

ON-THE-JOB

QUARTERLY NEWSLETTER



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

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Commission Releases Report on Labor Commission Medical Panels

The Labor Commission is proud of its service to Utah. The Commission's staff strives to fulfill public expectations for stewardship and responsible government. Nevertheless, even well-intentioned efforts can be misguided, resulting in mistakes being made. While those mistakes are painful, they provide opportunities and valuable lessons that cannot be lost or forgotten if the Commission is to remain a responsible steward and continue to uphold the public trust. Recently, the Commission has been dealing with such a mistake—the conduct of some of the Commission's Administrative Law Judges (ALJs) in dealing with the Commission's medical panels.

In early June, the Commission learned of some cases in which ALJs had rejected and destroyed medical panel reports and instructed the panels to submit modified reports, all without notice to the parties involved in the case. The Commission immediately concluded that such actions were contrary to statute and Commission policy and, therefore, took the following immediate corrective actions:

- ▶ Each ALJ was instructed verbally and in writing that the subject actions are impermissible and must not occur in the future.
- ▶ The Commission verified the specific cases in which the subject actions had occurred. Those cases were reassigned to other ALJs.
- ▶ The attorneys involved in those cases were notified of the situation and were provided copies of the original panel reports.
- ▶ The ALJs involved were placed on administrative leave pending further investigation.

**Our Office Hours are
Monday through Friday 8-5**

(Closed for Labor Day | Sept. 3rd)

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Report on Labor Commission Medical Panels continued

Recognizing that confidence in the Commission's adjudicative system could not begin to be restored without an independent assessment of this problem, Commissioner Sherrie Hayashi requested that John Pearce, Governor Herbert's General Counsel, arrange for an outside audit. The audit team began work immediately, free from direction or control by the Commission, and with full authority to pursue their investigation as they saw fit. The auditors reached the following conclusions:

- 1. The subject conduct was limited to two ALJs and involved five cases' during a 4 1/2 month period, between late January and early June.**
- 2. Improper communications between ALJs and medical panels could be reduced with better training for the panels.**
- 3. Addressing the results of ALJ performance surveys can limit future concerns.**

On June 14, the Utah Labor Commission discussed this matter with workers' compensation stakeholders at a meeting of the Workers' Compensation Advisory Council. Additionally, the Commission has taken appropriate personnel actions based on the two ALJs' conduct and other factors. Discussions with stakeholders are continuing, and public hearings will be conducted to consider whether additional rules are necessary to regulate the Commission's medical panel process. These discussions and hearings will be as inclusive as possible; and updates will be communicated directly to stakeholders and the public in a spirit of openness and transparency.

As already stated, the process of correcting the ALJs' mistakes regarding medical panel communications and reports is painful, but it provides valuable lessons that can be used to improve the Commission's stewardship and retain the public's trust. "The ALJs' actions in the cases referenced above are contrary to my expectations for transparency and openness" Commissioner Hayashi stated. "I recognize this situation undermines the public's confidence in the integrity and fairness of the Commission's adjudicative system, and I am determined to fully implement the recommendations of this report, and assure the confidence of the public and stakeholders in the medical panel's evaluation process."

For a copy of the independent
audit report and latest
developments in this matter, visit
the Commission's website at
www.laborcommission.utah.gov.

Anyone with concerns or
comments on this or any other
Commission subject is invited
to leave comments on the
Commission's website.



The Labor Commission office (on the left) and Workforce Services office (on the right) are located on third south between first and second east in SLC.

New Memorandum of Understanding between Utah Labor Commission and the Department of Workforce Services

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

A new Memorandum of Understanding (MOU) was recently finalized between the Utah Labor Commission and the Department of Workforce Services (DWS).

Both the Commission and DWS recognize the importance of information exchange to maintain accurate employer records and assist them to carry out their statutory duties.

Under this agreement, plans are being discussed between the Labor Commission and DWS to develop an automated system which will provide monthly updates to the Commission about employers already in our database, as well as updates including number of employee and new employer information. Additionally, there will be another tool developed to allow investigators to manually access the DWS system to obtain to-the-minute information on a particular company.

This MOU also allows the Commission to disclose unemployment insurance numbers to insurance carriers, thus enhancing our electronic reporting. The reciprocal terms of the agreement allow the Commission to supply DWS with injury and wage claim information, as well as information on workers' compensation non-compliance investigations where it appears an employer has no unemployment insurance number. All of this information is valuable to DWS as it relates to tracking unemployment insurance and claims.

Both the Commission and DWS feel that the information exchanged and the development of these tools will greatly enhance each agency's process. The Commission has had a wonderful working relationship with DWS over the years, and this more recent agreement is another testament that inter-agency collaboration is an essential component of serving the needs of our state.

This agreement will allow us to better share information resources. Among other things, the Labor Commission will share information on injury and wage claims, and Workforce Services will share up to date information about companies and other employers.



