Utah Supreme Court
Advisory Committee on the Utah Rules of Civil Procedure
Meeting Agenda
Rod Andreason, Chair

Location: WebEx Meeting: Link

Date: August 28, 2024

Time: 4:00 – 6:00 p.m.

Welcome and approval of minutes	Tab 1	Rod Andreason
Introductions of new and current members, and review subcommittees	Tab 2	Rod Andreason
Supreme Court Style Guide reminder	-------	Rod Andreason
Update on New URCP Rule 87, effective Sept. 1	Tab 3	Rod Andreason
Rules 65D and 65E – Administrative procedures	Tab 4	Bret Randall
Rule 26.4 – Recodification of probate statutes and need to update rule (*Discussion*)	Tab 5	Judge Scott
Request from Advisory Committee on Utah Rules of Professional Conduct to review Standard 16 for incorporation into the URCP (*Discussion*)	Tab 6	Stacy Haacke
Rule 63A - HJR008 – Joint Resolution Amending Rules of Civil Procedure on Change of Judge as a Matter of Right (*Information*)	Tab 7	Rod Andreason
Rule 35 – "medical examiner" language	Tab 8	Rod / Stacy

Reminder: Check style guide for conformity before rules are sent to the Supreme Court.

Upcoming Items:

- Rule 62 with guest appearance from Leslie Slaugh (hopefully)
- Rule 73 default attorney fee schedule
- Subcommittees anytime they are ready

URCP Committee Website: Link

Meeting Schedule:

August 28

September 25

October 23

November 20

December 18

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Summary Minutes – May 22, 2024
via Webex

THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX

Committee members	Present	Excused	Guests/Staff Present
Rod N. Andreason, Vice-Chair	X		Stacy Haacke, Staff
Lauren DiFrancesco, Chair	X		Keri Sargent
Trevor Lee		X	Crystal Powell, Recording Secretary
Ash McMurray	X		Jacqueline Carlton
Michael Stahler	X		
Timothy Pack		X	
Loni Page	X		
Bryan Pattison	X		
Judge Clay Stucki		X	
Judge Andrew H. Stone	X		
Justin T. Toth		X	
Susan Vogel	X		
Tonya Wright	X		
Judge Rita Cornish	X		
Commissioner Catherine Conklin	X		
Giovanna Speiss		X	
Jonas Anderson	X		
Heather Lester	X		
Jensie Anderson	X		
Judge Blaine Rawson		X	
Judge Ronald Russell	X		
Rachel Sykes	X		
Judge Laura Scott, *Emeritus*	X		
James Hunnicutt, *Emeritus*	X		

(1) INTRODUCTIONS

The meeting began at 4:03 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee Members.

(2) APPROVAL OF MINUTES

Ms. Di Francesco asked for approval of the April 2024 Minutes subject to amendments noted by the Minutes subcommittee. Mr. Rod Andreason moved to adopt the Minutes as amended. Mr. Michael Stahler seconded. The Minutes were unanimously approved.

(3) UPDATE ON NEW REMOTE HEARINGS RULE

Ms. DiFrancesco gave an update on the new remote hearings Rule. She inquired whether it has been sent out for public comment and Ms. Stacy Hacke confirmed that it has been sent out as of May 21, 2024.

(4) RULE 18. JOINDER OF CLAMS AND REMEDIES

Ms. DiFrancesco summarized the feedback received from public comments. Mr. Leslie Slaugh added the sole comment. He suggested that "will" in line 12 be replaced with "may." The Committee generally discussed the removal of shall from the Rules and when to use "will" or "may" as directed by the Style Guide. Mr. Ash McMurray reminded the Committee of the Style Guide instructions. Ms. DiFrancesco noted that in this Rule, either word would mean the same thing however "may" is more deferential to the court. The Committee came to agreement to leave the word "will." Ms. Susan Vogel questioned the use of "prosecuted" and that it might be confusing to self-represented persons who normally equate prosecution with criminal cases. Ms. Vogel noted that she would jot it down for consideration later.

