

1994

L & T Enterprises, Inc. and, or Workers
Compensation Fund of Utah v. Kim Kennedy dba
Kennedy Roofing (Uninsured), Jay C. Harris
(Uninsured), Uninsured Employers' Fund, and
Industrial Commission of Utah : Brief of Appellee

Utah Court of Appeals

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Callister, Nebeker & McCullough; James R. Black; Richard G. Sumsion.
Sharon J. Eblen; Alan Hennebold.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

940406

IN THE UTAH COURT OF APPEALS

L & T ENTERPRISES, INC.	:	BRIEF OF RESPONDENT
and/or WORKERS COMPENSATION	:	UNINSURED EMPLOYERS' FUND
FUND OF UTAH,	:	
	:	
Petitioners,	:	
	:	
vs.	:	Court of Appeals
	:	Case No. 940406-CA
KIM KENNEDY dba KENNEDY	:	
ROOFING (Uninsured), JAY C.	:	
HARRIS (Uninsured), UNINSURED	:	
EMPLOYERS' FUND, and	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
	:	
Respondents,	:	Priority No. 7
	:	

WRIT OF REVIEW FROM AN ORDER OF THE
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FILED

FEB 16 1995

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4. 1988 Utah Laws 512
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6. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (R. 62-68)

I.

STATEMENT OF JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction over this appeal pursuant to sections 35-1-82.53(2), 35-1-86 and 63-46b-16, Utah Code Ann. 1953, as amended.

II.

STATEMENT OF THE ISSUES

Is the Uninsured Employers' Fund ("UEF") liable for a portion of the benefits awarded to Chad Fulton under section 35-1-107, U.C.A.?

III.

STANDARD OF REVIEW

The correction of error standard is the appropriate standard of review to be applied in this matter. The Court will review the administrative agency's conclusions of law without deference to determine whether the agency has erroneously interpreted or applied the law.¹

IV.

STATEMENT OF THE CASE

The UEF hereby adopts the statement of the case contained in the Brief of Petitioner.

¹Section 63-46b-16(4)(d), Utah Code Ann.; Morton International vs. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581 (Utah 1991); Mor-Flo Industries vs. Bd. of Review, 817 P.2d 328 (Utah App. 1991).

V.

STATEMENT OF FACTS

1. The applicant, Chad O. Fulton ("Fulton") was injured in an industrial accident on July 11, 1992, when he fell off a roof while working on a construction project for Kim Kennedy Roofing ("Kennedy"), subcontractor to L & T Enterprises, Inc. ("L&T"). (R. 63)

2. Fulton filed an application for workers compensation benefits. (R. 57)

3. The administrative law judge issued his Findings of Fact, Conclusions of Law and Order on May 5, 1993. (R. 62-68)

4. The administrative law judge concluded that:

A. Fulton was an employee of Kennedy and a statutory employee of L & T.;

B. Kennedy was jointly responsible with L & T for the payment of workers' compensation benefits to Fulton;

C. Because Kennedy was uninsured and insolvent, the administrative law judge ordered L & T to pay Fulton's workers' compensation benefits. (R. 62-68)

D. The UEF was ordered to pay L & T for Kennedy's share of the benefits. (R. 62-68)

5. On June 4, 1993, the UEF filed a motion for review claiming that it was not liable to pay benefits because Fulton's employer L & T was insured and able to pay benefits. (R. 69-74)

6. The Industrial Commission granted the UEF's motion for Review on June 28, 1994, adopting the administrative law judge's

findings of fact but reaching different conclusions of law. The Industrial Commission concluded "[w]hile Kennedy is uninsured and insolvent, L & T is neither uninsured nor insolvent. Therefore, because L & T is Fulton's employer and is able to pay workers' compensation benefits, the provisions of section 35-1-107(1) are not triggered and UEF is not obligated to pay any of Fulton's benefits." (R. 78-82)

VI.

SUMMARY OF THE ARGUMENT

The parties agree that L & T Enterprises was Fulton's statutory employer. The Workers Compensation Act provides that liability for an injured employee moves up the hierarchy of employers and statutory employers until it reaches an insured or solvent employer. That employer is then liable for the injured worker's benefits.

The UEF was created to pay the claims of employees whose employers are uninsured and insolvent. The relevant portions of the Utah Workers' Compensation Act must be applied in harmony to determine who is liable for the payment of benefits. One must first determine whether there is an insured or solvent employer to pay benefits. If there is an insured or solvent employer, UEF liability does not arise.

VII.

ARGUMENT

THE UTAH WORKERS COMPENSATION ACT
DOES NOT REQUIRE THE UNINSURED EMPLOYERS'
FUND TO PAY BENEFITS WHERE THERE IS AN
INSURED OR SOLVENT EMPLOYER.

The Utah Workers Compensation Act, Title 35, Chapters 1 and 2, U.C.A. ("Act") was created to "alleviate hardships on workers and their families"² and "afford ... injured industrial workmen or their dependents simple, adequate and speedy means of securing compensation to the end that the cost of human wreckage may be taxed against the industry that employs it."³ To advance these purposes, the legislature created the "statutory employer"⁴ and the Uninsured Employers' Fund.⁵

A. The Statutory Employer.

The statutory employer provision of the Act was intended to liberally extend the definition of employer to include contractors who, in some instances, would not qualify as common law employers and:

to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principle contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers [and] forestall evasion of [workmen's compensation acts] by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers.

Bennett vs. Industrial Commission, 726 P.2d 427, 431 quoting 1C A.

²*Baker vs. Industrial Commission*, 405 P.2d 613, 17 Utah 141, 143 (1965).

³*Park Utah Consolidated Mines Co. vs. Industrial Commission*, 36 P.2d 979, 981 (1934).

⁴Section 35-1-42(6), U.C.A. (1994).

⁵Section 35-1-107, U.C.A. (1994).

Larson, *Workmen's Compensation Law*, Sections 49.14, 49.15 (1986).

Thus, the statutory employer was created to provide a safety net for the employees of subcontractors who, through inadvertence or design, chose to ignore the requirement of providing workers compensation insurance for their employees. If an injured worker was employed by an uninsured and insolvent subcontractor, the worker could proceed up the chain until he found an employer who was insured.

[I]n the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors, upon sub-subcontractors, if an employee of the lowest subcontractor on the totem pole is injured, there is no practical reason for reaching up the hierarchy any further than the first insured contractor.

Jacobsen vs. Industrial Commission, 738 P.2d 658,661 (Ut App. 1987) quoting 1C A. Larson, *Workmen's Compensation Law*, Section 49.14 (1986).

The term "employer" is defined in section 35-1-42, "each person ... who regularly employs one or more workers or operatives in the same business, or in and about the same establishment, under any contract of hire, express or implied, oral or written is considered an employer under this title."⁶ This section further provides:

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 part or process in the trade or business of the employer, the contractor, all persons employed

⁶Section 35-1-42(2), U.C.A. (1994).

by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.⁷

Thus, section 35-1-42(6) creates an employee/employer relationship between the statutory employer and all subcontractors and employees under him. The language of the statute is in the singular.⁸

B. The Uninsured Employers' Fund.

In 1984, the Utah Legislature created a fund which is now known as the Uninsured Employers' Fund ("UEF"). The statute initially provided that the UEF was:

for the purpose of paying and assuring, to persons entitled to, workers' compensation benefits when an employer ... does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities under this chapter.