Labor Commission Welcomes New Director of Adjudication Division

By: **Elena Bensor**, PIO/Community Relations

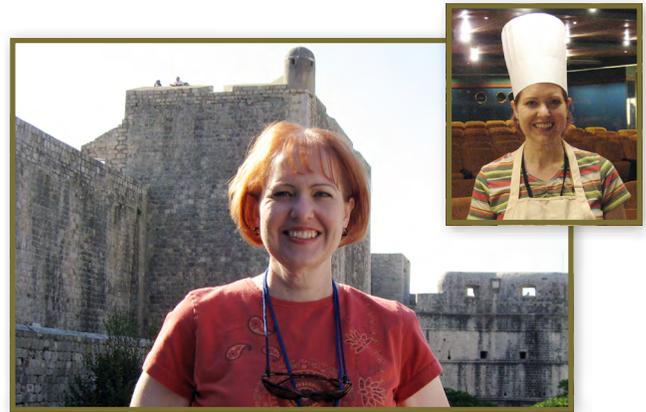
Recently, Commissioner Sherrie Hayashi announced the appointment of **Heather E. Gunnarson**, as the new Director of the Adjudication Division for the Utah Labor Commission.

Some interesting professional facts about Ms. Gunnarson (which most of us who've had the pleasure of working with her already knew) include:

- ▶ In 2006 Heather was appointed as the Director of the Utah Anti-Discrimination & Labor Division (UALD), by Governor Huntsman.
- ▶ Prior to her appointment as Director of UALD, Ms. Gunnarson was a litigation partner in the law firm of Hoole & King, L.C.
- ▶ She graduated from the J. Reuben Clark Law School, Brigham Young University.
- ▶ Some of her memberships include: Past President of the Utah Employment Lawyers Association and former member of the Advisory Committee on Sexual Harassment with the National Employment Lawyers Association.
- ▶ She filled a Judicial internship with the Utah Supreme Court.

Of course, those professional facts are impressive about her. But we wanted to know more about what makes Heather, well, Heather. To that end, she shared some interesting personal facts:

"I grew up in Eastern Canada, where I learned how to speak French, how to ice skate and how much I really hate winter. I came to the United States when I was 18 to attend BYU as an undergrad and ended up staying on for my law degree. I was excited to finally become a US citizen in 2002, just after the Olympics. I've lived



Heather E. Gunnarson

in several countries around the world (Switzerland, the West Bank, England); but America really is home now. I still love to travel and to see how other people live and especially what they eat. I've tried to go to one new country for each year that I am old, but right now, I'm 2 countries short, so either I need to stop getting older, or I need to pick up my pace.

"I met my husband nearly twenty years ago in law school, but we didn't start dating or get married until three years ago. It's a long story with a lot of lessons, but one thing it taught me was that you really need to be kind to everyone you meet because you don't know if you're going to run into them again somewhere down the road.

"My real passion (other than for my husband) is for cooking and baking. I am a proud member of the Bread Bakers Guild of America. I make a pretty great rye bread but my next big challenge is to tackle croissants."

We invite you to stop by and get to know more interesting facts about Heather's more recent travels and adventures, and congratulate her on her new post as Director of the Adjudication Division.



Commission wins two recognitions for the Governor's Award for Excellence in 2012

By: Commissioner Sherrie Hayashi

It's a great pleasure to announce that the Labor Commission has won in TWO categories for the Governor's Awards for Excellence.

Innovation and Efficiency Award: **The Adjudication Division & DTS Team**



Pictured from Left to Right: Rosalee Oakeson, Deidre Marlowe, Dawn Cornell, Cheryl Luke, Governor Gary Herbert, Lorrie Lima, Karla Rush, Aurora Holley, Richard LaJeunesse, Debbie Hann

Not pictured: Colleen Trayner and Alicia Zavala-Lopez of the Adjudication Division; and Todd Duvall and Arlene McCullough of the Dept of Technology Services

The Adjudication Division developed and implemented an electronic filing and mailing system. This allows the Division to receive and send thousands of documents each year. This new system has revolutionized how the public interacts with the Division by:

- 1) increasing response times from days to hours;
- 2) giving the public more time to respond to Division notices and orders since mail delays are eliminated;
- 3) putting rural Utahns on an even footing by eliminating longer mail delays;
- 4) giving all members of the public 24/7 Division access to file documents;
- 5) increased Division staff efficiency by reducing time spent photocopying, reducing time spent opening and sorting mail,

- 6) reducing mailing costs by 2/3; and
- 7) increasing efficiency and reducing costs for the public including mailing costs.

Outstanding Public Service Award: **Alan Hennebold**

Alan has served as Deputy Commissioner and General Counsel for the Labor Commission since 1994. Since that time, he has been the legal voice for the Commission.

Anyone who has worked with Alan knows that he has the innate ability to synthesize and distill any issue to very concrete concepts. This ability enables Alan to exhibit the highest standards of excellence as Commission management and legal counsel in many ways: administrative rules, legislation, legal decisions issued by the Commission and appellate work before the Court of Appeals and the Utah Supreme Court.

The Commission has a 93% success rate on appellate work. These cases shape the landscape of workers compensation in the State of Utah. Although many factors contribute to the health of Utah's workers' compensation system, Alan plays a vital role in providing sound advice and guidance in making our system one of the best in the country, as recently recognized by the Work Loss Data Institute, ranking Utah the highest of all states, receiving an A+ rating.

Alan is also being recognized for his role in the 2012 legislative session focusing on the issue of misclassification of workers as independent contractors.



Appellate Decisions

Since the last newsletter, the Utah Court of Appeals issued two decisions involving Labor Commission cases, bringing the total for the year to nine cases. The full text of these decisions is available at www.utcourts.gov/opinions/. The two decisions issued by the court dealt with the Utah Workers' Compensation Act.

Barron v. Labor Commission, Hogan & Associates Construction, and New Hampshire Insurance Company (2012 UT App. 80; issued March 22, 2012).

Mr. Barron was working on the second story of a building when he fell through temporary decking and onto a concrete floor, suffering serious injury. After the accident, Mr. Barron was taken to the hospital where he tested positive for cocaine metabolites. Mr. Barron admitted to using cocaine, but denied that he was impaired at the time of the accident. The presence of cocaine metabolites triggered a statutory presumption that Mr. Barron's drug use was the major contributing cause of his injury. Based on this presumption, the Commission determined that Mr. Barron's drug use, not his work activities, caused his injuries and denied his claim for benefits.

Mr. Barron appealed the matter to the Utah Court of Appeals. The court determined that while the statutory presumption was triggered due to the presence of illegal drugs in Mr. Barron's system, the Commission had erred in failing to consider evidence that Mr. Barron's drug use was not the major contributing cause of the accident. The court explained that the presumption shifted the burden to Mr. Barron, who could rebut the presumption by showing that his drug use was not the cause of the accident because he was not impaired when it occurred. If Mr. Barron rebutted the presumption, his employer could present its own evidence that Mr. Barron's drug use was the major contributing cause of the accident. The court concluded that the Commission had not applied the burden-shifting analysis properly and remanded the matter to the Commission for further proceedings.

Jex v. Labor Commission, Precision Excavating, and Owners Insurance Co.

(2012 UT App. 98; issued April 5, 2012). Mr. Jex offered to give a coworker a ride home from a remote construction site in his personal vehicle as his employer had asked him to do on previous occasions. As the two men were driving home, they were involved in an automobile accident. Mr. Jex claimed workers' compensation benefits for the accident by asserting that the "going and coming" rule did not apply to the situation because his vehicle served to benefit his employer, Precision Excavating, at the time of the accident by providing a ride to his coworker. The Commission determined that the going and coming rule did apply to Mr. Jex's

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Appellate Decisions continued

claim and denied his claim for benefits because at the time of the accident the ridesharing agreement was merely out of convenience and did not benefit his employer.

Mr. Jex appealed the matter to the Utah Court of Appeals, which agreed with the Commission that the going and coming rule applied to Mr. Jex's situation because his personal vehicle could not be considered an instrumentality of Precision Excavating's business when the accident occurred. The court therefore upheld the Commission's decision denying workers' compensation benefits to Mr. Jex. (Note: Mr. Jex has appealed the court's decision to the Utah Supreme Court).

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 602-2-4 Adjudication

Attorneys' Fees in Workers' Compensation Cases. Corrects typographical error to increase fee cap for attorneys in workers' compensation cases effective October 1, 2011, rather than 2012.

Effective December 22, 2011.

R612-4 Industrial Accidents

Premium Rates. Extends existing premium assessment rates of 3.0% for the ERF and .05% for the UEF through the 2012 calendar year.

Effective January 1, 2012.

R610-3-21 Antidiscrimination and Labor

Uniforms. Because the Commission does not have clear statutory authority for this existing rule which generally requires employers to bear the cost of employee work uniforms, the Commission proposes to repeal the rule.

Effective on April 16, 2012

R616-2-3 and R616-3-3 Boilers, Elevators and Coal Mine Safety

Adoption of updated codes. Proposal to adopt updated versions of national codes for elevators, escalators, boilers and pressure vessels.

Effective May 22, 2012

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Rules Corner continued

R614-1-4

Occupational Safety & Health (UOSH)

Incorporation of federal standards. Incorporates into Utah's occupational safety and health rules recent modifications to corresponding federal standards for chemical hazard communications.

*Public hearing May 2, 2012;
published in Utah Bulletin June 15; may
be made effective July 23, 2012*

R612-1-12

Industrial Accidents
Division

Unincorporated entities licensed under the Constructions Trades Licensing Act. Addresses workers' compensation premiums for unincorporated entities and disability benefits in connection with such entities.

*Public hearing May 2, 2012; held for
further consideration*

**Utah Labor Commission**

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