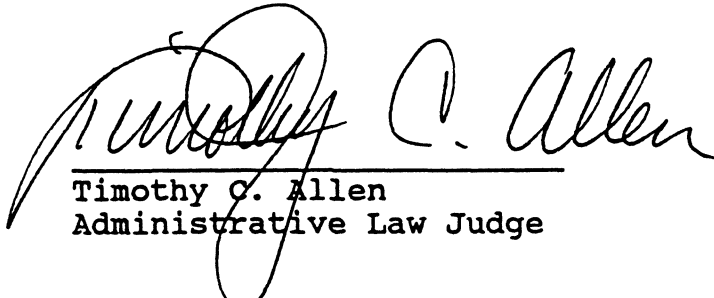
Jeff Kofoed for workers compensation purposes was an employee of The Department of Corrections on August 25, 1986. The applicant is entitled to workers compensation benefits as provided by law for his industrial accident of August 25, 1986.

ORDER:

IT IS THEREFORE ORDERED that The Department of Corrections furnish payroll records for Jeff Kofoed covering the period July 1986 through August 1986, said records to be submitted immediately.

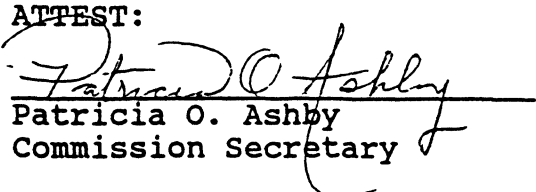
IT IS FURTHER ORDERED that the issue of medical causation, for the surgery of April 8, 1992, the period of temporary total disability, and the permanent impairment attributable to the industrial accident are hereby reserved, pending resolution of the legal issues. Upon resolution of those legal issues, the matter shall be referred to the medical panel for its evaluation.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.


Timothy C. Allen
Administrative Law Judge

Certified this 12th day of
November, 1992.

ATTEST:


Patricia O. Ashby
Commission Secretary



APPENDIX II

THE INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY, UT 84114-6600

REC-100
MAR 02 1965

Jeff Kofoed,

Applicant,

vs.

State of Utah/ Department of
Corrections, Workers Compensa-
tion Fund and Employers' Rein-
surance Fund,

Respondent.

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GRANT OF MOTION
FOR REVIEW

Case No. 9200395

92-10462-86

Workers
Comp.

The Industrial Commission of Utah (Commission) reviews the motion for review of respondents in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The provisions of U.C.A. Sections 35-1-1 et. seq. are applicable in this case.

The order of the administrative law judge (ALJ) is presumed to be lawful and reasonable "until it is found otherwise in an action brought for that purpose, or until altered or revoked by the commission." U.C.A. Section 35-1-20 (1953).

The statutes further provide that:

A substantial compliance with the requirements of this title [Title 35] shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature.

U.C.A. Section 35-1-33 (1953).

The Commission has "the duty ... and ... full power, jurisdiction, and authority to ... administer and enforce all laws for the protection of life, health, safety, and welfare of employees," U.C.A. Section 35-1-16(1)(a)(1953), and to "consider and determine" the matters in issue, U.C.A. Section 35-1-24 (1953).

Additional evidence that the Commission has been granted discretion in its determinations is shown by U.C.A. Section 35-1-88 (1965) which provides:

...The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the

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parties and to carry out justly the spirit of the Workmen's Compensation Act.

The preceding statute relates to matters at hearings, and shows the extent to which the legislature desired to provide the Commission with the necessary discretion to reach a decision. This statute also provides the authority for the Commission to deviate from common-law rules, statutory rules of evidence, technical or formal rules of procedure, unless provided for in the workers' compensation act, or unless otherwise adopted by Commission rules. Id.

Thus, the statutes expressly and impliedly give the Commission, commensurate with its statutory duty, broad authority and discretion to interpret, construe, consider, and determine the matters before it in the workers' compensation arena.

The respondents on December 11, 1992 requested that we review the November 12, 1992 order of the administrative law judge (ALJ) finding that the applicant who was a prisoner confined to the custody of the Department of Corrections (hereafter Corrections), and who was injured in a traffic accident while travelling in a van en route to fight a forest fire in Idaho, was an employee entitled to the benefits of the Utah Workers' Compensation Act. The applicant encourages us to uphold the order of the ALJ as being sound policy.

The relevant facts are recited by the ALJ, and there does not appear to be any disagreement with them by the parties.

The applicant while a prisoner volunteered for the Conservation Camp (hereafter Camp) at the Utah State Prison. The purpose of the Camp was to perform fire fighting and conservation activities throughout the West including Utah. The Camp was a joint program between the Division of State Lands and Forestry, and the Department of Corrections. The Camp was not located with the regular prison population, but was instead housed at the Lone Peak facility.

The agreement between the applicant and the Camp stated that the applicant's participation was voluntary, and that he agreed to remain in the program for at least one year. Also agreed to were some training courses which were completed by the applicant. During the summer of 1986, the applicant fought approximately 30 fires. Apparently, the Division of Lands received between \$6 - 6.50 per hour for the applicant's fire fighting services, and the applicant was given \$3.50 per hour.

As stated, while travelling to Idaho, the applicant was injured when the van in which he was riding plunged off a cliff.

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He sustained low back injuries, and was diagnosed as having a bad bruise. He was hospitalized for three days. Over the years, his pain increased. He has alternately been in and out of prison during the relevant period, and he ultimately had surgery on April 8, 1992.

The Department of Corrections had custody of the applicant as shown by the pertinent statute:

All offenders committed for incarceration in a state correctional facility, for supervision on probation or parole, or for evaluation, shall be placed in the custody of the department. The department shall establish procedures and is responsible for the appropriate assignment or transfer of public offenders to facilities or programs.

U.C.A. Section 64-13-7 (1953 as amended).

