

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 Petitioner

Utah Court of Appeals

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Robert Breeze; Attorney for Petitioner.

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BEFORE THE UTAH COURT OF APPEALS

JEFF KOFOED,

Petitioner/Applicant

vs.

BOARD OF REVIEW OF THE IN-  
DUSTRIAL COMMISSION OF UTAH,  
STATE OF UTAH DEPARTMENT OF  
CORRECTIONS and WORKERS  
COMPENSATION FUND OF UTAH,

Respondent/Defendant.

Case No. 930201 CA

Priority No. 07

BRIEF OF PETITIONER

BRIEF OF CONVICT LABORER WHO WAS  
DENIED WORKERS COMPENSATION BENEFITS  
FOR INJURIES SUSTAINED WHILE FIRE  
FIGHTING

UTAH COURT OF APPEALS

BRIEF

UTAH  
DEPARTMENT  
OF  
CORRECTIONS  
&

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**FILED**

Utah Court of Appeals

SEP 29 1993

  
Mary T. Noonan  
Clerk of the Court

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None.

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BEFORE THE UTAH COURT OF APPEALS

|                              |   |                    |
|------------------------------|---|--------------------|
| JEFF KOFOED,                 | ) |                    |
|                              | ) |                    |
| Petitioner/Applicant         | ) |                    |
|                              | ) |                    |
| vs.                          | ) |                    |
|                              | ) |                    |
| BOARD OF REVIEW OF THE IN-   | ) | Case No. 930201 CA |
| DUSTRIAL COMMISSION OF UTAH, | ) |                    |
| STATE OF UTAH DEPARTMENT OF  | ) |                    |
| CORRECTIONS and WORKERS      | ) |                    |
| COMPENSATION FUND OF UTAH,   | ) |                    |
|                              | ) |                    |
| Respondent/Defendant.        | ) |                    |
| <hr/>                        |   |                    |

I. JURISDICTION AND NATURE OF PROCEEDINGS

This Court has jurisdiction over this Petition for Review pursuant to Section 78-2a-3(2)(a) Utah Code Annotated.

II. (a) STATEMENT OF ISSUES

(a) Did the Industrial Commission err when it ruled that the convict Applicant was not an employee within the meaning of Sections 35-1-45 and 35-1-43 Utah code Annotated?

II. (b) STANDARD OF REVIEW

Because these proceedings began after January 1, 1988 the Court of Appeals should review this case under the Utah Administrative Procedures Act (Section 63-46b-1 et seq.).

Section 63-46b-16(4)(d) allows this Court to grant relief if the Industrial Commission of Utah has erroneously interpreted or applied the law.

This Court has set forth a two level analysis with regard to the Standard of Review used in determining the question of whether or not an agency erroneously interpreted or applied the law. King v. Industrial Commission, 850 P.2d 1281 (Ut. App. 1993).

### IMPLICIT OR EXPLICIT GRANT OF AUTHORITY?

Under King the first enquiry is whether the legislature of Utah gave the Industrial Commission an explicit grant of discretion to interpret Sections 43 and 45. If not, the Court should determine whether an implicit grant of discretion was made to the agency.

With respect to Section 45 this Court has repeatedly held that there is neither an explicit or implicit grant of discretion to interpret Section 45. (See King at 1292, Cross v. Board of Review, 824 P2d 1202, 1204 (Utah App. 1992) and Stokes v. Board of Review, 832 P2d 56, 58 (Utah App. 1992)).

As far as this Petitioner has been able to ascertain, no Utah Appellate court has determined specifically whether the legislature has given a grant of discretion to the Industrial Commission to interpret Section 43. However, to the extent that the legislature used Section 43 to define the terminology used in Section 45, it appears that an identical analysis would apply and that no grant of discretion had been given with respect to Section 43.

Therefore, this Court should review the legal interpretation of the Industrial Commission using a correction of error standard which affords no deference to the legal conclusions of the Industrial Commission.

### III. DETERMINATIVE STATUTORY PROVISIONS

The Petitioner hereby asserts the below listed statutes, the full texts of which are appended hereto, and are determinative of the issue raised by the Petition for Review.

- a. 35-1-42 (1986 version attached hereto as Exhibit No. 1).
- b. 35-1-43 (1986 version attached hereto as Exhibit No. 1).
- c. 35-1-45 (1986 version attached hereto as Exhibit No. 1).