1984 Utah Laws 613, *appended* at Appendix 2. The portion of the statute relevant to this appeal was amended in 1986⁹ and 1988.¹⁰

⁷Section 35-1-42(6)(a) U.C.A. (1994).

⁸In *Kinne vs. Industrial Commission*, the Utah Supreme Court held that "an employee for workers compensation purposes may have more than one employer." *Id.* at 928.

⁹Subsection (1) of the statute was amended in 1986 to read:

There is created a ~~Default-Indemnity~~ an Uninsured Employers' Fund for the purpose of paying and assuring, to persons entitled to workers compensation benefits when ~~an~~ every employer of the claimant who is found to be individually, jointly, or severably liable... does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities under this chapter.

1986 Utah Laws 662, *appended* at Appendix 3.

In *Jacobsen vs. Industrial Commission*,¹¹ this Court determined that this statute did not require contribution by the UEF in cases where there was an insured statutory employer.

Ring was Pugh's direct employer. Ring is primarily liable. Jacobsen was Pugh's statutory employer. Jacobsen is, therefore, also liable with Ring. "[I]n the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors upon sub-subcontractors, if an employee of the lowest subcontractor on the totem pole is injured, there is no practical reason for reaching up the hierarchy any further than the first insured contractor." 1C A. Larson, *Workmen's Compensation Law*, Section 49.14 (1986). Ring has no means to pay benefits to Pugh, but Jacobsen, the party secondarily liable, has insurance coverage. If Jacobsen did not have sufficient funds or coverage, then "every" employer of Pugh would be unable to cover the liabilities for Pugh's benefits, as contemplated in section 35-1-107 (1) (1986). At that point, and not until that point, the Uninsured Employers' Fund would come into operation for the benefit of Pugh.

Id. at 661.

¹⁰The 1988 amendment, in relevant part, read as follows:
The fund has the purpose of paying and assuring, to persons entitled to assisting in the payment of workers' compensation benefits when every to any person entitled to them, if that person's employer of the claimant is found to be individually, jointly or severally liable to pay the benefits, but becomes or is insolvent, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to cover workers compensation liabilities... If it becomes necessary to pay benefits,, the fund is liable for all obligations of the employer as set forth in Title 35 Chapters 1 and 2, with the exception of penalties on those obligations.

1988 Utah Laws 512, appended at Appendix 4.

¹¹738 P.2d 658, 661 (Ut. App. 1987).

Although the language of the statute was changed somewhat by the 1988 amendment, the analytical framework is the same. One must determine whether there is a statutory employer liable to pay benefits. All parties agree that L & T was Fulton's statutory employer. It is clear that L & T is able to pay Fulton's benefits. If there is an insured and solvent employer, the provisions of section 35-1-107 do not come into play.

Section 35-1-107 only requires the UEF to pay benefits when a claimant's "employer" is uninsured and insolvent. The statute provides that the UEF is "liable for all obligations of the employer," not a portion thereof. Where there is an insured or solvent statutory employer, UEF liability does not arise. L & T was Fulton's employer. L & T was insured and able to pay workers compensation benefits. Therefore, UEF liability does not arise.

To hold that the UEF must pay benefits in cases where there is an insured statutory employer would contravene the purpose behind the creation of the statutory employer. It would remove the incentive for a statutory employer to require his subcontractors to provide workers compensation insurance for their employees. This is an important first line of defense in the Industrial Commission's efforts to ensure compliance with workers' compensation insurance requirements. It would also allow the statutory employer to shift part of his cost of doing business to his competitors, enabling him to maintain a competitive advantage in the marketplace by avoiding the full cost of workers compensation insurance for his employees.

The Petitioner asserts that the 1988 amendments to section 35-1-107 were "a direct response" to the *Jacobsen* decision.¹² Our investigation of the legislative history simply does not bear out this claim. The legislative history of House Bill 113, the 1988 Workers Compensation Amendments, contains no reference at all to the *Jacobsen*¹³ decision and only a single reference to the amendments to section 35-1-107.¹⁴

It is important to note that section 35-1-107 was modified by the 1988 Legislature to not only delete the word "every," but also to delete passive voice and make other technical amendments. If the legislature really intended to overrule the *Jacobsen* decision as Petitioner claims, it is surprising that this purpose was never mentioned in the debates in the Utah House and Senate. If the legislature really intended to overrule *Jacobson*, one would expect some indication in the legislative record. For example, when the legislature amended section 35-1-42 to overrule the Supreme Court's

¹² Petitioners' Brief at 10.

¹³The only judicial decision mentioned in the legislative history is *Bennett vs. Industrial Commission*, 726 P.2d 427 (1986). *Bennett* broadened the definition of statutory employer. The 1988 amendments to section 35-1-42 were intended to narrow the scope of the statutory employer provision to exclude certain independent contractors. Debate and vote of the Utah House of Representatives, HB 113, 1988 General Session, February 10, 1988; Debate and vote of the Utah Senate, HB 113, 1988 General Session, February 23, 1988.

¹⁴In the Senate debate before the vote on HB 113, Senator Black asked Senator Nielsen, then President of the Senate, what was the Uninsured Employers' Fund. Senator Nielsen responded that the fund paid a workers benefits when the employer was insolvent and uninsured. Senator Black then asked whether there was funding for the bill and received an affirmative answer. Debate and vote of the Utah Senate, HB 113, 1988 General Session, February 23, 1988.

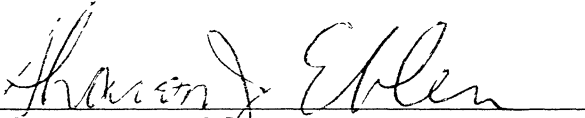
decision in *Bennett*, that case was cited as the reason for the amendment in the debates of the House and Senate prior to the vote on the bill.¹⁵

VIII.

CONCLUSION

The legislature crafted the Workers Compensation Act so that its parts work together in harmony. Therefore, section 35-1-107 must be read in conjunction with section 35-1-42. The purpose behind the Workers Compensation Act is to benefit injured workers, not to set up escape mechanisms for statutory employers and their insurance carriers. Accordingly, the Uninsured Employers' Fund respectfully requests that this Court affirm the Order of the Industrial Commission in this matter.

DATED THIS 16 DAY OF FEBRUARY, 1995.


Sharon J. Eblen
Uninsured Employers' Fund

¹⁵Debate and vote of the Utah House of Representatives, HB 113, 1988 General Session, February 10, 1988; Debate and vote of the Utah Senate, HB 113, 1988 General Session, February 23, 1988.