Traditionally, inmates have been denied worker's compensation for injuries sustained during assigned prison work. Larson, infra. at Section 47.31. Apparently, with the exception of Wyoming, none of the states surrounding Utah provide worker's compensation coverage to inmates. Ariz. Rev. Stat. Ann. Section 23-901(5)(f)(West 1985)(individual confined to a penal institution is not an employee of the department); Watson v. Ind. Comm'n, 414 P.2d 144 (Ariz. 1966)(trustee injured while working on prison farm was not covered by worker's compensation); Parson's v. Workmen's Compensation Appeals Bd., 179 Cal. Rptr. 88 (1981)(county prisoner granted probation and subsequently injured while working was not an employee of the county); Colo. Cum. Supp. Sect. 8-40-301(3)(a) & (b) (1992)(city, county, or state prisoners participating in any training, rehabilitation, or work program are not eligible for workers' compensation unless working for private employer); Shain v. Idaho State Pen., 291 P.2d 870 (Id. 1955)(prisoner injured while working in license plate factory at the state penitentiary was not an employee within the terms of workmen's compensation); Scott v. City of Hobbs, 366 P.2d 854 (N.M. 1961)(city prisoner injured while working on city street was not entitled to compensation); 172 Nev. Op. Att'y Gen. 48 (1974)(Nevada attorney general opinion recommends denial of mandatory workers' compensation coverage to inmates); WS Title 27-14-108(c)VI (WY 1977 as amended)(prisoners are covered by workers' compensation when performing work pursuant to law or court order).

There is no Utah statute or any case law which deals with the question before us. However, there is an informal opinion of the Utah attorney general which states that inmates are not covered by workers' compensation. Opinion No. 79-90, Utah attorney gen'l. The Utah attorney general reasoned that Utah Code Annotated Section

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35-1-43 (1953 as amended) required for qualification as "employees" under this section that prisoners must be serving the state under an express or implied contract of hire.

Further, the attorney general went on to explain that "[t]he relationship between the state and its prisoners is the antithesis of voluntary employment. All imprisonment is at hard labor ... The state does not employ prisoners at will, is not obligated to pay wages to them, and obviously does not intend an employer-employee relationship. Likewise, prisoners do not enter the reformatory to find work."

Although many of the provisions mentioning "hard labor" have been abrogated or replaced in the punishment provisions of the Utah Code, current statutes do show that the legislative intent is for inmates to do labor:

Unless incapable of employment because of sickness or other infirmity or for security reasons, the department may employ inmates to the degree that funding and available resources allow. An offender may not be employed on work which benefits any employee or officer of the department.

U.C.A. Section 64-¹³14-16 (1953 as amended).

There is no indication in this legislation, however, that there is any legislative intention to create an employer-employer relationship. We construe the term "employ" in the above statute to be synonymous with the word "work."

Another section which pertains to county government, shows a similar intent to allow labor to be performed for the public benefit.

They may provide for the working of prisoners confined in the county jail under convictions for misdemeanors, under the direction of some responsible person, for the benefit of the county, upon public grounds, roads, streets, alleys, highways or public buildings, when under such judgment of conviction or existing laws such prisoners are liable to labor.

U.C.A. Section 17-5-31 (1953).

The instant case does not involve a work release situation which we believe can involve a true employer-employee relationship entitling a prisoner in a work-release status to

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workers' compensation. In the work release situation, it is apparently the intention of the legislature to require that certain minimum conditions of employment be met. The statute relating to work release provides:

(6) An inmate who is housed at a nonsecure correctional facility and on work release may not be required to work for less than the current federally established minimum wage, or under substandard working conditions. U.C.A. Section 64-13-14.5 (1953 as amended).

Corrections raises a number of defenses. First, Corrections states that the decision of the ALJ is contrary to Utah public policy; second, that the claim may be barred by the statute of limitations in U.C.A. Section 35-1-99; and, third, that the ALJ could not enter a final order because there were issues remaining to be resolved.

We will address the first issue of public policy. Prisoners and convicts have usually been denied compensation for injuries sustained in connection with work done within the prison even when some kind of reward or payment is made. Larsen, Workmen's Compensation Law, Section 47.31(a). The reason normally given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. Id.

The ALJ determined that there was a distinction between the circumstances in the instant case and the explanation given by Professor Larsen.

As Professor Larsen has stated:

Convicts and prisoners by judicial decision, by statute, or sometimes by both, have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions. (Note omitted). The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. The inducements which might be held out to him, in the form of extra food or even money, are in no sense consideration for an enforceable contract of hire.

Section 47.31(a), Larsen's Workmen's Compensation Law.

In the instant case, the ALJ reasoned, the applicant was

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performing his duties outside the prison whereas Professor Larsen was describing work done within the prison. To us, we see little difference as to the geographical location of where the duties were performed.

The applicant was under the custodianship of Corrections, and was not free to exercise the rights of other citizens. He was thus deprived of certain liberties whether he was within the prison walls or was outside the walls. In this day when various prison programs allow prisoners to perform their punishment/rehabilitation outside the prison, we see no reason for the distinction. In fact, in the appropriate case, a prisoner within the walls of prison, as well as outside, could still be considered to be an employee as long as there is "any contract of hire, express or implied, oral or written...." U.C.A. Section 35-1-42 (1953 as amended 1992). There must be evidence of an employee-employer relationship between Corrections and the prisoner, and we cannot imply such a relationship under the circumstances.

A review of the so-called agreement between the Conservation Camp and the applicant reflects an emphasis on proper behavior, good citizenship, and rehabilitation. There is no discussion of wages or other employment features normally discussed in an employment agreement. See Exh. D-2. In addition, we find no evidence that there was any voluntary bilateral employment agreement, express or implied, but to the contrary the applicant was enrolled in a prison program of rehabilitation not rising to the level of employment. See e.g., Bd of Educ. of Alpine School Dist. v. Olsen, 684 P.2d 49, 50-51 (Utah 1984). The fact that there were some rewards associated with the Conservation Camp does not provide him coverage under workers' compensation. Gourdin v. SCERA, 203 Utah Adv. Rep. 3 (Utah Sup. Ct. Dec. 28, 1992).