Commissioner Conklin moved to approve the Rule without changes. Judge Cornish seconded the motion. The motion was unanimously approved.

(5) RULE 4.

Ms. DiFrancesco notified the Committee that there was a request indicating that the requirements for a person serving process found in Utah Code §78B-8-302(7) are not

found in the process outlined by URCP Rule 4. Those requirements include documenting the date and time of service on the front page of each document being served; the servers name, address, and telephone number; signing the return of service; the badge number if the server is a peace officer, sheriff, or deputy sheriff; the investigator's identification number if a private investigator. Ms. Haacke questioned whether this issue had before been assigned to Ms. Vogel. Ms. Vogel noted that it had not been, but she supplied draft language during the discussion.

The Committee discussed their experiences of receiving returns of service. Judge Stone noted that he agreed with the requirements being for every front page on the documents served to ensure that the full package is served. He noted he has frequent experience of people noting that they were not served the entirety of documents. The Committee noted that just the date and time is required for each paper. The Committee generally discussed process service, the statute, and edits to the draft language provided by Ms. Vogel. Ms. Vogel questioned whether this law is for non-process servers. Ms. Ash McMurray noted that the law was one of his projects and it was done in conjunction with the unsworn declarations statute to provide a uniform process compliant with that statute.

The Committee edited the numbering of the draft Rule. Ms. DiFrancesco opined that given the depth of drafting being done, it seems there needs to be a Subcommittee to organize the draft language. Ms. Rachel Sykes volunteered to chair the Subcommittee. Mr. Ash McMurray and Ms. Tonya Wright also volunteered Ms. Vogel noted that the Rule will be a big change, but the change is welcomed. Others agreed with her.

(6) RULES 1 AND 81. BUSINESS AND CHANCERY COURT

Ms. Stacy Haacke summarized the change regarding the rule where the scope of the URCP needed to be amended to reflect the creation of separate procedural rules for the Business and Chancery Court. Mr. Ash McMurray intended to ask a question but withdrew it. Mr. Michael Stahler moved to approve the draft language. Ms. Wright seconded. The motion passed unanimously. Mr. Rod Andreason raised if Rule 81 was meant to replace the existing Rule 81(d). Judge Cornish noted that the Redline simply pushed it down in numbering.

(7) MOTION TO ENFORCE ORDER AND FOR SANCTIONS

Judge Cornish summarized the history of the amendment where persons filing motions for sanctions for failure to disclose were being told to file it under Rule 7. She noted that the Subcommittee did not make a lot of language changes. Limitations under Rule 7 (h) were clarified to include motions for sanctions filed under Rule 37(b). The

Committee discussed contempt of court and discussed whether Rule 37 (b)(6) should be deleted from the Rules. Ms. DiFrancesco noted that she read 37 (b)(6) to be a carve out that a person refusing to undertake a mental or physical examination would not receive contempt of court sanctions and whether that carve out would need to be placed somewhere else. Having discussed the changes, Commissioner Conklin moved to approve them. Judge Ronald Russell seconded. The motion passed unanimously.

(8) RULE 60. RELIEF FROM JUDGMENT OR ORDER. FRAUD ON COURT

Judge Rita Cornish summarized the Utah Supreme Court case that precipitated this rule change. Judge Cornish noted that the issue which was referred as never being addressed was indeed addressed before in Utah law, noting that it is impossible to differentiate between fraud on the court and fraud on the party. The Subcommittee raised the issue with the Supreme Court. The feedback from the Court was that the Subcommittee could make a clarification in the Rules if they felt the jurisprudence on the issue was not clear. The Subcommittee's opinion is that there is no distinction between intrinsic and extrinsic fraud and that the Supreme Court got it right originally and no language change was needed for that. The Subcommittee however had considered that they could make changes to the timeframe in the Rule such as 90 days after discovering the fraud not 90 days after the ruling if the larger Committee believes the deadline is too short. The Committee sought guidance on how to proceed as that was not under the original mandate.