CERTIFICATE OF MAILING

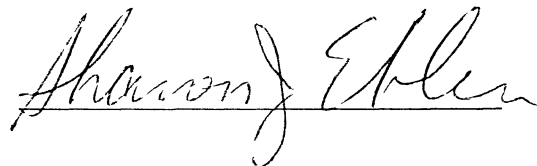
I hereby certify that on the 16 day of February, 1995, I mailed two copies of the foregoing Brief of Respondent Uninsured Employers' Fund, in Case No. 940406, postage prepaid, to the following:

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A handwritten signature in cursive script, appearing to read "Sharon E. Ehlert", written over a horizontal line.

Appendix 1

35-1-42, U.C.A.

NOTES TO DECISIONS

ANALYSIS

Determination of identity of employer.
Foreign employer.

Determination of identity of employer.

The determination of who is the employer, and who owned the business, in the employ of which the employee was injured, if a material issue in the case, must be determined by the commission and on the basis of competent evi-

dence before it. *Putnam v. Industrial Comm'n*, 80 Utah 187, 14 P.2d 973 (1932).

Foreign employer.

The Legislature in using the word "employer" in this section had in mind only those employers whose employees are regularly employed, plus, perhaps, under § 35-1-54, those hired here. *United Airlines Transp. Corp. v. Industrial Comm'n*, 110 Utah 590, 175 P.2d 752 (1946).

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 384.

Key Numbers. — Workers' Compensation ⇐ 1090.

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

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

(b) For the purposes of the exclusive remedy in this title prescribed in Sections 35-1-60 and 35-2-3, the state is considered to be a single employer and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

(2) Except as provided in Subsection (4), each person, including each public utility and each independent contractor, who regularly employs one or more workers or operatives in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written is considered an employer under this title. As used in this subsection:

(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) The client company in an employee leasing arrangement under Title 58, Chapter 59, Employee Leasing Company Licensing Act, is considered the employer of leased employees and shall secure workers' compensation benefits for them by complying with Subsection 35-1-46(1)(a) or (b) and commission rules.

(b) Insurance carriers may underwrite such a risk showing the leasing company as the named insured and each client company as an additional insured by means of individual endorsements.

(c) Endorsements must be filed with the commission as directed by rule.

(4) (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.
- (5) 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.
- (6) (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.
 - (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).

History: L. 1917, ch. 100, § 50; C.L. 1917, § 3110; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-40; L. 1939, ch. 51, § 1; C. 1943, 42-1-40; L. 1949, ch. 52, § 1; 1975, ch. 101, § 1; 1983, ch. 355, § 1; 1986, ch. 211, § 3; 1988, ch. 109, § 1; 1992, ch. 178, § 2; 1993, ch. 106, § 1; 1993, ch. 140, § 1.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, substituted "(4)" for "(3)" near the beginning of Subsection (2), added Subsection (3), and redesignated former Subsections (3) through (5) as Subsections (4) through (6).

The 1993 amendment by ch. 106, effective May 3, 1993, in Subsection (1), added the (a) designation and added Subsection (1)(b).

The 1993 amendment by ch. 140, effective

May 3, 1993, added the (a) designation in Subsection (3), substituted "under Title 58, Chapter 59, Employee Leasing Company Licensing Act" for "as defined in Subsection 16-14-2(2)" and "Subsection 35-1-46(1)(a) or (b) and commission rules" for "commission rules in securing workers' compensation insurance under Subsection 35-1-46(1)(a) or (b)" in Subsection (3)(a), added Subsections (3)(b) and (c), and made stylistic changes.

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

Compiler's Notes. — Section 35-2-3, cited in Subsection (1)(b), was repealed in 1991. For present comparable provisions, see § 35-2-102(3).

NOTES TO DECISIONS

ANALYSIS

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 Contractor employees.
 Contractor or subcontractor as employer.
 "Definite job" test.
 Determination of nature of business.
 Employee and independent contractor.
 Express company.
 Foreign corporation.
 Independent contractor.
 — Defined.
 — Effect.
 — Employees.
 Judicial review.
 Jurisdiction.
 Jurisdictional question.
 Operation and effect.
 Question on appeal.
 Regular employment.
 Relationship of employer and employee.
 Right of employer to come under act.
 School district.
 Statutory employer.
 — Right to control.
 Subcontractor an employee.
 — Employee of subcontractor.
 Supervision.
 Tests and determinative factors.
 Cited.

Agricultural and domestic workers.

One employed by co-operative owners of threshing machine to thresh crop was an "agricultural laborer" within Workmen's Compensation Act. *Jones v. Industrial Comm'n*, 55 Utah 489, 187 P. 833 (1920).

Shepherd is included within term "agricultural laborers" as used in this section and, hence, not entitled to compensation for injuries. *Davis v. Industrial Comm'n*, 59 Utah 607, 206 P. 267 (1922).

Where employer conducts both industrial and agricultural enterprises, death of employee while engaged in latter work is not compensable notwithstanding he might have done industrial work after farm work was completed, and notwithstanding employer used farm produce to feed animals employed in its industrial enterprise. *Ocean Accident & Guarantee Co. v. Industrial Comm'n*, 69 Utah 473, 256 P. 405 (1926).

Farm laborers and domestic servants, having been excepted from the provisions of the act (§ 35-1-1 et seq.), are left in the same situation they would have been in had the act not been passed. *Murray v. Strike*, 76 Utah 118, 287 P. 922 (1930).

A housekeeper is to be classed as a "domestic servant" within the meaning of that term as used in this section. *Murray v. Strike*, 76 Utah 118, 287 P. 922 (1930).

Employee injured by falling off hay to be used to feed horses in connection with operation of brick plant is doing work incidental to his employment with brick plant and not in agricultural occupation. *Harding v. Industrial Comm'n*, 83 Utah 376, 28 P.2d 182, 91 A.L.R. 1523 (1934).

Bringing excepted employees under act.

The statute requires an employer of excepted employees to meet the following requirements in order to bring himself and such employees

Appendix 2

1984 Laws Utah 613

CHAPTER 77

(Passed January 27, 1984. In effect March 29, 1984.)

WORKERS' COMPENSATION DEFAULT INDEMNITY FUND

By Senators Stratford, Cornaby

ACT RELATING TO WORKERS' COMPENSATION, CREATING A
DEFAULT INDEMNITY FUND FOR THE PAYMENT OF WORKERS'
COMPENSATION CLAIMS; AND PROVIDING SUBROGATION
RIGHTS.

THIS ACT ENACTS SECTION 35-1-107, UTAH CODE ANNOTATED
1953.

Enacted by the Legislature of the State of Utah

Section 1. Section enacted.

Section 35-1-107, Utah Code Annotated 1953, is enacted to read

35-1-107. Default Indemnity Fund--Creation--Liability--
Funding--Administration--Subrogation.

(1) There is created a Default Indemnity Fund for the purpose of
paying and assuring to persons entitled to workers' compensation benefits
when an employer becomes insolvent, appoints or has appointed a receiver,
or otherwise does not have sufficient funds, insurance, sureties, or other
security to cover workers' compensation liabilities under this chapter. If it
becomes necessary to pay benefits, the fund will be liable for all obligations
of the employer as set forth in Chapters 1 and 2, Title 35.