The current Utah Constitution provides one prohibition in the area of convict labor:

The Legislature shall prohibit:

* * *

(2) The involuntary contracting of convict labor.

* * * *

Utah Const. Art. XVI, Section 3.

This provision does not seem relevant to our current inquiry since it appears to be designed to prevent convict labor from competing with other labor in connection with private employment. See e.g. Utah Mfrs.' Ass'n v. Mabey, 63 Utah 374, 226 P. 189 (1924) which interpreted a similar phrase in the 1924 version of U.C.A. Section 64-13-19 to have reference to the old practice of states to lease or hire prisoners to private individuals or corporations.

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Since we have resolved the issue of employment against the applicant, we do not reach the other issues asserted by the respondents such as the claim being barred by the statute of limitations in U.C.A. Section 35-1-99 (1953 as amended 1988 and repealed 1990), or medical causation.


The findings of fact, conclusions of law, and orders of the ALJ are therefore reversed, and we substitute our findings, conclusions and order.

ORDER:

IT IS ORDERED that the order of the administrative law judge dated November 12, 1992 is set aside, and the application is dismissed with prejudice.

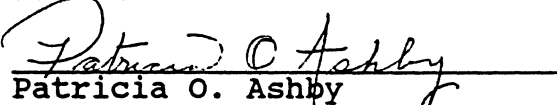
IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date of the order, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, 63-46b-16, and Couriers v. Dep't of Empl. Sec. et al., 201 Utah Adv. Rep. 79 (CA, 12/4/92). The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.


Stephen M. Hadley
Chairman


Thomas R. Carlson
Commissioner


Colleen S. Colton
Commissioner

Certified this 26th day of February 1993.
ATTEST:


Patricia O. Ashby
Commission Secretary



ADDENDUM

RATIONALE

Utah case law has long held that the purpose of workers' compensation is to provide injured employees a measure of financial security during employment-induced disability. This rationale is inapplicable to an inmate who, by means of his criminal conduct, has already disabled his earning capacity. The inmate's basic needs for food, clothing, shelter, and medical care (including any medical attention necessitated by work-related injury) are met by virtue of his incarcerated status; therefore, he does not have financial requirements comparable to the injured non-inmate whose income must provide for these needs. Because the inmate does not incur expenses similar to the non-offender, compensation for his injuries would take on the properties of an inducement or reward for injury rather than a reimbursement for losses incurred due to injury. The rehabilitative purpose of inmate employment should also be noted: the transferable social and work skills acquired, rather than the money earned, are the objective. Finally, it is important to recognize that inmates have no property interest in their jobs, and can be terminated from these positions at any time or for any reason.

To the extent that an inmate's injury may cause a disability that outlasts his incarceration, alternative remedies are available. Social Security disability benefits can be sought on the basis of his condition. Benefits for dependents may also be available. State-assisted job retraining and rehabilitation may be available independently or as an adjunct to Social Security benefits. It is significant that these are also options used by disabled non-offenders and are therefore not stigmatizing to former inmates as a class. It is also important that these remedies, unlike workers' compensation, do not act as incentives to self-injury.

The eligibility of inmates for workers' compensation has been addressed in neither Utah statute nor Utah case law. Not until recently have any state jurisdictions applied workers' compensation, even in limited form, to inmate populations, and the position holding inmates eligible is still a minority one. Because inmates have historically been regarded as ineligible, it is unlikely that the Utah legislature, in enacting the workers' compensation statute, ever considered the issue of inmate coverage. The absence of explicit language regarding inmates in this historical context also suggests that the legislature did not intend inmate coverage.

The fiscal impact of extending coverage to inmates would be substantial. Committing a large share of the state's scarce fiscal resources to a single cause requires a careful balancing of competing social needs. Such social choices are best left to the discretion of the legislature, which is structurally responsive to public input from all elements of society. In the absence of clear legislative direction, leaving this decision to the courts inappropriately engages them in judicial policymaking.

The lack of economic need during incarceration, the distinctive objective of inmate employment, and the availability of alternative means to address extended disability all contend against extension of workers' compensation coverage to inmates.

DISCUSSION: WORKERS' COMPENSATION AMENDMENTS

1. Uninsured Employers' Fund Not Implicated.

If inmates are removed from the definition of "employee," funds are not available to them from the Uninsured Employers' Fund (Utah Code Ann. § 35-1-107). This is a statutorily created fund which provide benefits to eligible employees under specified circumstances. A threshold requirement for eligibility is employee status. Under the proposed amendments, inmates could not meet this threshold requirement and would be unable to recover from these funds. (See § 35-1-107(1): "The fund has the purpose of assisting in the payment of workers' compensation benefits to any person entitled to them . . ."). However, even if an inmate were found to meet this threshold burden and to be eligible for workers' compensation benefits, the Uninsured Employers' Fund would not be implicated because the state is an insured entity.

2. Workers' Compensation Benefits Inappropriate.

A. Inmates' Basic Needs Met.

An inmate's needs for food, clothing, shelter, and medical care are met by the very nature of incarceration. Recovery of benefits to meet these needs is therefore redundant. The inmate's loss of earning capacity derives from the fact of incarceration, not from injury. Prison work is a management and rehabilitation tool, not employment in the ordinary sense.

B. Wage Replacement Benefits Create Incentive for Injury.

Statutory benefits provided by workers' compensation are excessive or inappropriate for most inmate employees. Utah Code Ann. § 35-1-65, for instance, states that temporary disability benefits shall be "a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of eighteen years, up to a maximum of four such dependent children . . .". For a relatively well-paid inmate earning \$0.75 per hour, full-time weekly wages for forty hours would reach only \$30. Most inmates earn substantially less than \$0.75 per hour. However, even at this higher rate, temporary disability benefits become an incentive for injury, as they provide greater compensation than the inmate can obtain by working.

C. Medical Benefits Implicate Prison Management Concerns.

Another example of an inappropriate benefit is the change of physician permitted an injured employee by Utah Admin. Code R568-2-9A2, which permits the employee to make one change of doctor without requesting the permission of the insurance carrier. Inmates' medical care is given by the prison's health care providers, who may refer the inmate to selected outside providers as deemed necessary. A change of physician at the inmate's

discretion would implicate the prison's legitimate security and management interests (e.g., scheduling, transportation, public safety) as well as its fiscal resources. Further, the constitutional standard for medical care is different from that in the private sector. If an inmate is being treated pursuant to workers' compensation, which standard applies--negligence or deliberate indifference?

3. Permanent Injuries Rare.

Few work-related injuries sustained in the prison context are of a magnitude that impacts post-incarceration activity. It is a better use of the state's fiscal resources to settle such claims on a case-by-case basis than to pay expensive workers' compensation insurance premiums for each inmate on the possibility that a significant injury may occur.

4. Alternative Non-Stigmatizing Remedies Available.

Social Security provides disability benefits. State-assisted job training and/or rehabilitation may be available independently or as an adjunct. Dependent benefits may also be available. Non-offenders who sustain disabling conditions in non-work-related contexts also use these options.

5. Workers' Compensation Provided for Private Sector/Prison Industries Enhancement (PS/PIE) Programs Paying Market Wages.

Inmates who are paid prevailing market wages under federally authorized programs are provided workers' compensation coverage. However, unlike inmates serving in non-certified programs, these workers have income tax withheld and pay certain expenses of incarceration as well as victim reparations.

P:WORKCOMP.TPR

INFORMATION SHEET

HB 267

(STATE GOVERNMENT - WORKERS' COMPENSATION AMENDMENT)

Existing Coverage For Inmates

With the exception of a very few inmates working in a federally certified private sector/prison industry program, no inmates in Utah Prisons are insured under Workers' Compensation.

Reason for Concern

The eligibility of inmates for workers' compensation has been addressed in neither Utah statute nor Utah case law. Not until recently have any state jurisdictions applied workers' compensation, even in limited form, to inmate populations, and the position holding inmates eligible is still a minority one. Because inmates have historically been regarded as ineligible, it is unlikely that the Utah legislature, in enacting the workers' compensation statute, ever considered the issue of inmate coverage. The absence of explicit language regarding inmates in this historical context also suggests that the legislature did not intend inmate coverage. **Isolated recent Administrative Law Judge decisions have found in favor of inmates who have applied for benefits under workers compensation. These decisions appear to have occurred because existing Utah statutes do not specifically exclude inmates from the definition of "employee."**

Possible Ramifications if Inmates Are Not Excluded From The Definition of Employees

We are concerned that if inmates are not specifically excluded from the definition of "employee," their may be very costly ramifications beyond workers' compensation issues.

Inmates may be eligible for FLSA considerations. This would mean the inmates working in the prison laundry, food service, correctional industries, or other work/training programs would be eligible for federal minimum wages for services performed.

We are concerned that if inmates are not specifically excluded from the definition of "employee," the Utah Department of Corrections may be required to insure all working inmates under workers's compensation. It is estimated that insurance premiums could range from \$75,000 to \$300,000 per year for current inmate populations, and would grow each year as more offenders are sent to prison. Additionally, since inmates would be considered employees of the State, according

to workers's compensation staff, if a disproportionate amount of claims started coming from the prison, the rate structure for the entire State would need to be adjusted.

The cost for insurance premiums, would in the most part be funded out of the corrections budget. Corrections would need to receive this increased budget or severely curtail inmate work/training programs.

Additionally, if inmates in work/training programs are classified as employees of the State and FLSA requirements apply, payrolls for inmates doing routine maintenance, laundry, grounds keeping, and other duties would go up by a magnitude of 10. This could add \$10 to \$20 million to the corrections budget.

I, Jeff Koford agree to the following rules, guidelines, and procedures of the Utah State Prison Conservation Camp.

1. I will obey all State and Federal Laws.
2. I will comply to all institutional rules governing my behavior: (i.e. NO drugs, alcohol, etc.; no unauthorized visitors).
3. I will realize that I am not available for personal endeavors.
4. I will work hard and follow instructions given by fire fighter supervisors, prison staff and designated squad bosses.
5. I will satisfactorily complete the Fire Fighting Training Program and advanced first aid by The American Red Cross, and other training as needed or assigned.
6. I agree to participate in all community service projects assigned and perform in a manner to bring credit to myself and the program.
7. I will follow through on all work assignments pledging to make my best efforts from the time of departure until time of return to the institution.
8. I recognize that there may be a possibility of danger and injury resulting from my participation in the Conservation Camp.
9. I release the Utah State Prison from any and all liability and responsibility for any injury received while in the Conservation Camp Program. Emergency treatment and proper medical attention will be provided or arranged for by the Utah State Prison Medical Department.
10. My participation in the Conservation Camp is purely voluntary. I recognize that no special treatment or favors are due me as a result of my participation.
11. I realize I will be on probation for ⁹⁰~~60~~ days and can be removed from the program for failure to perform up to expected standards at any time during this period, or anytime in the future I fail to perform to expected standards.
12. I pledge that my personal conduct while living in the Conservation Camp and any off property activities will be of the highest standards. I also pledge to help others and to accept help from them to maintain this high standard.
13. Any Major Disciplinary or Minor Disciplinary action may be cause for immediate removal from the Conservation Camp, forfeiting all priviledges earned up to date of removal.
14. I desire to participate in the Conservation Camp Program and to live in the Conservation Camp.
15. I agree to remain in the program for a minimum of 1 year.

7-20-84

62 Jeff Koford 17558
DATE INMATE SIGNATURE USP #

GALYN BLACKBURN, DIRECTOR

35-1-16. Powers and duties of commission — Fees.