### IV. STATEMENT OF THE CASE

- a. Course of Proceedings below:

This is an appeal from the Industrial Commission of Utah's reversal of the Administrative Law Judge's determination that the Petitioner was entitled to Workers Compensation Benefits for the injuries he received while serving his prison sentence as a convict fire fighter.<sup>1</sup> The ALJ determined Petitioner was an employee. The Industrial Commission of Utah reversed, holding that Petitioner was not an employee. This Petition for Review ensued.

- b. Statement of Facts:<sup>2</sup>

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

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<sup>1</sup>Petitioner was released from prison approximately September 7, 1993.

<sup>2</sup>Taken verbatim from the Administrative Law Judge's Findings of Fact through page 4 (except for the last paragraph). Additionally, the paragraphs have now been numbered. (R. 00068 through R. 00071).



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 also noted that the applicant's "Participation in the Conservation Camp is purely voluntary." In addition, that 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. 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.

4. 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 antinflamatory 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.

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

6. 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.

7. 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 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.

8. This 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 conditions 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 him 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 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.

9. 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.

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

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

12. 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 received 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.

## V. SUMMARY OF ARGUMENT

The Petitioner was in fact an employee at the time of his injury.

### ARGUMENT

#### POINT I

#### **PETITIONER WAS AN EMPLOYEE AT THE TIME OF THE INJURY**

On October 25, 1986 Section 35-1-45 of the Workers Compensation Act read in relevant part as follows:

"Each employee mentioned in Section 35-1-45 who is injured. . . by accident arising out of or in the course of his employment . . . shall be paid compensation . . .".<sup>3</sup>

A review of Section 43 to determine if Petitioner was a "employee mentioned" reveals the following language:

1. ". . . employee" means . . . (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."

The crucial language of Section 43 appears to require a four step analysis to determine if someone is an employee. This analysis is as follows:

1. Is the claimant in the service of;

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<sup>3</sup>The conjunctive arising "out of and in the course" of employment language appeared in the statute effective July 1, 1988.

2. An employer as defined in Section 42;
3. Which employer regularly employs one or more operatives;
4. But not including any person whose employment is:
  - a. casual; and
  - b. not in the usual course of the trade, business or occupation of his employer.

First, it is clear that the petitioner was rendering a service while fighting fires. The Department of Corrections had lent the employee to the State Division of Lands and Forestry, which in turn lent Petitioner to the Forest Service. It is beyond dispute that the Petitioner was paid the sum of \$3.50 per hour for his services. See Yount v. Boundary County, 796 P.2d 516 (Id. 1990) for a discussion from the Idaho Supreme Court regarding the issue of when a non-traditional employee (in this case a citizen serving on jury duty) is "in the service" of a governmental entity. See also Clark Co. v. State of Nevada, Industrial Comm., 669 P.2d 730 (Nev. 1983) for a case which held election clerks (who only work on election days) to be employees.

Second, a glance at Section 42 shows that: "The state, and each county, . . . are considered employers under this title."

Third, it is beyond dispute that the State of Utah employs more than one employee or operative in the conduct of its affairs.

Finally, casual refers to activities that are not in furtherance of the employer's usual activities. Summerville v. Industrial Commission, 196 P.2d 718 (1948) and Sorenson v. Industrial Commission, 598 P.2d 362 (Ut. 1972). Additionally, the

activities of fire fighting are part and parcel of what the State of Utah does. Therefore, it would be impossible for the work done by the applicant to be casual employment.

As noted by Professor Larsen in his treatise Larsen's Workmen's Compensation Law, Section 47.31, convicts have usually been denied compensation for work done while in prison based upon the lack of a contract of employment. However, Professor Larsen states at Section 47.31(d): "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).

The record herein shows that Petitioner was paid \$3.50 an hour, that he was lent to the State Division of Lands and Forestry, and that the State Division of Lands and Forestry then entered into an arrangement whereby the Petitioner would render service to the Forest Service.

Board of Education of Alpine v. Olsen, 684 P.2d 49, 51 (Utah 1984) the Utah Supreme Court found a school shop class volunteer not to be an employee because the claimant received no compensation and the employer had no control over work hours or any other aspect of work. However, the instant petition involves facts far different than those present in Olsen. First, Petitioner was paid \$3.50 per hour. Additionally, the state controlled every aspect of Petitioner's life, even going so far as to dispatch Petitioner to the far corners of the Western United States.