(2) Funds for the Default Indemnity Fund are to be provided pursuant
to Subsection 35-1-68 (2) (a). The state treasurer shall be the custodian of
the Default Indemnity Fund and the commission shall direct its distribu-
tion. Reasonable costs of administration may be paid from the fund. The
attorney general shall appoint a member of his staff to represent the
Default Indemnity Fund in all proceedings brought to enforce claims
against or on behalf of the fund.

(3) To the extent of the compensation and other benefits paid or payable to an employee or their dependents from the Default Indemnity Fund, the fund, by subrogation, has all the rights, powers, and benefits of the employee or their dependents against the employer failing to make the compensation payments.

(4) The receiver, trustee, liquidator, or statutory successor of an insolvent employer shall be bound by settlements of covered claims by the fund. The court having jurisdiction shall grant all payments made under this section a priority equal to that to which the claimant would have been entitled in the absence of this section against the assets of the insolvent employer. The expenses of the fund in handling claims shall be accorded the same priority as the liquidator's expenses.

(5) The commission shall periodically file with the receiver, trustee, or liquidator of the insolvent employer or insurance carrier statements of the covered claims paid by the fund and estimates of anticipated claims against the fund which shall preserve the rights of the fund for claims against the assets of the insolvent employer.

(6) When any injury or death for which compensation is payable from the Default Indemnity Fund has been caused by the wrongful act or neglect of another person not in the same employment, the fund has the same rights as allowed under Section 35-1-62.

(7) The fund, subject to approval of the Workers' Compensation Division of the Industrial Commission, shall discharge its obligations by adjusting its own claims or contracting with an adjusting company, risk management company, insurance company, or other company that has expertise and capabilities in adjusting and paying worker's compensation claims.

(8) For the purpose of maintaining this fund, the commission, upon rendering a decision with respect to any claim from the Default Indemnity Fund for compensation under this chapter, shall impose a penalty against the employer of 15% of the total award made in the claim and shall direct that the additional penalty be paid into the fund. Awards may be docketed as other awards under this chapter.

(9) The liability of the state, the Industrial Commission, and the state treasurer, with respect to payment of any compensation benefits, expenses, fees, or disbursement properly chargeable against the fund, is limited to the assets in the fund, and they are not otherwise in any way liable for the making of any payment.

(10) The commission may make reasonable rules for the processing and payment of claims for compensation out of the fund.

Approved February 15, 1984.

Appendix 3

1986 Laws Utah 662

Commission, the employer, or its insurance carrier, together with the payment of any compensation benefit or the furnishing of medical treatment by the employer or an insurance carrier, ~~[shall toll]~~ tolls the period for filing ~~[such]~~ the claim until the employer or its carrier notifies the ~~[industrial commission and]~~ employee, in writing, of its denial of liability or further liability~~[, as the case may be,]~~ for the industrial accident or injury, with instructions upon ~~[said]~~ the notification of denial to the employee to contact the Industrial Commission for further advice or assistance to preserve or protect the employee's rights~~[-, and provided further, that the said]~~. The claim for compensation in any event ~~[must]~~ shall be filed within 8 years ~~[from]~~ after the date of the accident.

Section 12. Section Amended.

Section 35-1-107, Utah Code Annotated 1953, as enacted by Chapter 77, Laws of Utah 1984, is amended to read:

35-1-107. Uninsured Employers' Fund -

Creation - Liability - Funding -
Administration - Subrogation - Insolvent
employer - Fund's rights with wrongful act or
neglect - Adjusting claims - Penalty -
Assessment of self-insured employers - Duty to
notify.

(1) There is created ~~[a Default Indemnity]~~ an Uninsured Employers' Fund for the purpose of paying and assuring, to persons entitled to~~[-]~~ workers' compensation benefits when ~~[an]~~ every employer of the claimant who is found to be individually, jointly, or severally liable becomes or is insolvent, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities under this chapter. This fund succeeds to all monies previously held in the Default Indemnity Fund. If it becomes necessary to pay benefits, the fund ~~[will be]~~ is liable for all obligations of the employer as set forth in Chapters 1 and 2, Title 35, with the exception of penalties on those obligations.

(2) Funds for the ~~[Default Indemnity]~~ Uninsured Employers' Fund ~~[are to]~~ shall be provided pursuant to ~~[Subsection]~~ Subsections 35-1-68 (2) (a) and 31A-3-201 (2). The state treasurer ~~[shall be]~~ is the custodian of the ~~[Default Indemnity]~~ Uninsured Employers' Fund and the commission shall direct its distribution. Reasonable costs of administration may be paid from the fund. The ~~[attorney general]~~ commission shall ~~[appoint a member of his staff]~~ employ counsel to represent the ~~[Default Indemnity]~~ Uninsured Employers' Fund in all proceedings brought to enforce claims against or on behalf of the fund, and upon the request of the commission, the attorney general, city attorney, or county attorney of the locality in which any investigation, hearing, or trial under the provisions of this title is pending, or in which the employee resides or an employer resides or is doing business, shall aid in the representation of the fund.

(3) To the extent of the compensation and other benefits paid or payable to or on behalf of an employee or their dependents from the ~~[Default~~

~~Indemnity]~~ Uninsured Employers' Fund, the fund, by subrogation, has all the rights, powers, and benefits of the employee or their dependents against the employer failing to make the compensation payments.

(4) The receiver, trustee, liquidator, or statutory successor of an insolvent employer ~~[shall be]~~ is bound by settlements of covered claims by the fund. The court having jurisdiction shall grant all payments made under this section a priority equal to that to which the claimant would have been entitled in the absence of this section against the assets of the insolvent employer. The expenses of the fund in handling claims shall be accorded the same priority as the liquidator's expenses.

(5) The commission shall periodically file with the receiver, trustee, or liquidator of the insolvent employer or insurance carrier statements of the covered claims paid by the fund and estimates of anticipated claims against the fund which shall preserve the rights of the fund for claims against the assets of the insolvent employer.

(6) When any injury or death for which compensation is payable from the ~~[Default Indemnity]~~ Uninsured Employers' Fund has been caused by the wrongful act or neglect of another person not in the same employment, the fund has the same rights as allowed under Section 35-1-62.

(7) The fund, subject to approval of the Workers' Compensation Division of the Industrial Commission, shall discharge its obligations by adjusting its own claims or by contracting with an adjusting company, risk management company, insurance company, or other company that has expertise and capabilities in adjusting and paying workers' compensation claims.

(8) For the purpose of maintaining this fund, the commission, upon rendering a decision with respect to any claim ~~[from the Default Indemnity Fund]~~ for ~~[compensation]~~ benefits under this chapter, shall impose a penalty against the uninsured employer of 15% of the value of the total award ~~[made]~~ in connection with the claim, and shall direct that the additional penalty be paid into the Uninsured Employers' Fund. Awards may be docketed as other awards under this chapter.

(9) The liability of the state, the Industrial Commission, and the state treasurer, with respect to payment of any compensation benefits, expenses, fees, or disbursement properly chargeable against the fund, is limited to the assets in the fund, and they are not otherwise in any way liable for the making of any payment.

(10) The commission may make reasonable rules for the processing and payment of claims for compensation ~~[out of]~~ from the fund.

