

# ON-THE-JOB

Q U A R T E R L Y N E W S L E T T E R



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ACHIEVING SAFETY IN UTAH'S WORKPLACES AND FAIRNESS IN EMPLOYMENT AND HOUSING



## A word from the Commissioner

As the Labor Commission strives to provide better and more efficient services to the public, our vision is to bring as many of our services on-line as possible and to use technology to be more efficient and effective. These are just a few enhancements that will be coming up this quarter which will enhance our services:

- Our new Workers compensation waiver system will be accessible 24/7 as an online service.
- Electronic Data Interchange (EDI) allows required workers compensation reporting requirements to be made by direct electronic transmission from insurance carriers, self-insured entities and medical care providers.
- Coal Miner Certification testing registration will be an accessible 24/7 online service.

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# Workers Compensation Coverage Waivers

By: **Ron Dressler**, *Director of Industrial Accidents Division*

The Workers' Compensation Act and the Insurance Code allow the issuance of a "Workers' Compensation Coverage Waiver" to qualified partners of a partnership, officers of a corporation, or owner of a sole proprietorship, that do not have employees. The waiver acts as a declaration of non-coverage and is typically used by independent contractors who hire out their services to employers. If the independent contractor does not have a waiver or proof of workers' compensation insurance coverage, the general rule is that the independent contractor and all subcontractors or persons employed by the contractor will be considered employees of the employer. The law currently provides that insurance carriers who are licensed to write workers' compensation insurance policies are authorized to issue waivers.

In **2008 S.B. 159 implemented §31A-22-1011** which added requirements to the process of acquiring a waiver. Business entities or individuals could no longer simply pay a fee to obtain a waiver but also had to show certain evidences of their independent contractor status. They also could not have employees at the time of their application. Evidence allowed by the law includes such things as proof of licensing, a liability insurance policy, tax return documentation, a business location, phone number, bank account, or proof of advertisement. In addition, at any time an employee is hired the waiver becomes invalid.

During the recently completed legislative session there have been additional changes to the waiver process. Senator Mayne's S.B. 191, which has been signed into law by Governor Herbert, transfers the responsibility of processing and issuing these waivers from the insurance carriers to the Labor Commission, effective July 1st, 2011. The bill does, however, leave intact all other requirements for an applicant to obtain a waiver. The Division of Industrial Accidents is working hard to be ready to process the waivers beginning July 1st. The bill provides an appropriation to allow us to hire an individual to run the waiver program, and our IT staff are assisting us with the program development, which will include an on-line application and payment tool. We also anticipate keeping the price of the waivers the same as it has been for the

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past number of years. Our goal is to make the overall process as efficient as possible while still meeting the needs of the public and adhering to the requirements of the law. We are also working closely with the Workers' Compensation Fund, which has been very helpful in making a seamless transition. We will also be communicating with all of our stakeholders regarding the change.

As always, the staff at the Utah Labor Commission and the Division of Industrial Accidents are available to assist our stakeholders and answer any questions regarding this change.

## Electronic Data Interchange (EDI)

By: **Ron Dressler**, *Director of Industrial Accidents Division*

For the past two years the Division of Industrial Accidents has been diligently working on the development of an Electronic Data Interchange (EDI) program for our divisions' claims program. This year will represent the culmination of our efforts as we begin implementing the program. Last year alone there were over 198,000 documents processed by our staff representing 59,617 workplace injuries that occurred in Utah. This takes valuable time away from our staff and limits the amount of time they can assist the public. EDI will streamline the submission of required document filings by eliminating the need for most paper forms. The advantages of moving towards an EDI system include time and cost savings, as well as improved accuracy and efficiency.

We will be having several meetings very soon as the implementation begins, including a general information meeting, a claim's adjuster training session, and a technical meeting. Please check our division's website for more information and if you haven't already, sign up on the Commission's notification system for workers' compensation related updates, which will include EDI updates.

This year promises to be a big year for this project as all of our hard work will begin to pay off.