(1) It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority to:

(a) supervise every employment and place of employment and to administer and enforce all laws for the protection of the life, health, safety, and welfare of employees;

(b) ascertain and fix reasonable standards, and prescribe, modify, and enforce reasonable orders, for the adoption of safety devices, safeguards, and other means or methods of protection, to be as nearly uniform as possible, as necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety, and welfare of employees in employment and places of employment;

(c) ascertain, fix, and order reasonable standards for the construction, repair, and maintenance of places of employment as shall make them safe;

(d) investigate, ascertain, and determine reasonable classifications of persons, employments, and places of employment as necessary to carry out the purposes of this title;

(e) promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees;

(f) establish and conduct free employment agencies, and license, supervise, and regulate private employment offices, and bring together employers seeking employees and working people seeking employment, and make known the opportunities for employment in this state;

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(g) collect, collate, and publish statistical and other information relating to employees, employers, employments, and places of employment and such other statistics as it considers proper; and

(h) ascertain and adopt reasonable standards and regulations, prescribe and enforce reasonable orders, and take such other actions as may be appropriate for the protection of life, health, safety, and welfare of all persons with respect to all prospects, tunnels, pits, banks, open cut workings, quarries, strip mine operations, ore mills, and surface operations or any other mining operation, whether or not the relationship of employer and employee exists, but the commission may not assume jurisdiction or authority over adopted standards and regulations or perform any mining inspection or enforcement of mining rules and regulations so long as Utah's mining operations are governed by federal regulations.

2) Unless otherwise provided by statute, the commission may adopt a schedule of fees assessed for services provided by the commission. The fee shall be reasonable and fair, and shall reflect the cost of services provided. Each fee established in this manner shall be submitted to and approved by the Legislature as part of the commission's annual appropriations request. The commission may not charge or collect any fee proposed in this manner without approval by the Legislature. Prior to submitting any proposed fee to the Legislature, the commission shall conduct a public hearing on the proposed fee.

History: L. 1917, ch. 100, § 16; C.L. 1917, § 2076; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-16; L. 1973, ch. 66, § 1; 1984 (2nd S.S.), ch. 15, § 45; 1988, ch. 197, § 1; 1988, ch. 198, § 1.

Amendment Notes. — The 1984 2nd S.S. amendment added Subsection (2); and made minor changes in phraseology, punctuation, and style.

The 1988 amendment, by Laws 1988, Chapter 197, effective April 25, 1988, added the last sentence in Subsection (2) and, in Subsection

(1), added "to" at the end of the introductory language, deleted "to" at the beginning of Paragraphs (a) through (h) and made a series of minor stylistic changes throughout Paragraphs (f) and (h).

The 1988 amendment, by Laws 1988, Chapter 198, effective April 25, 1988, added the language beginning with "but the commission" at the end of Subsection (1)(h).

This section is set out as reconciled by the Office of Legislative Research and General Council.

History: L. 1917, ch. 100, § 17, subd. 2;
C.L. 1917, § 3077, subd. 1; L. 1921, ch. 67,
§ 1; R.S. 1933 & C. 1943, 42-1-20.

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 386.

Key Numbers. — Workers' Compensation
⇐ 1092.

35-1-23. Petition for hearing — Contents.

Such hearing shall be on verified petition filed with the commission, setting out specifically and in full detail the order upon which a hearing is desired and every reason why such order is unreasonable or unlawful and every issue to be considered by the commission on the hearing. The petitioner shall be deemed to have waived all objection to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition.

History: L. 1917, ch. 100, § 17, subd. 2;
C.L. 1917, § 3077, subd. 2; L. 1921, ch. 67,
§ 1; R.S. 1933 & C. 1943, 42-1-21.

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 385.

Key Numbers. — Workers' Compensation
⇐ 1092.

35-1-24. Hearing — Procedure.

Upon receipt of such petition, if the issues presented therein have theretofore been adequately considered, the commission shall determine the same by confirming, without hearing, its previous determination, or, if necessary to determine the issue presented, the commission shall order a hearing thereon and consider and determine the matter at such time as shall be prescribed. Notice of the time and place of such hearing shall be given to the petitioner and to such other persons as the commission may find directly interested therein. If the order complained of is found to be unlawful or unreasonable, the commission shall substitute therefor such other order as may be lawful and reasonable.

History: L. 1917, ch. 100, § 17, subds. 3, 4;
C.L. 1917, § 3077, subds. 3, 4; L. 1921, ch. 67,
§ 1; R.S. 1933 & C. 1943, 42-1-22.

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 385.

Key Numbers. — Workers' Compensation
⇐ 1092.

35-1-42. Employers enumerated and defined — Regularly employed — Statutory employers.

(1) The state, and each county, city, town, and school district in the state are considered employers under this title.

(2) Except as provided in Subsection (3), 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 title. As used in this subsection:

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(a) "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.

(b) "Independent contractor" means any person engaged in the performance of any work for another who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

(3) (a) An agricultural employer is not considered an employer under this title if:

(i) his employees are all members of his immediate family and he has a proprietary interest in the farm where they work; or

(ii) he employed five or fewer persons other than immediate family members for 40 hours or more per week per employee for 13 consecutive weeks during any part of the preceding 12 months.

(b) 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 title.

(4) An employer of agricultural laborers or domestic servants who is not under this title has the right and option to come under it by complying with its provisions and the rules of the commission.

(5) (a) If any person who is an employer procures any work to be done wholly or in part for him by a contractor over whose work he 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 him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

(b) A general contractor may not be considered to have retained supervision or control over the work of a subcontractor solely because of the customary trade relationship between general contractors and subcontractors.

(c) A portion of a construction project subcontracted to others may be considered to be a part or process in the trade or business of the general building contractor, only if the general building contractor, without regard to whether or not it would need additional employees, would perform the work in the normal course of its trade or business.

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

(e) A partner in a partnership or an owner of a sole proprietorship may not be considered an employee under Subsection (a) if:

(i) the person is not included as an employee under Subsection 35-1-43 (3) (a); or

(ii) the person is included as an employee under Subsection 35-1-43 (3) (a), but his employer fails to insure or otherwise provide adequate payment of direct compensation, which failure is attributable to an act or omission over which the person had or shared control or responsibility.