For nearly 45 years the key test of whether one is an employee



is the issue of control. Auerbach Co. v. Industrial Commission, 195 P.2d 245 (1948). Respondents would be hard pressed to dispute the assertion that Petitioner was totally under the direction and control of the State of Utah and its agents at all times relevant herein. For further authority for the proposition that the right to control the details of the work is the determining factor with regard the employee status see Bennett v. Industrial Comm., 726 P.2d 427 (Ut. 1986) and Rustler Lodge v. Industrial Comm., 562 P.2d 227 (Ut. 1977).

#### POINT II.

#### **PRISONERS WERE NOT MADE NON EMPLOYEES UNTIL 1993**

In 1993 the Utah Legislature passed major amendments to the Workers Compensation Act with regard to the status of convict labor. Attached hereto as Exhibit No. 2 find the portions of the Workers Compensation Act which were amended in 1993.

The conduct of the legislature in passing new laws with regard to convict labor and workers compensation coverage is persuasive evidence that prisoners could in fact be employees prior to 1993.

#### CONCLUSION

The Petitioner meets all the statutory and case law criteria which must be satisfied in order to qualify as an employee. Furthermore, the legislature did not deny Workers Compensation to inmates until 1993.

WHEREFORE, Petitioner prays for an Order reversing the legal conclusion made by the Industrial Commission and for an Order remanding this matter for further proceedings pursuant to the Order

of the Administrative Law Judge.

RESPECTFULLY SUBMITTED this 29 day of September, 1993.

Robert Breeze  
ROBERT BREEZE  
Attorney for Petitioner

**CERTIFICATE OF MAILING**

I certify I mailed/hand delivered a copy of the foregoing to:

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

on this 29 day of September, 1993.

Robert Breeze

## **ADDENDUM**

**Attachment No. 1**

**Section 35-1-42 (1986 version)**

**Section 35-1-43 (1986 version)**

**Section 35-1-45 (1986 version)**

alteration, modification, amendment or rescission of the commission's order, and shall thereafter proceed with the action in the manner provided by law for other civil actions. 1953

**35-1-36. Actions to set aside orders - Exclusive jurisdiction of the Supreme Court, district courts, and the Court of Appeals.**

No court, except the district court, Court of Appeals, and the Supreme Court, has jurisdiction to review, vacate, set aside, reverse, revise, correct, amend, or annul any order of the commission requiring protection of life, health, safety, or welfare of employees in any employment or places of employment, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties. 1986

**35-1-37. Stay of proceedings - Supersedeas bond.**

The pendency of an action to set aside, vacate or amend an order of the commission shall not of itself stay the operation of an order of the commission; but during the pendency of the action the district court in its discretion may stay, in whole or in part, the operation of the commission's order. No order so staying or suspending an order of the commission shall be made by the court otherwise than upon three days' notice and after a hearing. In case the order is stayed, the order of the court shall not become effective until a supersedeas bond shall have been executed and filed in the action and approved by the court or the clerk thereof, payable to the state of Utah and sufficient in amount and security to ensure the prompt payment by the party complaining of all damages caused by the delay in the enforcement of the order of the commission. 1953

**35-1-38. Proceedings preferred on trial calendars.**

All actions and proceedings under this title, and all actions or proceedings to which the commission or the state may be a party, in which any question arises under this title, or under or concerning any order of the commission, shall be advanced for trial or hearing over all other civil causes, except election and public utility causes, irrespective of position on the calendar. The same preference shall be granted upon application of the commission in any action or proceeding in which it may be allowed to intervene. 1953

**35-1-39. Violation of judgments, orders, decrees or provisions of act - Grade of offense.**

If any employer, employee or other person violates any provision of this title, or does any act prohibited hereby, or fails or refuses to perform any duty lawfully imposed, or fails, neglects or refuses to obey any lawful order given or made by the commission, or any judgment or decree made by any court in connection with the provisions of this title, such employer, employee or other person shall be guilty of a misdemeanor. 1953

**35-1-40. Each day's default a separate offense.**

Every day, during which any person or corporation fails to observe and comply with any order of the commission, or to perform any duty imposed by this title shall constitute a separate and distinct offense. 1953