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## HUD Assistant Secretary Visits Utah

By: Dan Singer, Fair Housing Manager

On February 25, 2011, members of the Fair Housing Unit of the Utah Anti-Discrimination and Labor Division met with HUD Assistant Secretary John Trasviña to discuss fair housing issues in Utah. Secretary Trasviña spoke about initiatives that HUD is undertaking to affirmatively further fair housing opportunities nationwide.

Members of the UALD discussed our role in investigating and enforcing fair housing laws. Additionally, representatives of the Division spoke with Secretary Trasviña about pending litigation related to a community's denial of the building of a group home/treatment center for teenagers with various disabilities. We were also able to discuss with Secretary Trasviña ways in which the Fair Housing Unit could be more visible in its efforts to educate Utah citizens on their rights and responsibilities under the State and Federal Fair Housing Acts.

"It was quite an honor to be able to speak with Secretary Trasviña about fair housing issues in Utah," said Dan Singer, fair housing manager with the UALD. "Every citizen of Utah has the right to rent, purchase, or finance housing without discrimination. We're proud to play a part in educating, investigating, and enforcing fair housing laws throughout the state."



**From left:**

**Evelyn Meinger**  
*HUD Regional Director for Fair Housing*

**Kelly Jorgensen**  
*HUD Field Office Director*

**Stephanie Carrillo**  
*UALD Investigator*

**Dan Singer**  
*UALD Fair Housing Manager*

**Michelle Hutchins**  
*HUD Equal Opportunity Specialist*

**Heather Gunnarson**  
*UALD Director*

**John Trasvina**  
*HUD Assistant Secretary*

**Sherrie Hayashi**  
*Labor Commissioner*

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Every citizen of Utah has the right to rent, purchase, or finance housing without discrimination.



## Young Worker Summer Safety & Health Campaign 2011

Approximately 1.9 million adolescents ages 15 to 17 years worked in the U.S. in 2009. Official employment statistics are not available for younger adolescents who are also known to work, especially in agricultural settings. In 2008, 34 youth under age 18 died from work-related injuries; this number does not include those that died while driving a motor vehicle or this number would be much higher.

According to the U.S. Bureau of Labor Statistics, the leading causes of teenage deaths on the job during 2008 were: motor vehicle accidents; contact with electric current; oxygen deficiency, i.e., drowning, choking on an object or substance, depletion of oxygen in an enclosed, restricted or confined space; assaults and violent acts; and exposure to harmful environments or substances.

“Teenagers are twice as likely to be hurt on the job as are their adult co-workers,” said Utah Labor Commissioner Sherrie Hayashi. “Nationally, approximately 158,000 sustain work-related injuries, with 52,600 injuries serious enough to be treated in the emergency room.”

Each year, the UOSH Consultation Program provides two booklets designed to address some of the most frequently asked questions asked by young workers and their parents.

- WHAT HAZARDS SHOULD I WATCH OUT FOR?
- COULD I GET HURT OR SICK ON THE JOB?
- WHAT ARE MY RIGHTS ON THE JOB?
- IS IT OKAY TO DO THIS KIND OF WORK AT MY AGE?
- SHOULD I BE WORKING THIS LATE OR THIS LONG?
- WHAT IF I HAVE QUESTIONS ABOUT SAFETY ON THE JOB?

“*A Parent’s Guide to Youth Workers*” and “*The Youth Workers’ Guide to Workplace Safety*” are available at [www.laborcommission.utah.gov](http://www.laborcommission.utah.gov).

This year the UOSH Consultation Program is working to create awareness regarding distracted driving from texting which has become an epidemic in the United States, and its often fatal consequences. Youth have an even higher risk of injury from distracted driving.

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# Picture It!

## Safe Workplaces Photo Contest



By: **Kate McNeill**, Consultation Manager, Utah Occupational Safety & Health

Federal OSHA has recently launched the Picture it! Safe Workplaces Photo Contest [www.osha.gov/osha40/photo-contest.html](http://www.osha.gov/osha40/photo-contest.html). The Contest, which is part of OSHA's yearlong 40th anniversary celebration, is open to members of the public ages 18 and older and will run through Friday, August 12, 2011. Photographers may interpret "image of workplace safety and health" in any way they choose; they are not restricted to particular subject matters or themes.