**also defined — Mining lessees and sublessees
— Partners and sole proprietors — Corporate of-
ficers and directors — Real estate agents and
brokers.**

(1) As used in this chapter, "employee," "worker" or "workmen," and "operative" mean:

(a) each elective and appointive officer and any other person, in the service of the state, or of any county, city, town, or school district within the state, serving the state, or any county, city, town, or school district under any election or appointment, or under any contract of hire, express or implied, written or oral, including each officer and employee of the state institutions of learning and members of the National Guard while on state active duty; and

(b) each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, including aliens and minors, whether legally or illegally working for hire, but not including any person whose employment is casual and not in the usual course of the trade, business, or occupation of his employer.

(2) Unless a lessee provides coverage as an employer under this chapter, any lessee in mines or of mining property and each employee and sublessee of the lessee shall be covered for compensation by the lessor under this chapter, and shall be subject to this chapter and entitled to its benefits to the same extent as if they were employees of the lessor drawing such wages as are paid employees for substantially similar work. The lessor may deduct from the proceeds of ores mined by the lessees an amount equal to the insurance premium for that type of work.

(3) (a) A partnership or sole proprietorship may elect to include as an employee under this chapter any partner of the partnership or the owner of the sole proprietorship. If a partnership or sole proprietorship makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be covered. No partner of a partnership or owner of a sole proprietorship is considered an employee under

this chapter until this notice has been given. For premium rate making, the insurance carrier shall assume the salary or wage of the employee to be 150% of the state's average weekly wage.

(b) A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

(4) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services in that capacity for a real estate broker if:

(a) substantially all of the real estate agent's or associated broker's income for services is from real estate commissions;

(b) the services of the real estate agent or associated broker are performed under a written contract specifying that the real estate agent is an independent contractor; and

(c) the contract states that the real estate agent or associated broker is not to be treated as an employee for federal income tax purposes.

(5) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include an offender performing labor under Section 64-13-16 or 64-13-19, except as required by federal statute or regulation.

History: L. 1917, ch. 100, § 51; C.L. 1917, § 3111; L. 1919, ch. 63, § 1; 1925, ch. 73, § 1; R.S. 1933, 42-1-41; L. 1939, ch. 51, § 1; C. 1943, 42-1-41; L. 1943, ch. 48, § 1; 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1957, ch. 62, § 1; 1963, ch. 49, § 1; 1975, ch. 101, § 2; 1984, ch. 76, § 1; 1985, ch. 75, § 1; 1986, ch. 211, § 4; 1988, ch. 109, § 2; 1992, ch. 106, § 2.

ment by ch. 106, effective May 3, 1993, added Subsection (5).

The 1993 amendment by ch. 130, effective May 3, 1993, inserted "and members of the National Guard while on state active duty" near the end of Subsection (1)(a).

This section is set out in . . .

Injury arising out of or in course of employment.

"Act of God" is not by implication excluded in Subdivision (5) of this section. *State Rd. Comm'n v. Industrial Comm'n*, 56 Utah 252, 190 P. 544 (1920).

Where mine superintendent was killed by holdup bandits as he entered store to purchase cigar for his own use, his death was not compensable as "accidental" injury within this section since in order to recover for accidental injury there must be some causal connection or relation between act causing injury and employment or duties of injured employee. *Westerdahl v. State Ins. Fund*, 60 Utah 325, 208 P. 494 (1922).

Where state road employee while working on road sought shelter from storm and was struck by lightning, the accident arose out of and in course of employment. *State Rd. Comm'n v. Industrial Comm'n*, 56 Utah 252, 190 P. 544 (1920).

Under Subdivision (5) although an employee is employed on the day of an accident, it cannot be said he is in the course of his employment where he steps aside to engage in an altercation with some third person concerning a personal grievance wholly unrelated to matters connected with his employment. *Wilkerson v.*

Industrial Comm'n, 71 Utah 355, 266 P. 270 (1928).

Wife of deceased drugstore employee was not entitled to compensation where she did not sustain burden of proving that typhoid fever was result of injury received in course of his employment. *Chase v. Industrial Comm'n*, 81 Utah 141, 17 P.2d 205 (1932).

Death of beer truck driver after being taken to the hospital when he had a severe pain in his chest after making his second morning delivery, did not result from an accident arising out of or in the course of his employment, where substance of opinions of medical panel was that death from coronary thrombosis with myocardial infarction was not caused from the exertion of deceased's work on that morning. *Burton v. Industrial Comm'n*, 13 Utah 2d 353, 374 P.2d 439 (1962).

Regular course of employment.

Bricklayer killed in automobile accident while returning home from work was not killed in an accident arising out of or in the course of employment despite fact that decedent's hourly wage had been increased due to location of construction site; increased hourly wage did not constitute pay for travel time. *Barney v. Industrial Comm'n*, 29 Utah 2d 179, 506 P.2d 1271 (1973).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 1.

A.L.R. — Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.

Workmen's compensation: injury or death due to storms, 42 A.L.R.3d 385.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 A.L.R.3d 566.

Master and servant: employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 A.L.R.3d 505.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Workers' compensation: sexual assaults as compensable, 52 A.L.R.4th 731.

Key Numbers. — Workers' Compensation ⇐ 47.

35-1-45. Compensation for industrial accidents to be paid.

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "As provided by statute, the Supreme Court or the Court of Appeals" for "The Supreme Court or other appellate court designated by statute" in Subsection (1); inserted "with the appropriate

appellate court" in Subsection (2)(a); and substituted "appellate rules of the appropriate appellate court" for "Utah Rules of Appellate Procedure" in Subsections (2)(a) and (2)(b).

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

(4) The director of the department shall provide staff assistance and any information necessary for the Corrections Advisory Council to fulfill its responsibilities under this chapter.

History: C. 1953, 64-13-5, enacted by L. 1985, ch. 198, § 5.

Repeals and Enactments. — Laws 1985, ch. 198, § 5 repeals former § 64-13-5, as

enacted by Laws 1977, ch. 253, § 5, creating division of corrections, and enacts the above section.

COLLATERAL REFERENCES

C.J.S. — 72 C.J.S. Prisons § 5.

Key Numbers. — Prisons ⇐ 4.

64-13-6. Purpose of department.

The primary purpose of the Department of Corrections includes the following:

- (1) protection of the public through institutional care and confinement, and supervision in the community where appropriate;
- (2) implementation of court-ordered punishment of the criminal offender for the purpose of maintaining a law-abiding and productive society;
- (3) provision of rehabilitation opportunities to assist the criminal offender in functioning as a law-abiding and productive member of society;
- (4) individualized treatment of the offender; and
- (5) management of programs to take into account the needs and interests of victims where reasonable.

History: C. 1953, 64-13-6, enacted by L. 1985, ch. 211, § 1.

Repeals and Enactments. — Laws 1985, ch. 198, § 9 repeals § 64-13-6, and Laws 1985,

ch. 211, § 1 repeals former § 64-13-6 as amended by Laws 1979, ch. 102, § 16, relating to appointment of director, and enacts the above section.

64-13-7. Offenders in custody of department.

All offenders committed for incarceration in a state prison facility, for supervision on probation or parole, or for evaluation, shall be placed in the custody of the department. The department shall establish procedures and is responsible for the appropriate assignment or transfer of public offenders to facilities or programs.

History: C. 1953, 64-13-7, enacted by L. 1985, ch. 211, § 2.

Repeals and Enactments. — Laws 1985, ch. 211, § 2 repeals former § 64-13-7, as enacted by Laws 1977, ch. 253, § 7, relating to

administration of state prison, and enacts the above section.

Cross-References. — Pardons and paroles, Chapter 27 of Title 77.

64-13-16. Inmate employment.

(1) Unless incapable of employment because of sickness or other infirmity or for security reasons, the department may employ inmates to the degree that funding and available resources allow. An offender may not be employed on work which benefits any employee or officer of the department.

(2) An offender employed under this section is not considered an employee, worker, workman, or operative for purposes of Title 35, Chapter 1, Workers' Compensation, except as required by federal statute or regulation.

History: C. 1953, 64-13-16, enacted by L. 1985, ch. 211, § 11; 1987, ch. 116, § 11; 1993, ch. 106, § 3.

Amendment Notes. — The 1987 amendment substituted "the department may employ inmates to the degree that funding and available resources allow" for "inmates shall be employed on a regular basis, as is practicable" at

the end of the first sentence, substituted "An offender may not" for "No inmate may" at the beginning of the second sentence, and deleted the former third, fourth, and last sentences.

The 1993 amendment, effective May 3, 1993, added the (1) designation and added Subsection (2).

64-13-19. Labor at correctional facilities.

(1) The department shall determine the types of labor to be pursued, and what kind, quality, and quantity of goods, materials, and supplies shall be produced, manufactured, or repaired at correctional facilities. Contracts may be made for the labor of offenders, including contracts with any federal agency for a project affecting national defense. As many offenders as practicable may be employed to produce, manufacture, or repair any goods, materials, or supplies for sale to the state or its political subdivisions. Prices for all goods, materials, and supplies shall be fixed by the department.

(2) An offender performing labor under this section is not considered an employee, worker, workman, or operative for purposes of Title 35, Chapter 1, Workers' Compensation, except as required by federal statute or regulation.

History: C. 1953, 64-13-19, enacted by L. 1985, ch. 211, § 14; 1987, ch. 116, § 13; 1993, ch. 106, § 4.

Amendment Notes. — The 1987 amendment substituted "correctional facilities" for "the prisons" at the end of the first sentence

and "offenders" for "inmates" in the second and third sentences, and inserted "sale to" in the third sentence.

The 1993 amendment, effective May 3, 1993, added the (1) designation and added Subsection (2).

June 18, 1979

Mr. Gary L. Webster
Deputy Director
Division of Corrections
Department of Social Services
150 West North Temple
Salt Lake City, Utah 84110

Inmates

Re: Employee Status of
at the Utah State Prison,
No. 79-90

Dear Mr. Webster:

In your letter of March 13, 1979, you asked whether an inmate at the Utah State Prison employed in the Prison Industries Program is defined as a state employee. My research indicates that the answer to your question is no, based on the following analysis.

If inmates of the Utah State Prison who work in the Prison Industries Program are defined as employees of the State of Utah while they perform such work, such inmates may be entitled to claim Workmen's Compensation benefits for injuries suffered in the course of their employment. In addition, the State would be required to comply with reporting requirements imposed upon employers by the Industrial Commission, in relation to inmates as employees.

In order for a laborer in Utah to qualify as a potential claimant for Workmen's Compensation benefits, he must fall within the definition of "employee" found in Utah Code Ann. 35-1-43 (1963), as amended (all statutory references are to the Utah Code Annotated unless otherwise specified). That section provides:

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The words "employee," "workmen" and "operative," as used in this title, shall be construed to mean:

(1) Every elective and appointive

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officer, and every other person, in the service of the state . . . under any election or appointment, or under any contract of hire, express or implied, written or oral. . . . (emphasis added).

Since inmates of the prison working in the Prison Industries Program are neither elected nor appointed, in order for such inmates to qualify as "employees" as above defined, they must be serving the state under an express or implied "contract of hire."

Although there have been no cases decided in Utah dealing with the question of the status of inmates as state employees, several other state courts have dealt with the question and a general rule has emerged from such opinions. This general rule is stated in 1A LARSON, WORKMEN'S COMPENSATION LAW, 47.31 at p. 795:

Convicts and prisoners have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions. The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. The inducements which might be held out to him, in the form of extra food or even money, are in no sense consideration for an enforceable contract of hire.