**35-1-41. Furnishing information to commission - Employers' annual report - Rights of commission - Examination of employers under oath - Penalties**

of each year every employer shall prepare and mail to the commission a statement containing the following information, viz: The number of persons employed during the preceding year from July 1, to June 30, inclusive; the number of such persons, employed at each kind of employment; the scale of wages paid in each class of employment, showing the minimum and maximum wages paid; and the aggregate amount of wages paid to all employees; which information shall be furnished on blanks to be prepared by the commission and furnished employers free of charge upon request therefor. Every employer shall cause such blanks to be properly filled out so as to answer fully and correctly all questions therein propounded, and shall give all the information therein sought, or, if unable to do so, he shall give to the commission, in writing, good and sufficient reasons for such failure. The commission may require the information herein required to be furnished to be made under oath and returned to the commission within the period fixed by it or by law. The commission, or any member thereof, or any person employed by the commission for that purpose, shall have the right to examine, under oath, any employer, his agents or employees, for the purpose of ascertaining any information which such employer is required by this title to furnish to the commission. Any employer who, within a reasonable time to be fixed by the commission and after the receipt of written notice signed by at least two members of the commission specifying the information demanded and served by registered mail, refuses to furnish to the commission the annual statement herein required, or who refuses to furnish such other information as may be required by the commission under authority of this section, or who willfully furnishes a false or untrue statement shall be liable to a penalty of not to exceed \$500 for each offense to be recovered in a civil action brought by and in the name of the commission. All such penalties when collected shall be paid into the combined injury benefit fund. 1977

**35-1-42. Employers enumerated and defined -**

**Regularly employed - Independent contractors.**

The following constitute employers subject to the provisions of this title:

(1) The state, and each county, city, town, and school district in the state.

(2)(a) Every person, firm, and corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except:

(i) agricultural-employers : (A) whose employees are all members of the immediate family of the employer, which employer has a proprietary interest in the farm, the inclusion of any immediate family member under the provisions of this title being at the option of the employer; or (B) who employ 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; and

(ii) domestic employers who do not employ one employee or more than one employee at least 40 hours per week.

(b) Employers of agricultural laborers and domestic servants have the right to come under the

(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) Where any 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.

(c) Any person, firm, or corporation engaged in the performance of work as an independent contractor is considered an employer.

(d) "Independent contractor" means any person, association, or corporation 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. 1906

**35-1-43. "Employee," "workmen," and "operative" defined - Mining lessees and sublessees - Partners and sole proprietors - Real estate agent or broker.**

(1) The words "employee," "workmen," and "operative," as used in this chapter, mean:

(a) every elective and appointive officer, and every 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 all officers and employees of the state institutions of learning; and

(b) every 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 trade, business, or occupation of his employer.

(2) All lessees in mines or of mining property and the employees and sublessees of these lessees shall, unless the lessee provides coverage as an employer under this chapter, be covered for compensation by the lessor under this chapter, and shall, in such event, 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 similar or substantially similar work. The lessor may deduct from the proceeds of ores mined by the lessees an amount equal to the insurance premium for such type of work.

(3) A partnership or sole proprietorship may elect to include as an employee under this chapter any member of the partnership or the owner of the sole proprietorship. If this election occurs, the employer shall serve upon the employer's insurance carrier and upon the commission written notice naming the partners to be covered. No partner is considered an employee under this chapter.

carrier shall assume the salary or wage of the employee to be 150% of the state's average weekly wage.

(4) As used in this chapter, the words "employee," "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services as such 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. 1906

**35-1-44. Definition of terms.**

The following terms as used in this title shall be construed as follows:

(1) "Order" shall mean and include any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at, or decision made, by such commission.

(2) "General order" shall mean and include an order applying generally throughout the state to all persons, employments or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(3) "Welfare" shall mean and include comfort, decency and moral well-being.

(4) "Safe" and "safety," as applied to any employment or place of employment, shall mean such freedom from danger to the life, health or welfare of employees as the nature of the employment will reasonably permit.

(5) "Personal injury by accident arising out of or in the course of employment" shall include any injury caused by the willful act of a third person directed against an employee because of his employment. It shall not include a disease, except as it shall result from the injury.