First-, second- and third-place prizes will be awarded for the most outstanding portrayals of occupational safety and health in terms of artistic value, and ability to raise awareness about safety and health to the general public. All winning and finalist photographs will be displayed on the OSHA photo contest Web page. The first-place winner also will receive a framed letter of congratulations from Secretary Solis, and the three winning photos will be framed and hung in OSHA's national office in Washington, where they will serve as a daily reminder for leading policymakers and prominent professionals of the real-life impact of OSHA's mission.

The Utah Labor Commission would also be interested in receiving any similar photos, which then might be used in the Labor Commission's annual report or on their web site. If you have some that you would like to share (*without royalty charges or other costs*) please send them to [dlamb@utah.gov](mailto:dlamb@utah.gov).





# Appellate Decisions

As of the end of June, the Utah Court of Appeals has issued decisions in nine Labor Commission cases this year. The Court's decisions are summarized below. Their full text is available at [www.utcourts.gov/courts/appell/](http://www.utcourts.gov/courts/appell/).

**Olsen v. Labor Commission, et al.** (2011 UT App 70, issued March 10, 2011). In 1963, Mr. Olsen's lower right arm was amputated in a work accident. He managed to return to work a week later and to continue working for another 23 years in the same industry, for two different employers. He retired in 1986 at age 62. In 2006, 20 years after he retired and 43 years after the work accident, Mr. Olsen claimed permanent total disability compensation for the loss of his right arm.

At the time of Mr. Olsen's injury, the standard for permanent total disability came from appellate decisions such as *United Park City Mines Company v. Prescott*, 15 Utah 410, 412 (Utah 1964):

[A] workman may be found totally disabled if by reason of the disability resulting from his injury he cannot perform work of the general character he was performing when injured, or any other work which a man of his capabilities may be able to do or to learn to do . . .

In applying this standard to Mr. Olsen claim, the Commission noted that: 1) Mr. Olsen's injury had caused difficulty in some aspects of his life but he developed adaptive techniques to mitigate those problems; 2) He continued to be sought after by employers for work in responsible supervisory positions; 3) His retirement was motivated primarily by personal preferences; and 4) Even after retirement, Mr. Olsen was called back by his employer as a consultant. Without intending to minimize the challenges Mr. Olsen faced as a result of his work injury, the Commission concluded that work within his capabilities remained available for him and, therefore, denied Mr. his claim for permanent total disability compensation.

The Court of Appeals affirmed the Commission's decision. Specifically, the Court found the Commission's factual findings to be sufficiently detailed and supported by substantial evidence. While the Court expressed concern over the length of time the Commission had taken to decide Mr. Olsen's claim, the Court found no prejudice to Mr. Olsen as a result of the delay.

**Note:** In March 2008 the backlog of cases pending before the Commission reached a high—238 cases. By January 2010, when the Commission denied Mr. Olsen's claim, the backlog stood at 182 cases. As of June 1, 2011, the Commission has further reduced the backlog to 96 cases and expects to eliminate the backlog entirely by the end of 2011.

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**Smith's Food and Drug, Inc. v. Labor Commission and Gina Christensen**, (2011 *UT. App.* 67; issued March 10, 2011). For many years, Christensen worked in Smith's dairy department processing milk into cheese. Her work required lifting and pulling heavy equipment. After about 8 years she began to experience shoulder pain, then additional pain in her hand, wrist and arm.

Smith's denied Ms. Christensen's request for workers' compensation benefits and Ms. Christensen filed her claim with the Commission. The Commission's impartial medical panel found that Ms. Christensen's injury was caused by her repetitive work duties. The Commission accepted the panel's opinion and concluded that Ms. Christensen's injury was compensable under the Utah Workers' Compensation Act.

On appeal, Smith's argued that Ms. Christensen's medical problems could not be considered the result of a work "accident" because they developed gradually. The Court of Appeals rejected Smith's argument. Specifically, the Court noted that an "accident" is not necessarily restricted to a single sudden incident, but can occur over time as a result of repetitive stress or strain. Accordingly, the Court affirmed the Commission's award of benefits to Ms. Christensen.

**Larson Beverage et al. v. Labor Commission, et al.** (2011 *UT. App.* 69; issued March 10, 2011). In 1993, Ms. Hutchison injured her back working for Larson. Under the law in effect at the time of injury, the Employers' Reinsurance Fund ("ERF") shares liability with employers and their insurance carriers for the disability compensation and medical expenses of permanently and totally disabled workers. Ms. Hutchison's back injury grew worse over time. In 2004 she claimed permanent total disability compensation from Larson and the ERF.

The parties stipulated that Ms. Hutchison was entitled to a tentative finding of permanent total disability and payment of disability compensation, subject to an evaluation of whether she could be rehabilitated and reemployed. As part of the stipulation, Larson agreed to pay Ms. Hutchison's disability benefits "until further order of the Commission" and to also pay her medical expenses.

After completion of Ms. Hutchison's vocational evaluation, Larson advised the Commission that Ms. Hutchison could not be rehabilitated and, therefore, was entitled to continuing disability and medical benefits. The administrative law judge ordered Larson to continue paying all those benefits in accordance with the parties' earlier stipulation. Larson appealed to the Commission, arguing that it had only agreed to pay the total amount of Ms. Hutchison's benefits while she was being evaluated for vocational rehabilitation—after that, ERF was obligated to pay its share of the benefits.

The Commission held that the plain language of the parties' stipulation constituted Larson's waiver of its right contribution from the ERF. However, on appeal, the Court of Appeals reversed the Commission's decision. The Court noted that the stipulation did not explicitly address Larson's right to reimbursement from the ERF, and the Court declined to imply a waiver of that right against Larson.

In **Barnhardt v. Labor Commission and Orson Gygi**, (2011 *UT. App.* 87; *per curiam* decision issued March 24, 2011), the Court of Appeals summarily disposed of Mr. Barnhardt's appeal of the Commission's dismissal of his employment discrimination complaint. The Court held that Mr. Barnhardt had waived some of his arguments on appeal by failing to raise them before the Commission. The Court also held that Mr. Barnhardt had failed to adequately controvert Orson Gygi's motion for summary judgment, thereby justifying the Commission in granting the motion and dismissing Mr. Barnhardt's employment discrimination complaint.

The Court of Appeals' decision in **Rathmann v. Labor Commission, et al.**, (2011 *UT App* 110; issued April 7, 2011), resolved a jurisdictional question that arises from time to time. After the Commission dismissed Mr. Rathmann's claim, Mr. Rathmann filed both a timely request for reconsideration with the Commission and a timely petition for review with the Court of Appeals. The Court of Appeals ruled it did not have jurisdiction in the matter—"once reconsideration is initiated, it must be followed through before seeking judicial review." The Court dismissed Mr. Rathmann's petition for review

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without prejudice to refiling after the Commission ruled on reconsideration.

**Timpanogos Hospital and Zurich American Insurance v. Labor Commission and Bishop**, (2011 UT App 106; issued April 7, 2011). The Court of Appeals upheld the Commission's award of benefits, rejecting arguments by Timpanogos/Zurich that 1) conflicting medical opinions necessitated appointment of a medical panel; 2) the evidentiary hearing should have been reopened; and 3) the Commission should have viewed the medical evidence more favorably to Timpanogos.

In a per curiam decision in **French v. Labor Commission, et al.**, (2011 UT App 120; issued April 14, 2011), the Court of Appeals summarily affirmed the Commission's denial of Ms. French's claim for workers' compensation benefits. Specifically, the Court of Appeals noted that some of Ms. French's arguments on appeal had never been raised in proceedings before the Commission, and that the Commission's findings were supported by substantial evidence.

In **Henderson v. Labor Commission, et al.** (2011 UT App 127; issued April 21, 2011), Ms. Henderson claimed benefits for injuries suffered in a fall that occurred while she was at work as a flagger on a road construction project. The specific issue in dispute was whether the fall occurred as a result of personal, non-work reasons—a fainting episode—or whether it occurred because Ms. Henderson tripped over a construction safety barrel. Alternatively, Ms. Henderson argued that, even if she did faint, it was in some part due to the conditions and demands of her work. The Commission found that neither of Ms. Henderson's factual arguments was supported by the evidence. The Court of Appeals affirmed the Commission's decision.