(11) In the event it becomes necessary for the Uninsured Employers' Fund to pay benefits pursuant to the provisions of this section to any employee of an insolvent self-insured employer, the Uninsured Employers' Fund may assess all other self-insured employers amounts necessary to pay (a) the obligations of the fund subsequent to an insolvency, (b) the expenses of handling covered claims subsequent to an insolvency, (c) the cost of

assessments under Subsection (12), and (d) other assessments authorized by this section. The assessment of each self-insured employer shall be in the proportion that the manual premium of the self-insured employer for the preceding calendar year bears to the manual premium of all self-insured employers for the preceding calendar year. Each self-insured employer shall be notified of his assessment not later than 30 days before it is due. No self-insured employer may be assessed in any year an amount greater than 2% of that self-insured employer's manual premium for the preceding calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments from the fund for one or more insolvent self-insured employers, the unpaid portion shall be paid as soon as funds become available. All self-insured employers are liable under this section for a period not to exceed three years after the self-insured employer's voluntary or involuntary termination of self-insurance privileges within this state. This subsection does not apply to claims made against an insolvent self-insured employer if the insolvency occurred prior to July 1, 1986.

(12) It is the duty of all self-insured employers to notify the Industrial Commission of any information indicating that any self-insured employer may be insolvent or in a financial condition hazardous to its employees or the public. Upon receipt of that notification and with good cause appearing, the Industrial Commission may order an examination of that self-insured employer. The cost of the examination shall be assessed against all self-insured employers as provided in Subsection (11). The results of the examination shall be kept confidential.

Section 13. Section Amended.

Section 35-3-8, Utah Code Annotated 1953, as last amended by Chapter 242, Laws of Utah 1985, is amended to read:

35-3-8 (Effective 07/01/86). Withdrawal from State Insurance Fund.

Any employer may, upon complying with Subsection 35-1-46 [(2)] (1) (b) or [35-1-46 (3)] (c), withdraw from the State Insurance Fund by turning in his insurance contract or policy for cancellation, provided he is not in arrears for premiums due to the fund and has given to the director of the Division of Finance written notice of his intention to withdraw before the expiration of the period for which he has elected to insure in the fund.

Section 14. Effective Date

This act takes effect on July 1, 1986.

Passed into law without Governor's signature.

CHAPTER 212

H. B. No. 373

Passed February 26, 1986

Effective April 28, 1986

(Failed to obtain 2/3 vote required for earlier effect.)

FUNDING FOR CAPITAL FACILITIES ENROLLED COPY

By Glen E. Brown

AN ACT RELATING TO CAPITAL FACILITIES; APPROPRIATING \$6,900,000 FROM THE WATER RESOURCES CONSERVATION AND DEVELOPMENT FUND AND AUTHORIZING THE ISSUANCE OF \$24,000,000 OF GENERAL OBLIGATION BONDS FOR THE FINANCING OF VARIOUS CAPITAL PROJECTS; PROVIDING FOR MANNER OF ISSUANCE, MATURITY, AND REPAYMENT; AND PROVIDING AN EFFECTIVE DATE.

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

ENACTS:

CHAPTER 63, TITLE 63, UTAH CODE ANNOTATED 1953

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

Section 1.

There is appropriated from the Water Resources Conservation and Development Fund \$6,900,000 to the Department of Transportation-State Construction for fiscal year 1986-87 for the following projects:

PRIORITY	PROJECTS	AMOUNT
1	Burr Trail	1,700,000
2	Trapper's Loop Road	5,200,000
	TOTAL	\$6,900,000

Section 2. Chapter Enacted.

Chapter 63, Title 63, Utah Code Annotated 1953, is enacted to read:

63-63-1. (Codified as 63-64-1) General obligation bonds authorized - Maximum amount.

The commission created under Section 63-56a-1 may issue and sell general obligation bonds of the state pledging the full faith, credit, and resources of the state for the payment of the principal of and interest on the bonds, to provide funds to the Division of Facilities Construction and Management. The total amount of bonds issued under this chapter may not exceed \$24,000,000.

Appendix 4

1988 Laws Utah 512

[as such] 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.

Section 3. Section Amended.

Section 35-1-107, Utah Code Annotated 1953, as last amended by Chapters 2 and 126, Laws of Utah 1987, is amended to read:

35-1-107. Uninsured Employers' Fund — Creation — Liability — Funding — Administration — Subrogation — Insolvent employer — Fund's rights with wrongful act or neglect — Adjusting claims — Penalty — Assessment of self-insured employers — Duty to notify — Burden of proof — Partners and sole proprietors — Corporate officers and directors — Administrative funding.

(1) There is created an Uninsured Employers' Fund [for]. The fund has the purpose of [paying and assuring, to persons entitled to] assisting in the payment of workers' compensation benefits [when every] to any person entitled to them, if that person's employer [of the claimant who] is [found to be] individually, jointly, or severally liable to pay the benefits, but becomes or is insolvent, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities [under this chapter]. This fund succeeds to all monies previously held in the Default Indemnity Fund. If it becomes necessary to pay benefits, the fund is liable for all obligations of the employer as set forth in Chapters 1 and 2, Title 35, with the exception of penalties on those obligations.

(2) Funds for the Uninsured Employers' Fund shall be provided under Subsection 59-9-101 (2). The state treasurer is the custodian of the Uninsured Employers' Fund and the commission shall direct its distribution. Reasonable costs of administration may be paid from the fund. The commission shall employ counsel to represent the Uninsured Employers' Fund in all proceedings brought to enforce claims against or on behalf of the fund[, and upon]. Upon the request of the commission, the attorney general, city attorney, or county attorney of the locality in which any investigation, hearing, or trial under [the provisions of] this title is pending, or in which the employee resides or an employer resides or is doing business, shall aid in the representation of the fund.

(3) To the extent of the compensation and other benefits paid or payable to or on behalf of an employee or [their] the employee's dependents from the Uninsured Employers' Fund, the fund, by subroga-

tion, has all the rights, powers, and benefits of the employee or [their] the employee's dependents against the employer failing to make the compensation payments.

(4) The receiver, trustee, liquidator, or statutory successor of an insolvent employer is bound by settlements of covered claims by the fund. The court [having] with jurisdiction shall grant all payments made under this section a priority equal to that to which the claimant would have been entitled in the absence of this section against the assets of the insolvent employer. The expenses of the fund in handling claims shall be accorded the same priority as the liquidator's expenses.

(5) The commission shall periodically file with the receiver, trustee, or liquidator of the insolvent employer or insurance carrier statements of the covered claims paid by the fund and estimates of anticipated claims against the fund which shall preserve the rights of the fund for claims against the assets of the insolvent employer.

(6) When any injury or death for which compensation is payable from the Uninsured Employers' Fund has been caused by the wrongful act or neglect of another person not in the same employment, the fund has the same rights as allowed under Section 35-1-62

(7) The fund, subject to approval of the Workers' Compensation Division of the Industrial Commission, shall discharge its obligations by adjusting its own claims or by contracting with an adjusting company, risk management company, insurance company, or other company that has expertise and capabilities in adjusting and paying workers' compensation claims.