(6) "Compensation" shall mean the payments and benefits provided for in this title.

(7) "Award" shall mean the finding or decision of the commission as to the amount of compensation due any injured, or the dependents of any deceased, employee.

(8) "Average weekly earnings" shall mean the average weekly earnings arrived at by the rules provided in section 35-1-75. 1903

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

Every employee mentioned in Section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or 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 insurer.

**Attachment No. 2**

**1993 Amendments regarding convict laborers**

(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 remodeling 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.

(f) For purposes of Subsection (e)(ii):

(i) a partner of a partnership and an owner of a sole proprietorship are presumed to have had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation, the burden of proof being on any person seeking to establish the contrary; and

(ii) evidence affirmatively establishing that a partner of a partnership or an owner of a sole proprietorship had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation may only be overcome by clear and convincing evidence to the contrary.

(g) A director or officer of a corporation may not be considered an employee under Subsection (a) if the director or officer is excluded from coverage under Subsection 35-1-43 (3)(b).

#### **Section 2. Section Amended.**

Section 35-1-43, Utah Code Annotated 1953, as last amended by Chapter 109, Laws of Utah 1988, is amended to read:

**35-1-43. "Employee," "worker" or "workmen," and "operative" defined- Mining lessees and sublessees- Partners and sole proprietors- Corporate officers 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

(b) each person in the service of any employer, as defined in Section 35-1-42, who employs one or

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.

#### **Section 3. Section Amended.**

Section 64-13-16, Utah Code Annotated 1953, as last amended by Chapter 116, Laws of Utah 1987, is amended to read:

##### **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



considered an employee, worker, workman, or operative for purposes of Title 35, Chapter 1, Workers' Compensation, except as required by federal statute or regulation.

**Section 4. Section Amended.**

Section 64-13-19, Utah Code Annotated 1953, as last amended by Chapter 116, Laws of Utah 1987, is amended to read:

**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.

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**H. B. No. 268**

Passed 3/03/93, Approved 3/10/93

Effective 7/01/93

Laws of Utah 1993, Chapter 44

**Rural Medical Financial Assistance**

By Christine R. Fox

**An Act relating to health; creating a grant and scholarship program for rural physician assistants, and consolidating the existing rural physician grant and scholarship program with the rural physician assistants program; providing procedures for qualifications, service, and enforcement; and providing an effective date.**

**THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:**

**AMENDS:**

26-1-7, as last amended by Chapter 252, Laws of Utah 1992

**ENACTS:**

26-9-201, Utah Code Annotated 1953  
26-9-202, Utah Code Annotated 1953  
26-9-203, Utah Code Annotated 1953  
26-9-204, Utah Code Annotated 1953  
26-9-205, Utah Code Annotated 1953  
26-9-206, Utah Code Annotated 1953  
26-9-207, Utah Code Annotated 1953  
26-9-208, Utah Code Annotated 1953  
26-9-209, Utah Code Annotated 1953

26-9-210, Utah Code Annotated 1953  
26-9-211, Utah Code Annotated 1953  
26-9-212, Utah Code Annotated 1953  
26-9-213, Utah Code Annotated 1953

**REPEALS:**

26-9a-101, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-102, as last amended by Chapter 55, Laws of Utah 1992  
26-9a-103, as last amended by Chapter 55, Laws of Utah 1992  
26-9a-104, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-105, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-106, as last amended by Chapter 55, Laws of Utah 1992  
26-9a-107, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-108, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-109, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-110, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-111, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-112, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-113, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-114, as last amended by Chapter 55, Laws of Utah 1992  
26-9a-116, as enacted by Chapter 148, Laws of Utah 1990  
26-9a-117, as enacted by Chapter 148, Laws of Utah 1990  
26-9b-101, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-102, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-103, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-104, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-105, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-106, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-107, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-108, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-109, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-110, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-111, as enacted by Chapter 149, Laws of Utah 1990  
26-9b-113, as enacted by Chapter 149, Laws of Utah 1990  
26-9c-1, as enacted by Chapter 55, Laws of Utah 1992

***Be it enacted by the Legislature of the state of Utah:***

**Section 1. Section Amended.**

Section 26-1-7, Utah Code Annotated 1953, as last amended by Chapter 252, Laws of Utah 1992, is amended to read: