

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 Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Callister, Nebeker & McCullough; James R. Black; Richard G. Sumsion; Co-Counsel for Petitioners. Jay C. Harris; Pro Se; Sharon Eblen; Alan Hennebold.

Recommended Citation

Brief of Appellant, *L & T Enterprises, Inc. v. Kennedy*, No. 940406 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/6058

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

* * * * *

L & t ENTERPRISES, INC.	)	BRIEF OF PETITIONERS L
and/or WORKERS COMPENSATION	)	&T ENTERPRISES, INC. AND
FUND OF UTAH,	)	WORKERS COMPENSATION
	)	FUND OF UTAH
Petitioners,)	
	)	Court of Appeals
vs.	)	Case No. 940406-CA
)	
KIM KENNEDY dba KENNEDY)	
ROOFING (Uninsured); JAY C.)	
HARRIS (Uninsured);	)	Industrial Commission
UNINSURED EMPLOYERS' FUND,	)	Number: 92-1246
AND INDUSTRIAL COMMISSION OF)	
UTAH,)	
	)	Priority No. 7
Respondents.)	

* * * * *

WRIT OF REVIEW FROM AN ORDER OF THE INDUSTRIAL
COMMISSION OF UTAH

JAY C. HARRIS
(Pro Se)
1914 South Columbia Lane
Orem,
Utah 84604

UNINSURED EMPLOYERS FUND
SHARON EBLEN
160 East 300 South, #300
Salt Lake City, Utah 84111

INDUSTRIAL COMMISSION OF UTAH
ALAN HENNEBOLD
General Counsel
160 East 300 South
Salt Lake City, Utah 84111
Telephone: (801) 530-6593

Co-Counsel For Petitioners
CALLISTER NEBEKER & McCULLOUGH
JAMES R. BLACK #0347
800 Kennecott Building
Salt Lake City,
Utah 84133
Telephone: (801) 530-7300

Co-Counsel For Petitioners
RICHARD G. SUMSION #3156
392 East 6400 South
Murray, Utah 84107
Telephone: (801) 288-8150

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
A10

940406

FILED

JAN 17 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

* * * * *

L & t ENTERPRISES, INC.	)	BRIEF OF PETITIONERS L
and/or WORKERS COMPENSATION	)	&T ENTERPRISES, INC. AND
FUND OF UTAH,	)	WORKERS COMPENSATION
	)	FUND OF UTAH
Petitioners,)	
	)	Court of Appeals
vs.	)	Case No. 940406-CA
)	
KIM KENNEDY dba KENNEDY)	
ROOFING (Uninsured); JAY C.)	
HARRIS (Uninsured);	)	Industrial Commission
UNINSURED EMPLOYERS' FUND,	)	Number: 92-1246
AND INDUSTRIAL COMMISSION OF)	
UTAH,)	
	)	Priority No. 7
Respondents.)	

* * * * *

WRIT OF REVIEW FROM AN ORDER OF THE INDUSTRIAL
COMMISSION OF UTAH

JAY C. HARRIS
(Pro Se)
1914 South Columbia Lane
Orem,
Utah 84604

UNINSURED EMPLOYERS FUND
SHARON EBLEN
160 East 300 South, #300
Salt Lake City, Utah 84111

INDUSTRIAL COMMISSION OF UTAH
ALAN HENNEBOLD
General Counsel
160 East 300 South
Salt Lake City, Utah 84111
Telephone: (801) 530-6593

Co-Counsel For Petitioners
CALLISTER NEBEKER & McCULLOUGH
JAMES R. BLACK #0347
800 Kennecott Building
Salt Lake City,
Utah 84133
Telephone: (801) 530-7300

Co-Counsel For Petitioners
RICHARD G. SUMSION #3156
392 East 6400 South
Murray, Utah 84107
Telephone: (801) 288-8150

LIST OF PARTIES BEFORE THE INDUSTRIAL COMMISSION

For the Applicant Chad O. Fulton	T. Jeffrey Cottle Attorney at Law 387 West Center Orem, Utah 84057 Not A Party To The Appeal
For the Defendant Kim Kennedy dba Kim Kennedy Roofing (Uninsured) (Pro Se):	Failed to appear at hearing and default was entered.
Defendant Jay C. Harris (Uninsured) (Pro Se):	1914 South Columbia Lane Orem, Utah 84604
For the Workers' Compensation Fund and L&T Enterprises:	Richard G. Sumsion Attorney at Law 392 East 6400 South Murray, Utah 84107
For the Uninsured Employers' Fund:	Sharon Eblen Attorney at Law 160 East 300 South, Suite 300 Salt Lake City, Utah 84111

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
TABLE OF APPENDICES	v
I. STATEMENT OF JURISDICTION OF THE COURT OF APPEALS . . .	1
II. STATEMENT OF THE ISSUE	1
III. STANDARD OF REVIEW	1
IV. STATEMENT OF THE CASE AND CITATIONS TO THE RECORD SHOWING THAT THE ISSUES WERE PRESERVED BEFORE THE INDUSTRIAL COMMISSION	2
A. Nature of the Case	2
B. Course of Proceedings.	2
C. Disposition by the Industrial Commission	4
V. STATEMENT OF FACTS	5
VI. SUMMARY OF THE ARGUMENT	7
VII. ARGUMENT	9
THE UNINSURED EMPLOYERS' FUND HAS AN OBLIGATION TO PAY A PROPORTIONATE SHARE OF THE COMPENSATION BENEFITS WHEN THE INJURED OR DECEASED EMPLOYEE HAS JOINT EMPLOYERS OR A STATUTORY EMPLOYER AND ONE OR MORE OF THOSE EMPLOYERS IS UNABLE TO "COVER [ITS] WORKERS COMPENSATION LIABILITIES".. . . .	9
VIII. CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASE AUTHORITIES:

<u>Jacobsen v. Industrial Com'n of Utah</u> , 738 P.2d 658 (Utah App. 1987)	8-11
<u>Mor-Flo Industries v. Board of Review</u> , 817 P.2d 328 (Utah App. 1991)	1
<u>Morton International, Inc., v. Auditing Division of the Utah State Tax Commission</u> , 814 P.2d 581 (Utah 1991) . . .	1

STATUTES:

Utah Code Ann. § 35-1-82.53(2), 1953, as amended	1
Utah Code Ann. § 35-1-86, 1953, as amended.	1
Utah Code Ann. § 35-1-107, as amended in 1988	1, 3-10, 12
Utah Code Ann. § 35-1-42, as amended in 1988 . . . . .	.3
Utah Code Ann. § 63-46B-16, 1953, as amended	1

TABLE OF APPENDICES

1. SECTION 35-1-107, U.C.A., AMENDED 1988
2. FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER (R. 62-68)
3. ORDER GRANTING MOTION FOR REVIEW (R. 78-82)

I.

STATEMENT OF JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction in this matter pursuant to §§ 35-1-82.53(2), 35-1-86 and 63-46B-16, Utah Code Ann. 1953, as amended.

II.

STATEMENT OF THE ISSUE

Did the Industrial Commission err in not finding the Uninsured Employer's Fund liable along with the statutory employer L & T Construction and its insurance carrier the Workers Compensation Fund of Utah for a portion of the workers' compensation benefits awarded Mr. Fulton as is required by §35-1-107 U.C.A.? (Attached as Appendix 1)

III.

STANDARD OF REVIEW

The standard of review is a correction of error standard without deference to the decision of the administrative agency when "the agency has erroneously interpreted or applied the law." Utah Administrative Procedures Act Section 63-46b-16(4)(d) & (h)(iv) Utah Code Ann.; Morton International, Inc., v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991); Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah App. 1991).

IV.

STATEMENT OF THE CASE AND CITATIONS TO THE RECORD SHOWING THAT THE ISSUES WERE PRESERVED BEFORE THE INDUSTRIAL COMMISSION

A. Nature of the Case

The Industrial Commission of Utah awarded workers compensation benefits to the applicant, Chad O. Fulton (hereinafter "Fulton") for injuries he suffered when he fell from a roof while in the course of his employment for Kim Kennedy dba Kennedy Roofing (Uninsured) (hereinafter "Kennedy"). (See Findings of Fact, Conclusions of Law and Order, R. 62-68 attached as Appendix 2 hereto; and Order Granting Motion for Review, R. 78-82 attached as Appendix 3 hereto.) The parties on appeal do not contest the award of benefits. Rather the parties contest which of them is responsible for those payments and in what proportion they are responsible. The applicant below, Fulton, is not a party to the appeal. While the issues among the parties are being determined the petitioner, Workers' Compensation Fund of Utah (hereinafter "WCF"), the workers compensation insurance carrier for the statutory employer L & T Enterprises, Inc. (hereinafter "L & T") is advancing payment of compensation benefits.

B. Course of Proceedings.

Fulton, was injured on June 11, 1992, when he fell from the roof of a building while working for Kennedy. Fulton filed an Application For Hearing October 17, 1992, claiming entitlement to workers compensation benefits. He listed Kennedy Roofing, Jay Harris and L & T as employers. A notation was made that "All

contractors appear uninsured". (R. 2) The Workers Compensation Fund of Utah answered on behalf of L & T with a general denial. WCF alleged that L & T was not the employer. WCF further alleged that Fulton was the employee of independent subcontractor(s). WCF relied on the 1988 amendments to §35-1-42 U.C.A. (R. 59)

An evidentiary hearing was conducted on April 29, 1993. (R. 61, R. 130-179) At the hearing evidence was presented regarding employee/employer relationship issues. Following the hearing, the administrative law judge entered his Findings of Fact Conclusions of Law and Order on May 5, 1993. (Appendix 2 hereto.) Applying the facts to the law, the administrative law judge found:

CONCLUSION 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.

(R. 65).

Because all of the direct employers were uninsured and apparently impecunious and unable to pay the compensation benefits, the administrative law judge ordered WCF to pay the compensation benefits to Fulton on behalf of L & T Enterprises. Pursuant to §35-1-107 U.C.A., the judge 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.

(R. 66)

The Uninsured Employer's Fund (hereinafter "UEF") filed a Motion for Review on June 4, 1993, arguing the following:

1. The issue is one of statutory construction of §35-1-107 U.C.A.;

2. The statutory employer should be responsible for 100% of the benefits because in UEF's interpretation of §35-1-107 U.C.A., the role of the UEF is as a fund of last resort or "safety net" in the event all employers and statutory employers are uninsured and insolvent. (R. 69-74)

L & T and WCF filed a responsive letter supporting the Findings of Fact, Conclusions of Law and Order of the administrative law judge on July 7, 1993. (R. 76)

C. Disposition by the Industrial Commission

The Industrial Commission entered its Order Granting Motion for Review on June 28, 1994. The Commission adopted the administrative law judge's Findings of Fact including the finding that L & T was Fulton's statutory employer but made different conclusions of law based on those facts. The Commission concluded:

The Commission disagrees with the ALJ's application of [§35-1-107 U.C.A.]. The statute imposes liability on the UEF only in those cases where an injured employee's employer is uninsured and insolvent...In this case, Fulton had two employers; Kennedy and L & T...

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.

(R. 78-81 and Appendix 3)

By Petition for Writ of Review (R. 83-85) and Docketing Statement (R. 88-106), both filed July 14, 1994, L & T and WCF bring this matter to the Court of Appeals for an interpretation of §35-1-107 U.C.A.

V.

STATEMENT OF FACTS

The Industrial Commission of Utah adopted as its own the Findings of Fact of the administrative law judge. (R. 78) Those facts are not in dispute. However, the application of those facts to the statutory law is in dispute. Reference to the facts will primarily be those cited by the administrative law judge. We will not further cite to the Record on Appeal unless the fact is not one contained in the Findings of Fact, Conclusions of Law and Order. (R. 62-68 & Appendix 2 hereto).

1. The applicant below, Chad O. Fulton, sustained a compensable industrial injury on July 11, 1992, when he fell fifty to sixty feet from a roof on which he was working. Shortly prior to his injury, Mr. Fulton was hired by defendant Jay C. Harris who represented himself to be a roofing foreman to do roofing work on a project for defendant Kim Kennedy dba Kennedy Roofing. Defendant Kennedy Roofing was a subcontractor for

petitioner L & T Enterprises which was the general contractor of the project on which Mr. Fulton was injured.

2. An evidentiary hearing was conducted on April 29, 1993. The administrative law judge entered his Findings of Fact Conclusions of Law and Order on May 5, 1993. Applying the facts to the law, the administrative law judge found the following:

A. Chad O. Fulton was an employee of defendant Kim Kennedy dba Kennedy Roofing/Total Construction/Norric Enterprises/Norman King (uninsured) (Hereinafter "Kennedy"). Mr. Fulton was also a statutory employee of petitioner L & T Enterprises, Inc. No party contests that L & T is the "statutory employer" of Mr. Fulton;

B. Defendant Kennedy is jointly responsible with petitioner Workers' Compensation Fund of Utah (Hereinafter "WCF") for the payment of compensation benefits to Mr. Fulton;

C. The WCF is to pay the benefits in the first instance subject to being reimbursed 50% from the Uninsured Employers' Fund;

D. The Uninsured Employers' Fund has full rights of subrogation for the benefits it pays from Kennedy and the principals associated therewith.

3. UEF filed its Motion for Review (R. 69-74) on June 4, 1993, arguing the following:

A. The issue is one of statutory construction of §35-1-107 U.C.A.;

B. The statutory employer (L & T) should be responsible for 100% of the death benefits because in UEF's interpretation §35-1-107 U.C.A. the role of the UEF is as a fund of last resort or "safety net" in the event all employers and statutory employers are uninsured and insolvent.

4. L & T and WCF filed a response asserting their support of reasoning contained in the Findings of Fact, Conclusions of Law and Order. (R. 76)

5. The Industrial Commission entered its Order Granting Motion for Review (R. 78-82 and Appendix 3 hereto) on June 28, 1994, in which:

A. The Commission adopted the administrative law judge's Findings of Fact but made different conclusions of law based on those facts.

B. The Commission found UEF is not liable for any portion of the benefits. Essentially the Commission found that §35-1-107 U.C.A. which creates UEF is a fund of last resort to pay compensation benefits only if there is no employer or statutory employer solvent to pay those benefits.

VI.

SUMMARY OF THE ARGUMENT

In 1984, the Utah Legislature enacted §35-1-107 U.C.A. which established the Uninsured Employer's Fund. The purpose of the Uninsured Employer's Fund was originally limited to being the last resort payer of compensation benefits to injured employees whose employers had failed to buy workers compensation insurance

and were otherwise financially incapable of paying the benefits. Funds for the UEF are provided through a premium tax paid by the State's insurance carriers which write workers compensation insurance. The UEF is administered by the Industrial Commission of Utah.

An argument was made in 1987 in the case of Jacobsen v. Industrial Com'n of Utah, *infra.*, that the Uninsured Employer's Fund should either share or pay all of the benefits in situations when the actual employer is uninsured and there is a "statutory employer". The Court of Appeals ruled UEF was not liable for payments because the statute provided that its responsibility began only "...when every employer of the claimant..." including statutory employers were uninsured and insolvent.

Because of the perceived unfairness to innocent "statutory employers", joint employers and their insurance carriers having to pay for uninsured employers' failures, the Legislature took little time in reacting to the Jacobsen case. In 1988, §35-1-107 was amended eliminating the word "every" on which the Court had relied in Jacobsen. The Legislature also added the phrase that the UEF is to "...assist in the payment...if the person's employer is individually, jointly, or severally liable..." UEF is therefore obligated to share the responsibility. That accomplishes the beneficent intent of the Legislature to spread among all insurance carriers the costs of protecting the State's workers from unscrupulous or negligent employers' failures to provide coverage.

Herein, the Industrial Commission overruled the administrative law judge's well thought out opinion which found UEF partially responsible to pay benefits. Because Fulton's direct employer Kennedy is uninsured and apparently impecunious, the responsibility is on UEF to "assist in the payment" of the benefits to Fulton. The administrative law judge's determination that the UEF share with the Workers Compensation Fund equally in the payment of benefits in the event Kennedy is unable to pay should be reinstated.

VII.

ARGUMENT

THE UNINSURED EMPLOYERS' FUND HAS AN OBLIGATION TO PAY A PROPORTIONATE SHARE OF THE COMPENSATION BENEFITS WHEN THE INJURED OR DECEASED EMPLOYEE HAS JOINT EMPLOYERS OR A STATUTORY EMPLOYER AND ONE OR MORE OF THOSE EMPLOYERS IS UNABLE TO "COVER [ITS] WORKERS COMPENSATION LIABILITIES".¹

This is not the first time the issue of UEF responsibility to pay compensation benefits in joint employment situations has been presented to the Court of Appeals. In Jacobsen v. Industrial Com'n of Utah, 738 P.2d 658 (Utah App. 1987) the Court was asked to consider whether the statutory employer and UEF should share in the payment of benefits when the actual employer was uninsured and unable to do so. At that time §35-1-107(1), 1986 stated UEF:

...has the purpose of paying and assuring, to persons entitled to workers' compensation benefits when every employer of the claimant

¹. §35-1-107(1) U.C.A., 1990. See the entire current version of the Uninsured Employers' Fund enabling statute as Appendix 1 hereto.

who is found to be individually, jointly, or severally liable...does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities under this chapter.

(Emphasis added.) The Court emphasized that the word "every" was the controlling feature of the statute. The reasoning of the Court was essentially that as long as any entity or individual in a workers' compensation employer relationship with the injured employee is capable of paying the benefits, UEF has no responsibility.

In a direct response to the Jacobsen decision, the Legislature amended §35-1-107(1) in 1988 by eliminating the word "every" upon which the Jacobsen Court relied. At the time of the accident in question and currently the statute reads in pertinent part:

...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 ...does not have sufficient funds...to cover workers' compensation liabilities...

(Emphasis added.) (See Appendix 1 for the complete text.) This Court must consider that the Legislature made the above changes advisedly. The term "assisting in the payment" can only contemplate that UEF has the obligation to "assist" some other person or entity making compensation benefits. The elimination of the word "every" makes it clear that UEF must assist those in any sort of workers' compensation employer relationship even if

they are capable of paying the benefits because of having insurance coverage or qualifying as self-insureds.

The good sense of this sort of cost spreading is borne out when one considers how UEF is financed. Every workers compensation insurance carrier in the State, including WCF, pays a premium tax assessed by the Industrial Commission of Utah. A portion of the dollars so generated is dedicated to funding UEF. §59-9-102(2)(a) & (b) U.C.A. Therefore, in reality, this is a method for insurance carriers and employers to spread the risk of being found secondarily or jointly responsible for paying compensation benefits to cover employers who fail to comply with the statutory requirement to provide for their employees. In other words, it prevents an unfair burden on one employer or insurance carrier in joint responsibility situations.

The Uninsured Employer's Fund takes the position that it is only secondarily liable and that [UEF] only has liability in the event that the statutory employer and the uninsured employer are unable to pay benefits. That argument totally disregards the 1988 amendment which removed the word every from that statute. The only reasonable conclusion to be drawn from that change is that the Legislature intended to overcome the effects of the decision in Jacobsen v. Industrial Commission, *supra*.

VIII.

CONCLUSION

The Workers' Compensation Act of Utah has as one of its purposes to have industry pay the costs of unfortunate accidents

which befall its employees. The Act does that by spreading the liability among all employers by requiring them to obtain workers compensation insurance. (The sole exception to that is for the very largest employers who meet the Commission's criteria to qualify as self-insureds.) That makes it possible for the small and medium sized employers such as L & T to continue in business even when the unfortunate catastrophic accident occurs. The Legislature recognized that in some circumstances employers will not obey the law to procure insurance. In such an instance, prior to the passage of §35-1-107 U.C.A., the injured employee was left without benefits.

§35-1-107 U.C.A. established the Uninsured Employer's Fund to pay those benefits. Financing for the Uninsured Employer's Fund is obtained by means of a premium tax assessed to all self-insureds and insurance carriers which write such compensation policies. That places the burden for defaulting employers back on industry where it belongs.

After a few years of experience with that system, the Legislature recognized that "statutory employers," joint employers and/or their insurance carriers could be hit with a significant liability in the event common law and/or coemployers fail to obtain compensation insurance. A catastrophic accident could significantly impact the business viability of such entities. Therefore, in 1988, the Legislature amended §35-1-107 U.C.A. to make it clear that UEF should share that responsibility. The effect is again to place more of the risk on

industry as a whole and not focus it on an innocent statutory employer which had complied with the law.

The Industrial Commission of Utah fails to recognize the Legislature's intent. Because Fulton's direct or common law employer is uninsured and incapable of paying his share, the Uninsured Employer's Fund should fulfill its purpose and pay a proportionate share to offset Kennedy's failure to procure workers compensation insurance as required by law. This Court should reverse the decision of the Industrial Commission and remand the case to the Industrial Commission to reinstate the Findings of Fact, Conclusions of Law and Order of the administrative law judge.

DATED this 17 day of January, 1995.

CALLISTER NEBEKER & McCULLOUGH

By: 

James R. Black
Co-Counsel for L & T
Enterprises, Inc. and Workers
Compensation Fund of Utah

WORKERS COMPENSATION FUND OF UTAH

By: _____

Richard G. Sumsion
Co-Counsel for L & T
Enterprises, Inc. and Workers
Compensation Fund of Utah

CERTIFICATE OF MAILING

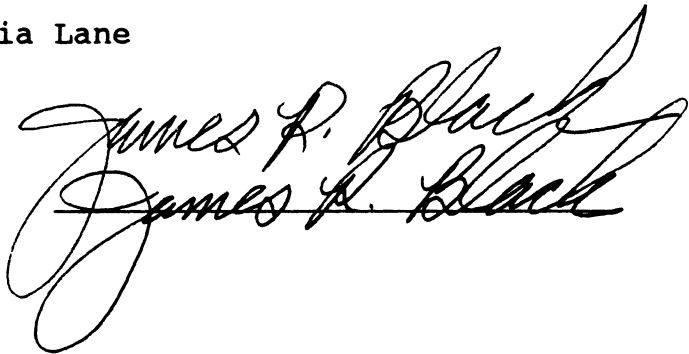
I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANTS L & T ENTERPRISES, INC. AND WORKERS COMPENSATION FUND OF UTAH were mailed, postage prepaid, on this 17 day of January, 1995 to the following:

T. Jeffrey Cottle
Attorney at Law
387 West Center
Orem, Utah 84057
Attorney for Applicant
Chad O. Fulton

Industrial Commission of Utah
Division of Legal Affairs
Alan Hennebold
160 East 300 South, #300
P.O. Box 510250
Salt Lake City, Utah 84151-0250

Sharon Eblen
Uninsured Employers Fund
160 East 300 South #300
P.O. Box 146612
Salt Lake City, Utah 84114-6612

Jay C. Harris
1914 South Columbia Lane
Orem, Utah 84604
Pro Se.

A handwritten signature in black ink, appearing to read "James R. Black", is written over a horizontal line. The signature is stylized with large, flowing loops.

127845-1

Tab 1

APPENDIX 1

SECTION 35-1-107, U.C.A., AMENDED 1988

History: R.S. 1933, 42-1-97a, enacted by
L. 1939, ch. 51, § 1; C. 1943, 42-1-97a.

COLLATERAL REFERENCES

C.J.S. — 82 C.J.S. Statutes § 92 et seq.
Key Numbers. — Statutes ⇌ 64(2).

35-1-107. Uninsured Employers' Fund.

(1) 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, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities. 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. 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 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 the employee's dependents from the Uninsured Employers' Fund, the fund, by subrogation, has all the rights, powers, and benefits of the employee or 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 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, 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 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

(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.

History: C. 1953, 35-1-107, enacted by L. 1984, ch. 77, § 1; 1986, ch. 211, § 12; 1987, ch. 2, § 35; 1987, ch. 126, § 4; 1988, ch. 109, § 3.

Amendment Notes. — The 1986 amendment, effective July 1, 1986, in Subsection (1) substituted "Uninsured Employers' Fund" for "Default Indemnity Fund" wherever it appears; inserted "of the claimant who is found to be individually, jointly, or severally liable" before "becomes" and inserted "or is" after "becomes" in the first sentence, inserted the second sentence, added "with the exception of penalties on those obligations" at the end of the last sentence, and made minor word changes; in Subsection (2) added "and 31A-3-201(2)" at the end of the first sentence, substituted "commission" for "attorney general", substituted "employ counsel" for "appoint a member of his staff", added "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," at the end of the fourth sentence, and made stylistic changes; made stylistic changes in Subsections (3), (4), (7), and (10); in the first sentence of Subsection (8) deleted "from the Default Indemnity Fund" following claim," substituted "benefits" for "compensation" following "for", inserted "uninsured" before "employer" and "value of the" before "total", deleted "made" following "award", inserted "in connection with" following "in", and inserted "Uninsured Employers'" before "Fund"; and added Subsections (11) and (12).

The 1987 amendment, by Chapter 2, effective February 6, 1987, in Subsection (2) substituted "Subsections 35-1-68(2)(a) and 59-9-101(2)" for "Subsections 35-1-68(2)(a) and 31A-3-201".

The 1987 amendment, by Chapter 208, effective July 1, 1987, in Subsection (2), in the first sentence substituted "under Subsection 31A-3-201(2)" for "pursuant to Subsections 35-1-68-(2)(a) and 31A-3-201(2)."

The section was set out in 1987 as reconciled by the Office of Legislative Research and General Counsel.

The 1988 amendment, effective April 25, 1988, in Subsection (1), divided the former first sentence into the present first two sentences and, in the second sentence, substituted "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" for "for the purpose of paying and assuring, to persons entitled to workers' compensation benefits when every employer of the claimant who is found to be

individually, jointly, or severally liable" and deleted "under this chapter" at the end; in Subsection (2), divided the former fourth sentence into the present last two sentences and deleted "the provisions of" preceding "this title" in the last sentence; substituted "the employees" for "their" twice in Subsection (3), "with jurisdiction" for "having jurisdiction" in the second sentence in Subsection (4) and "workers' compensation benefits" for "benefits under this chapter" in the first sentence of Subsection (8); and added Subsections (13) through (17).

Retrospective Operation. — Laws 1987, ch. 2, § 331 provides: "This act has retrospective operation to January 1, 1987."

NOTES TO DECISIONS

Cited in *Carlucci v. Utah State Indus. Comm'n & Default Indemn. Fund*, 725 P.2d

1335 (Utah 1986); *Jacobsen v. Industrial Comm'n*, 738 P.2d 658 (Utah Ct. App. 1987).

CHAPTER 2

OCCUPATIONAL DISEASE DISABILITY COMPENSATION

Section		Section	
35-2-1.	Short title.	35-2-15.	Benefits — Amounts — Permanent total disability — Vocational rehabilitation — Procedure and payments — Temporary total disability — Death — Dependents — Medical, hospital and burial expenses.
35-2-2.	Act to be administered by Industrial Commission.	35-2-16.	Employers to secure compensation — Ways allowed.
35-2-3.	Exclusive remedy against employer, or officer, agent or employee — Accidental injuries within Workmen's Compensation Act excepted.	35-2-17.	Repealed.
35-2-4.	Industrial Commission may sue or be sued — Service of process.	35-2-18.	State department, commission, board, or agency to pay premiums direct to insurance fund.
35-2-5.	Commission to prescribe rules and regulations.	35-2-19, 35-2-20.	Repealed.
35-2-6.	Claims to be filed with commission.	35-2-21.	Employers' failure to comply a misdemeanor — Penalty — False claim by employee a misdemeanor — Disposition of funds collected.
35-2-7.	Commission — Powers.	35-2-22.	Noncomplying employer — To pay compensation — Failure to pay.
35-2-8.	Depositions of witnesses.	35-2-23.	Docketing of award creates lien — Execution.
35-2-9.	Record of proceedings.	35-2-24.	Judgments for nonpayment of premiums — Preference.
35-2-10.	Employers enumerated and defined — Regularly employed — Independent contractors.	35-2-25.	Waiting period after disability — Exception as to disbursements and expenses.
35-2-11.	"Employees," "workmen" and "operatives" defined — Casual employment — Mining lessees and sublessees — Partnership members.	35-2-26.	Occupational diseases — Proximate causation.
35-2-12.	Construction of terms.		
35-2-13.	Employer liability for compensation — Conditions when no payment to be made.		
35-2-14.	Last employer liable — Exception.		

Tab 2

APPENDIX 2

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER (R. 62-68)

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 92-1264

CHAD O. FULTON,

Applicant.

vs.

KIM KENNEDY dba KENNEDY ROOFING
(UNINSURED); JAY C. HARRIS
(UNINSURED); L & T ENTERPRISES,
INC. and/or WORKERS COMPENSATION
FUND OF UTAH; UNINSURED
EMPLOYERS FUND,

Defendants.

* * * * *

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

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

CHAD FULTON
ORDER
PAGE TWO

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

00000

CHAD FULTON
ORDER
PAGE THREE

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.

000000

CHAD FULTON
ORDER
PAGE FOUR

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..

CHAD FULTON
ORDER
PAGE FIVE

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.

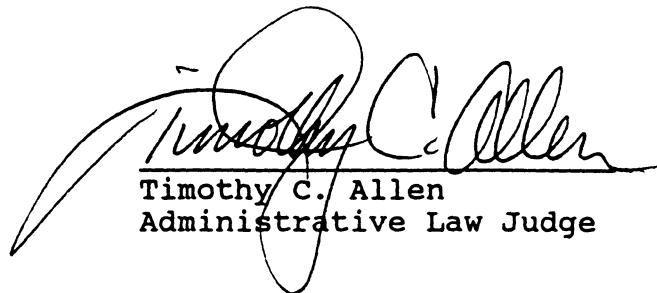
IT IS FURTHER ORDERED that the Uninsured Employers Fund shall reimburse the Workers Compensation Fund of Utah for 50% of the benefits paid by Workers Compensation Fund of Utah on behalf of the applicant as the result of the industrial accident of July 11, 1992.

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.

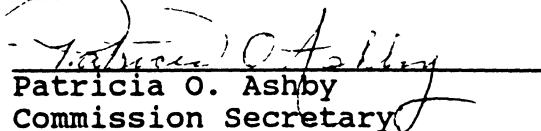
000000

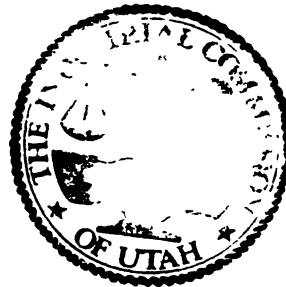
CHAD FULTON
ORDER
PAGE SIX

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 4th day of
May, 1993.
ATTEST:


Patricia O. Ashby
Commission Secretary



00387

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
Attorney at Law
387 West Center
Orem, UT 84057

Kim Kennedy dba
Kennedy Roofing
35 East 1700 South
Orem, UT 84058

Jay C. Harris
1914 South Columbia Lane
Orem, UT 84604

L & T Enterprises, Inc.
953 South State
Orem, UT 84058

Norman King
22 East 1450 South
Orem, Ut 84058

Richard G. Sumsion
Attorney at Law
Workers Compensation Fund of Utah
P O Box 57929
SLC, UT 84157

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

100000

Tab 3

APPENDIX 3

ORDER GRANTING MOTION FOR REVIEW (R. 78-82)

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.

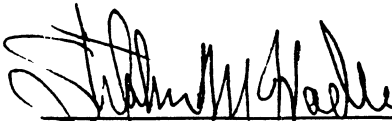
While Kennedy is uninsured and insolvent, L & T is neither uninsured nor insolvent. Therefore, because L & T is Fulton's employer and is able to pay workers' compensation benefits, the provisions of §35-1-107(1) are not triggered and UEF is not obligated to pay any of Fulton's benefits.

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.

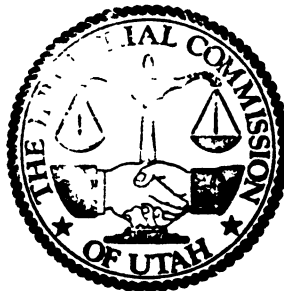
Dated this 28th day of June, 1994.



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
General Counsel
Industrial Commission of Utah

AH\92-12640

000001

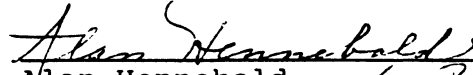
ORDER GRANTING MOTION FOR REVIEW
CHAD FULTON
PAGE FOUR

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\92-1264o

00087