(8) For the purpose of maintaining this fund, the commission, upon rendering a decision with respect to any claim for workers' compensation benefits [under this chapter], shall impose a penalty against the uninsured employer of 15% of the value of the total award in connection with the claim, and shall direct that the additional penalty be paid into the Uninsured Employers' Fund. Awards may be docketed as other awards under this chapter.

(9) The liability of the state, the Industrial Commission, and the state treasurer, with respect to payment of any compensation benefits, expenses, fees, or disbursement properly chargeable against the fund, is limited to the assets in the fund, and they are not otherwise in any way liable for the making of any payment.

(10) The commission may make reasonable rules for the processing and payment of claims for compensation from the fund.

(11) In the event it becomes necessary for the Uninsured Employers' Fund to pay benefits under this section to any employee of an insolvent self-insured employer, the Uninsured Employers' Fund may assess all other self-insured employers amounts necessary to pay (a) the obligations of the fund subsequent to an insolvency, (b) the expenses of handling covered claims subsequent to an insolvency, (c) the

cost of examinations under Subsection (12), and (d) other expenses authorized by this section. The assessments of each self-insured employer shall be in the proportion that the manual premium of the self-insured employer for the preceding calendar year bears to the manual premium of all self-insured employers for the preceding calendar year. Each self-insured employer shall be notified of his assessment not later than 30 days before it is due. No self-insured employer may be assessed in any year an amount greater than 2% of that self-insured employer's manual premium for the preceding calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments from the fund for one or more insolvent self-insured employers, the unpaid portion shall be paid as soon as funds become available. All self-insured employers are liable under this section for a period not to exceed three years after the self-insured employer's voluntary or involuntary termination of self-insurance privileges within this state. This subsection does not apply to claims made against an insolvent self-insured employer if the insolvency occurred prior to July 1, 1986.

(12) It is the duty of all self-insured employers to notify the Industrial Commission of any information indicating that any self-insured employer may be insolvent or in a financial condition hazardous to its employees or the public. Upon receipt of that notification and with good cause appearing, the Industrial Commission may order an examination of that self-insured employer. The cost of the examination shall be assessed against all self-insured employers as provided in Subsection (11). The results of the examination shall be kept confidential.

(13) In any claim against an employer by the Uninsured Employers' Fund, or by or on behalf of the employee to whom or to whose dependents compensation and other benefits are paid or payable from the fund, the burden of proof is on the employer or other party in interest objecting to the claim. The claim is presumed to be valid up to the full amount of workers' compensation benefits claimed by the employee or his dependents. This subsection applies whether the claim is filed in court or in an adjudicative proceeding under the authority of the commission.

(14) A partner in a partnership or an owner of a sole proprietorship may not recover compensation or other benefits from the Uninsured Employers' Fund if:

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

(b) 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.

(15) For purposes of Subsection (14) (b):

(a) a partner of a partnership and an owner of a sole proprietorship are presumed to have had or

shared control or responsibility, and to insure or otherwise provide adequate payment of direct compensation, the burden of proof being on any person seeking to establish the contrary; and

(b) 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.

(16) A director or officer of a corporation may not recover compensation or other benefits from the Uninsured Employers' Fund if the director or officer is excluded from coverage under Subsection 35-1-43 (3) (b).

(17) Any additional administrative burden imposed by amendments to Subsection 35-1-42 (5) during the 1988 general session of the Legislature may be funded out of the Uninsured Employers' Fund, up to a maximum of \$16,000.

CHAPTER 110

H. B. No. 128

Passed February 23, 1988

Approved March 14, 1988

Effective April 25, 1988

PROBATE CODE AMENDMENTS

By Ted D. Lewis

AN ACT RELATING TO THE PROBATE CODE; CHANGING A SURVIVING SPOUSE'S INTESTATE SHARE; LIMITING WHICH PRETERMITTED CHILDREN MAY SHARE IN THE ESTATE; INCREASING THE HOMESTEAD ALLOWANCE; PRIORITIZING EXPENSES OF ADMINISTRATION; OFFSETTING THE HOMESTEAD ALLOWANCE BY ANY AMOUNT PASSING UNDER A WILL; INCREASING THE AMOUNT OF EXEMPT PROPERTY; MAKING THE PROPERTY EXEMPTION CHARGEABLE AGAINST A SHARE PASSING UNDER A WILL; ALLOWING A PERSONAL REPRESENTATIVE TO DISCLAIM A NONTESAMENTARY TRANSFER; CLARIFYING NOTICE REQUIREMENTS FOR THE PERSONAL REPRESENTATIVE OF THE ALLOWANCE OR DISALLOWANCE OF CLAIMS; AND REQUIRING A PERSONAL REPRESENTATIVE'S CLOSING STATEMENT TO INCLUDE THE NATURE AND VALUE OF ESTATE'S ASSETS AT THE TIME OF DISTRIBUTION.

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

Appendix 5

Order Granting Motion for Review

THE INDUSTRIAL COMMISSION OF UTAH

CHAD O. FULTON,	*	
	*	
Applicant,	*	
	*	ORDER GRANTING
vs.	*	MOTION FOR REVIEW
	*	
KIM KENNEDY dba KENNEDY	*	Case No. 92-1264
ROOFING; JAY C. HARRIS; L & T	*	
ENTERPRISES, INC.; WORKERS'	*	
COMPENSATION FUND OF UTAH; and	*	
UNINSURED EMPLOYERS' FUND,	*	
	*	
Defendants.	*	
	*	

In this matter, the Administrative Law Judge awarded workers' compensation benefits to Chad Fulton. The ALJ then apportioned liability for Fulton's benefits among the following: Kennedy, as Fulton's uninsured common law employer; L & T Enterprises, as Fulton's statutory employer, and L & T's insurance carrier, Workers' Compensation Fund of Utah; and the Uninsured Employers' Fund ("UEF").

The parties agree that Fulton is entitled to workers' compensation benefits. However, UEF argues in its Motion For Review that it should not be held liable for any part of those benefits.

The Industrial Commission of Utah exercises jurisdiction over this Motion For Review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §35-1-82.53 and Utah Admin. Code R568-1-4.M.

FINDINGS OF FACT

The Commission adopts the findings of fact set forth in the ALJ's Order. In summary, L & T, as general contractor, hired Kennedy as a roofing subcontractor. Kennedy then employed Fulton

ORDER GRANTING MOTION FOR REVIEW
CHAD FULTON
PAGE TWO

to work as a roofer on the L & T project. Fulton was injured in the course of that work.

The ALJ found Kennedy to be Fulton's common law employer and L & T to be Fulton's "statutory employer" pursuant to §35-1-42 of Utah's Workers' Compensation Act. At the time of Fulton's accident, Kennedy did not have workers' compensation coverage for Fulton. However, L & T did have such coverage through the Workers' Compensation Fund of Utah.