Finally, in **Stampin' Up et al. v. Labor Commission et al.**, (2011 UT App 147, issued May 12, 2011), the Utah Court of Appeals addressed an injured worker's right to temporary disability compensation following his termination from light-duty work.

Specifically, after a 2006 accident, the employer provided suitable light-duty work for the injured worker. However, the employer terminated the light-duty work when it was discovered that the injured worker was distributing pornographic images to co-workers. The employer refused to begin payment of temporary disability compensation to the injured worker on the grounds the worker's misconduct constituted his constructive rejection of the light-duty work that had been made available by the employer.

After a hearing, the Commission ordered the employer to pay compensation. Relying on the Utah Court of Appeals' decision in *King v. Industrial Commission*, 850 P.2d 1281 (Utah Ct. App. 1993) as well as Commission precedent, the ALJ and the Commission Appeals Board concluded that compensation was due because the claimant did not intentionally engage in misconduct with the purpose of severing the employment relationship.

The Utah Court of Appeals upheld the Commission's judgment. The Court observed that the "Commission's interpretation of the statute reasonably draws a line between deliberate conduct by which an employee intends to sever his or her employment relationship and conduct that, while perhaps deliberate, lacks that purpose." The Court also noted that the Utah Legislature addressed this issue in 2008 by enacting § 34A-2-410.5. Although the statute was enacted after the claimant's injury and, therefore, does not apply in this case, in future cases § 34A-2-410.5 will allow the Commission to deny or reduce benefits in some cases where an injured worker's conduct results in loss of light-duty work. ■

**Note:** The Utah Supreme Court has agreed to review the Court of Appeals' decision in this matter.



# Rules Corner

Pursuant to authority granted by the Utah Legislature, the Commission has recently adopted or is considering the following substantive rules. If you have questions or concerns about any of these rules, please call the Labor Commission at 801-530-6953.

## Rule 612-2-5

Industrial Accidents

**Medical Fee Guidelines.** Proposed adoption of 2011 Resource-Based Relative Value Schedule (RBRVS), 2011 American Medical Association Current Procedural Terminology (CPT) coding standards, and the 2011 Utah Labor Commission Medical Fee Guidelines.

*The impact of the updated RBRVS and CPT standards on medical costs are under discussion and will be addressed at the July 13 meeting of the Workers' Compensation Advisory Council. The Guidelines will also be reviewed for conformity with the Workers' Compensation Act.*

## Rule 616-2

Boiler, Elevator and Coal Mine Safety

**Boiler and Pressure Vessel Rules.** Incorporates by reference the most recent versions of applicable sections of the American Society of Mechanical Engineers ("ASME") codes for construction of boilers; also adopts most current version of the National Boiler Board inspection code.

*To be published in Utah Bulletin July 15; can be made effective after August 22.*

## Rule 612-4-2

Industrial Accidents

**Workers' Compensation Coverage Waivers.** This rule implements S.B. 192, enacted by the 2011 Utah Legislature. S.B. 192 transfers responsibility for workers' compensation coverage waivers from insurance carriers to the Labor Commission's Industrial Accidents Division. The proposed rule establishes procedures and sets a \$50 annual fee.

*Approved by Workers' Compensation Advisory Council; presented at an open Public Hearing. Published in Utah Bulletin on May 15, 2011. Effective June 22, 2011.*

## Rules R602-1; R602-2; R602-4; R602-7 and R602-8

Adjudication

**Electronic Filing.** H.B. 188, enacted by the 2011 Utah Legislature, authorizes the Labor Commission to establish rules for electronic filing of documents. These proposed rules begin that process by allowing the Adjudication Division to receive and issue electronic documents.

*Approved by Workers' Compensation Advisory Council; presented at an open Public Hearing. Published in Utah Bulletin on May 15, 2011. Effective June 22, 2011.*



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