Only three states have recognized a limited right of prisoners to receive workmen's compensation benefits, and in those states such rights are expressly prescribed by statute. In Wisconsin, the state legislature provided that prisoners injured while incarcerated in a state institution may receive benefits only upon parole or final discharge, ". . . as if the

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injury had been covered by the worker's compensation act" Wis. Stat. 56.21 (1975). A Maryland statute provides that prisoners may receive benefits when injured while working for a county government; Md. Ann. Code, Art. 101 35 (1957). The North Carolina legislature, while recognizing that inmates generally cannot qualify for

benefits, has carved out a limited exception in which if death occurs or if the results of the injury continue after discharge, the inmate or his representatives may apply for benefits; N.C. Gen. Stat. 97.13(c) (1969). No provisions similar to these may be found in the Utah Code.

The courts of at least twelve states have addressed the issue of inmate status and each court has determined that inmates working on prison projects do not qualify as state or county employees because they are not employed under a "contract of hire." (1)

Representative of the case law on the subject is Frederick v. Men's Reformatory, 203 N.W.2d 797 (Iowa 1973), in which the Supreme Court of Iowa denied an award of workmen's compensation benefits to an inmate who was injured while working in the prison license plate factory. The court looked to the Iowa statute, which required a "contract of service" in order for a person to qualify as an employee for the purpose of the workman's compensation act. Emphasis was placed on the voluntariness of the relationship between the alleged employer and employee. The court stated at page 798:

The relationship between the state and its prisoners is the antithesis of voluntary employment. All imprisonment is at hard labor. . . The state does not employ prisoners at will, is not obligated to pay wages to them, and obviously does not intend an employer-employee relationship. Likewise, prisoners do not enter the reformatory to find work.

(1) The states which have addressed the issue include: Iowa, Idaho, Georgia, Massachusetts, Kentucky, Oklahoma, Tennessee, Louisiana, New York, Indiana, New Jersey, and Arizona.

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The court held that since the relationship was not voluntary, and the compensation of eight cents per hour was paid only to induce cooperation and not as compensation, inmates did not qualify as employees of the state. [See also Tackett v. Lagrange Penitentiary, Ky., 524 S.W.2d 468 (1975).]

In Abrams v. Madison County Highway Department, 495 S.W.2d 539 (Tenn. 1973), the Tennessee Supreme Court emphasized the lack of voluntariness in affirming the denial of an inmate's application for workman's compensation benefits. The court stressed that where inmates are required by law to work, and where sanctions such as solitary confinement may be imposed for failure to work, inmates do not have the ability to enter into a "contract of hire." In Reid v. New York State Department of Correctional Services, 387 N.Y.S.2d 589 (1976), the appellate division of the New York Supreme Court held that an inmate did not qualify as an employee of the state while working within the prison even though inmates were free to refuse work. The only alternative, 24 hour confinement in their cells, was not looked upon as a true alternative by the court.

The Idaho Supreme Court recognized in Shain v. Idaho State Penitentiary, 291 P.2d 870 (Ida. 1955), that nominal compensation, privileges, and favorable consideration upon parole hearings were not sufficient considerations to give rise to a contract of hire in an employer-employee relationship between inmates and the state. Finally, in two well reasoned opinions, the Arizona courts formulated a test to be applied in determining the employment status of inmates. In Watson v. Industrial Commission, 100 Ariz. 327, 414 P.2d 144 (1966), the court stated that in order for there to be a "contract of hire" between inmates working on prison projects

there must be: (1) a voluntary relationship of employment, (2) consideration flowing from the State to the inmates, and (3) at least two parties capable of consenting to the relationship. In this case, a prisoner was injured while working on a prison farm and his application for benefits was denied. The court reasoned that since the inmates were required to work and were disciplined for their failure to do so, no "contract of hire" could exist between them and the state. The Watson case was relied upon in Keeney v. Industrial Commission, 24 Ariz.App. 3, 535 P.2d 31 (1975), wherein the court affirmed the denial of a claim for benefits based upon an injury

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suffered by an inmate while working in the prison license plate plant. Although the inmate was receiving compensation in the form of two days' credit for every one day worked as well as 25 cents per hour, there could be no "contract of

hire" where such work was not voluntarily entered into.

Utah Code Ann. 77-36-7 (1953), as amended, provides:

In all cases when by law a person is sentenced to imprisonment, either in the state prison or in a county jail, it shall be at hard labor, whether so designated by the court or jury or not.

Further, Utah Code Ann. 64-13-14 (1953), as amended, provides:

Unless incapable of employment because of sickness or other infirmity or for security reasons, inmates shall be kept employed except on Sundays, other days of worship and holidays as far as practical. . . .

Utah Code Ann. 64-13-25 (1953), as amended, gives the Director of the Division of Corrections broad discretion in determining what lines of labor will be pursued in the Prison Industries Program. Thus, inmates of the Utah State Prison are required to work, and sanctions may be used for their failure to do so. Inmates are paid only a nominal compensation, insufficient to constitute consideration to support a contract of hire.

Applying the three-part test of the Watson case, supra, to the Prison Industries Program in Utah, the situation fails to meet each of the criteria. First, since prisoners are required by statute to work and since the Division of Corrections is mandated by statute to provide employment for them, the relationship between the state and the prisoners is "the antithesis of voluntary employment." Frederick, supra. Second, because the inmates receive no extra credit applied to their sentences for working, and because the nominal amount of money paid to them is not paid as wages but only to induce compliance with the work program, such compensation is not sufficient "consideration" flowing from the state to inmates to support a "contract of hire."

Finally, because of the statutory requirement that prisoners must work, they are not able to choose not to work without suffering disciplinary sanction. Inmates are not capable of consenting to the contractual relationship of employer-employee with the State of Utah.

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Inmates who work in the Prison Industries Program at the Utah State Prison do not qualify as employees of the State of Utah for the purpose of receiving workmen's Compensation benefits. This is because they do not serve the State under any express or implied "contract of hire," as required by Utah Code Ann. 35-1-43 (1953), as amended.

Very truly yours,

CRAIG L. BARLOW
Assistant Attorney General

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