DISCUSSION AND CONCLUSIONS OF LAW

Because Kennedy is insolvent and was uninsured at the time of Fulton's accident, the ALJ apportioned Fulton's benefits between L & T and UEF. In doing so, the ALJ relied upon §35-1-107 of Utah's Workers' Compensation Act, which provides in material part:

There is created an Uninsured Employers Fund. The Fund has the purpose of assisting in the payment of workers compensation benefits to any person entitled to them, if that person's employer is individually, jointly, or severally liable to pay the benefits, but becomes or is insolvent

The Commission disagrees with the ALJ's application of the foregoing statute. The statute imposes liability on the UEF only in those cases where an injured employee's employer is uninsured and insolvent. In Utah, an employee may have more than one employer. Kinne v. Industrial Commission, 609 P. 2d 926, 928 (Utah 1980) In this case, Fulton had two employers; Kennedy and L & T. The statute must be read in light of that fact.

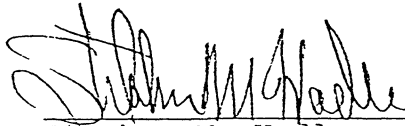
While Kennedy is uninsured and insolvent, L & T is neither uninsured nor insolvent. Therefore, because L & T is Fulton's employer and is able to pay workers' compensation benefits, the provisions of §35-1-107(1) are not triggered and UEF is not obligated to pay any of Fulton's benefits.

ORDER GRANTING MOTION FOR REVIEW
CHAD FULTON
PAGE THREE

ORDER

In light of the foregoing, the Commission modifies the ALJ's Order, found on page five of his decision, by striking paragraphs four and five in their entirety. The remainder of the ALJ's decision is affirmed. It is so ordered.

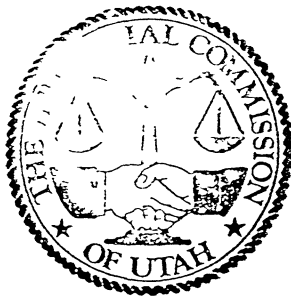
Dated this 28th day of June, 1994.



Stephen M. Hadley
Chairman



Thomas R. Carlson
Commissioner





Colleen S. Colton
Commissioner

NOTIFICATION OF APPEAL RIGHTS

Any party may ask the Commission to reconsider this Order by filing a request for reconsideration with the Commission within 20 days of the date of this Order. Alternatively, any party may appeal this Order by filing a Petition For Review with the Court of Appeals within 30 days of the date of this Order.

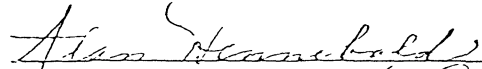
ORDER GRANTING MOTION FOR REVIEW
CHAD FULTON
PAGE FOUR

CERTIFICATE OF MAILING

I, Alan Hennebold, certify that I did mail by prepaid first class postage a copy of the ORDER GRANTING MOTION FOR REVIEW in the case of CHAD FULTON, CASE NO. 92-1264, on the 28th day of June, 1994 to the following:

T. JEFFREY COTTLE, ESQ.
387 WEST CENTER
OREM, UTAH, 84057

RICHARD G. SUMSION, ESQ.
WORKERS COMPENSATION FUND
P O BOX 57929
SALT LAKE CITY, UTAH 84157


Alan Hennebold *by PCH*
General Counsel
Industrial Commission of Utah

AH\92-12640

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Appendix 6

Findings of Fact, Conclusions
of Law & Order

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 92-1264

CHAD O. FULTON,	*	
	*	
	*	
Applicant.	*	FINDINGS OF FACT
	*	
vs.	*	CONCLUSIONS OF LAW
	*	
KIM KENNEDY dba KENNEDY ROOFING	*	AND ORDER
(UNINSURED); JAY C. HARRIS	*	
(UNINSURED); L & T ENTERPRISES,	*	
INC. and/or WORKERS COMPENSATION	*	
FUND OF UTAH; UNINSURED	*	
EMPLOYERS FUND,	*	
	*	
Defendants.	*	
	*	
* * * * *	*	

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on April 29, 1993, at 1:00 o'clock p.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 T. Jeffrey Cottle, Attorney at Law.

Defendant, Kim Kennedy dba Kennedy Roofing (Uninsured) failed to appear.

The defendant, Jay C. Harris (Uninsured) was present and represented Pro Se.

L & T Enterprises and/or Workers Compensation Fund of Utah were present and represented by Richard G. Sumsion, Attorney at Law.

The Uninsured Employers Fund was represented by Thomas C. Sturdy, Attorney at Law.

At the conclusion of the evidentiary hearing, the matter was taken under advisement by the Administrative Law Judge. Being

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fully advised in the premises, the Administrative Law Judge is now prepared to enter the following

FINDINGS OF FACT:

The applicant herein, Chad O. Fulton, sustained a compensable industrial accident on July 11, 1992. Just prior to his injury date, the applicant had been dating the daughter of Jay C. Harris. Knowing that the applicant needed work, Mr. Harris approached the applicant and informed him that he had been hired by Kim Kennedy, as the result of an ad he had seen in the Provo Herald, whereby Kim Kennedy was advertising himself as K. Kennedy Roofing. Mr. Harris informed Mr. Fulton that he had been hired by Kennedy as a roofing foreman and that to complete the job they were working on, they would require additional help, and thus the offer of employment to the applicant.

On July 11, 1992, the applicant was installing roofing at an apartment complex called The Avenues. As the applicant was doing so, unfortunately, he slipped and fell from the roof approximately 50 - 60 feet to the ground. As the result, the applicant fractured his pelvis in six places, collapsed a lung, and also fractured his left foot. He was treated at the Utah Valley Hospital. Dr. Schow, the applicant's treating physician released him to return to work effective October 1, 1992.

The applicant also testified that he was paid by the square, but that he did not keep track of his output, as "I was there to work." He did state, however, that the number of squares that he had installed was being recorded by Mr. Harris. Mr. Fulton also testified that he never observed Mr. Kennedy on the job.

Mr. Harris was called and testified that he had previously worked as a prop maker for the movie industry, but was no longer engaged in that occupation due to an industrial injury he sustained while so employed. He testified that he has roofed on and off from 1984, and that the total time spent roofing by him was 2 - 3 years. He also stated that roofing contractors generally pay by the square. He testified that he had made the acquaintance of Mr. Kennedy previous to this job, and that he had worked on a project called the Cambridge project. After he had completed that project, he went on a trip to Zions National Park with his wife. When he returned, he contacted Kim Kennedy, and was told by Mr. Kennedy that his father, Vern Kennedy, had secured a roofing job with L & T Enterprises, that was paying \$22.00 per square. Mr. Harris testified that he thought that he would be paid by Mr. Kennedy. When he went to get paid for the Cambridge job, he was told by

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Kennedy that he should see the accountant. When he reported to the "accountant", he discovered that it was Norric Enterprises, a dba of Norman King who also had a dba called Total Construction. Mr. Harris also stated that on the Avenues job, he dealt with someone from L & T named Kerry, who was in charge on the job site, and had a portable telephone. Mr. Harris went on to testify that he holds no contractor licenses from the state of Utah and also was not cited by OSHA for the accident. He did state that he furnished the safety equipment for himself and the applicant, but that Mr. Kennedy furnished all of the tools needed for the roofing. The materials were billed to L & T. Mr. Harris also stated that there was not much negotiation with respect to his dealings with roofing contractors. He noted that in Utah, the roofing contractors seemed to have the attitude that "roofers are lucky to have a job."

The President of L & T was called and testified that L & T is a general contractor engaged in small commercial and residential construction. He also testified that L & T has thirty employees of its own and that when they construct a building they accomplish the job with their own employees or they will use subcontractors. He stated further that they do everything involved in the construction of buildings except for those areas they are not licensed in, and those specifically are electrical, mechanical (heating, air conditioning, etc.) and plumbing. He went on to testify quite forthrightly that they have actually done a lot of their own roofing, and that, in fact, they had roofers on their payroll on July 11, 1992. He further testified that L & T had roofers on the job at the Avenues project, because when the subcontractor did a poor job, he stated that they moved in their own roofing crew and they finished the job. Mr. Bankhead went on to state that they had signed a roofing contract with Vern Kennedy, who was described as an estimator for Total Construction, and that Mr. Kennedy had signed on behalf of Total Construction (Norman King dba Norric Enterprises).

The legal issue in this case involves whether or not the general contractor, L & T Enterprises, Inc., was a statutory employer of the applicant at the time of his industrial accident. The applicable statutory provision is §35-1-42, subsection (5)(c) which provides:

A portion of a construction project subcontracted to others may be considered 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.

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The facts in this matter clearly indicate that L & T Enterprises, Inc., would have performed the roofing work in question, as part of its normal course of business. Mr. Bankhead testified quite candidly, that not only did L & T have roofers on their payroll on July 11, 1992, but, in fact, when the Total Construction/Kennedy Roofing . . . crew did not perform satisfactorily on that roofing job, a roofing crew already on L & T's payroll was dispatched to finish the job. Based on the foregoing, it is clear that L & T Enterprises, Inc., was the statutory employer of the applicant on July 11, 1992. The applicant's actual employer would have been Kennedy Roofing/Total Construction/Norric Enterprises. . . . On the date of his accident, the applicant had for workers compensation purposes, two employers, namely the statutory employer and the uninsured employer, Kennedy Roofing/Total Construction/Norric Enterprises. . . . Based on the Charles Kinne v. Industrial Commission, 609 P2d 926 (Utah 1980), case, the statutory employer and the employer, in fact, are jointly and severally liable for the applicant's compensation benefits. However, in this case, the applicant's employer, in fact, was uninsured and has insufficient assets or sureties to satisfy their portion of the applicant's compensation award. Accordingly, the Uninsured Employers Fund, pursuant to § 35-1-107, shall step into the shoes of the uninsured employer and shall pay the Uninsured Employer Fund's share of the applicant's benefits.

On July 11, 1992, the applicant was being paid by the square. The testimony of Mr. Harris indicated that the applicant and himself had agreed that for the week or so that the applicant had worked, he had earned \$100.00. Accordingly, the applicant would be entitled to compensation for temporary total disability at the rate of \$67.00 per week, when rounded to the nearest whole dollar. The applicant was temporarily and totally disabled for the period July 12, 1992 through October 1, 1992, or a period of 11.714 weeks. Therefore, the applicant is entitled to an award for temporary total disability of \$784.84. The applicant's treating physician, Dr. Schow, has indicated in a letter of January 28, 1993, that the applicant will have no residual permanent impairment due to his industrial accident.

CONCLUSIONS OF LAW:

The applicant sustained a compensable industrial accident on July 11, 1992, while employed by Kim Kennedy dba Kennedy Roofing/Total Construction/Norric Enterprises/Norman King. In addition, the applicant was also employed on July 11, 1992, by the statutory employer, L & T Enterprises, Inc..

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ORDER:

IT IS THEREFORE ORDERED that L & T Enterprises, Inc., and/or Workers Compensation Fund of Utah pay Chad O. Fulton, compensation at the rate of \$67.00 per week for 11.714 weeks for a total of \$784.84, as temporary total disability resulting from the industrial accident of July 11, 1992. These benefits shall be paid in a lump sum and shall include interest of 8% per annum from October 2, 1992.

IT IS FURTHER ORDERED that L & T Enterprises, Inc., and/or Workers Compensation Fund of Utah, pay T. Jeffrey Cottle, attorney for the applicant, the sum of \$157.00 plus 20% of the interest awarded to the applicant for services rendered in this matter. The same to be deducted from the award to the applicant and remitted directly to his office.

IT IS FURTHER ORDERED that L & T Enterprises, Inc., and/or Workers Compensation Fund of Utah, pay all medical expenses incurred as the result of the industrial accident of July 11, 1992, in accordance with the Medical and Surgical Fee Schedule of the Industrial Commission.

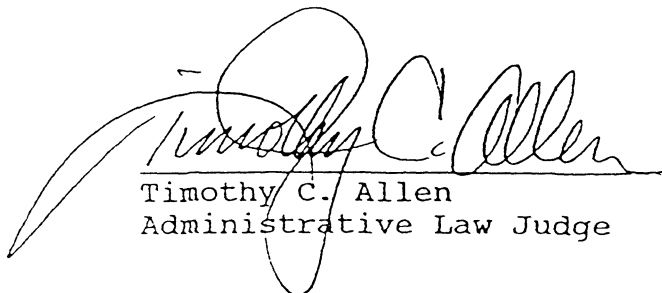
IT IS FURTHER ORDERED that the Uninsured Employers Fund shall reimburse the Workers Compensation Fund of Utah for 50% of the benefits paid by Workers Compensation Fund of Utah on behalf of the applicant as the result of the industrial accident of July 11, 1992.

IT IS FURTHER ORDERED that the Uninsured Employers Fund shall have full rights of subrogation for the benefits they have paid in this matter, said right of subrogation shall extend to Norman King and Kim Kennedy.

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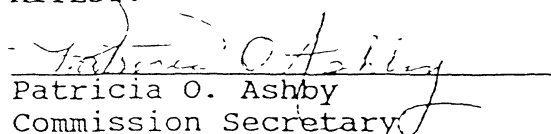
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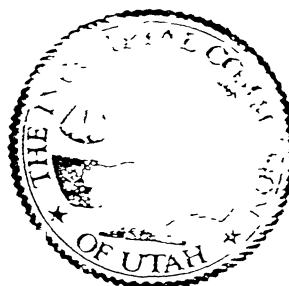
IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.


Timothy C. Allen
Administrative Law Judge

Certified this 2nd day of
May, 1993.

ATTEST:


Patricia O. Ashby
Commission Secretary



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CERTIFICATE OF MAILING

I certify that on May 5th, 1993, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Chad O. Fulton, was mailed to the following persons at the following addresses, postage paid:

Chad O. Fulton
1153 West 680 South
Orem, UT 84058

T. Jeffrey Cottle
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Kim Kennedy dba
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Norman King
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P O Box 57929
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Thomas C. Sturdy
Attorney at Law
Uninsured Employers Fund

Joyce Sewell
Administrator
Uninsured Employers Fund

INDUSTRIAL COMMISSION OF UTAH

By Wilma Burrows
Wilma Burrows
Adjudication Division

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