Judge Cornish also related the history of trying to change the timeframe for relief in the 1990s. She noted that there was enough outcry from the public that the suggestion was abandoned and the 90- day Rule persisted. She noted that 20 years since, it might be worth revisiting now; but that the history is informative.

The Committee also discussed motions to reconsider, and which Rule those misnomer motions are addressed under. Judge Cornish noted that she usually uses Rule 60. Judge Scott noted that she has in the past used Rule 59 depending on the issue. Ms. Vogel noted that they have a form to vacate dismissal and reinstate for some scenarios such as a case being dismissed for lack of movement on the case.

Ms. DiFrancesco questioned whether 60(d) did not already have provisions for fraud on the court. She noted that she has never heard of a case for an independent action to set aside a judgment. Judge Cornish noted that it is a separate basis for relief by filing a new fraud case regardless of the judgment or ruling. Judge Russell noted that he reads 60(d) to mean that a motion in the present action must be done within the 90-day timeframe but a separate action is not limited by any timeframe other than the state of limitations. Judge Russell noted that there is a lot of case law on how to treat actions under 60(d) and doesn't believe that the language needs to be changed. Judge Cornish also noted

that the 90-day deadline does not apply to an independent action. Ms. DiFrancesco noted that the Rule should be clear enough to not need interpretation through case law; and that that constitutes a particular access to justice issue. Ms. Vogel wondered how it could be clarified. The Committee discussed their experience with independent actions to set aside judgments. Mr. Jim Hunnicutt noted that he has done such an action as a tort case and relayed that experience.

The Committee discussed renumbering the Rule to make it clearer. The Committee also deleted the last sentence that "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Judge Cornish again clarified that additional changes are outside the scope of the instructions from the Supreme Court but that she is not against the recommendations for changes. Mr. Andreason moved to adopt the recommendation of making no changes to the Rule as instructed by the Supreme Court. Judge Cornish also motioned to submit further recommendations to the Supreme Court as discussed. Mr. Stahler seconded. The motions passed unanimously.

Ms. Wright questioned whether this Rule change would bar relief from a pro se person not knowing they have been divorced or if someone fraudulently signed their name or if they were never actually. Ms. Vogel noted that MyCase will lessen that occurrence and a big part of the issue is notice to the other party. The Committee discussed potential reliefs under the Rule for those scenarios.

(9) RULE 101

Mr. Jim Hunnicut briefly summarized the amendments made to Rule 101. The Committee discussed the language changes under Rule 101 including minor typos. Mr. Hunnicut noted that the Rules have not been out to public comments yet and the Committee will need to revisit them. Ms. Tonya Wright moved to approve the draft language. Commissioner Conklin seconded. The motion carried unanimously.

(10) ADJOURNMENT

Ms. DiFrancesco thanked the Committee for allowing her to serve and said her goodbyes. Mr. Rod Andreason will be the new Chair of the Committee. Committee members thanked her for her service. With no more time for new discussions, the meeting was adjourned at 5:56 p.m. The next meeting will be July 17 at 4:00 p.m.

Tab 2

Subcommittee/Subject	Members	Rules	Subcommittee Chair	Progress
ACTIVE:				
Probate	Judge Scott, *Allison Barger, Brant Christiansen, David Parkinson, Judge Kelly, Kathie Brown Roberts*, Keri Sargent, *Russ Mitchell, Shonna Thomas, Sarah Box*	New rules	Judge Scott	Ongoing work on new set of probate rules
Records Classification	~~Judge Stone~~, Justin Toth, Jim Hunnicutt, ~~Susan Vogel~~, Crystal Powell	New rule	~~Judge Stone~~	New rule went to SC once and came back with comments. Continue to pursue?
Plain language/Terminology	~~Susan Vogel~~, Ash McMurray, Trevor Lee, Loni Page, Heather Lester, Giovanna Speiss, Crystal Powell; ~~Jensie Anderson~~	104 14, 18, 19, 20, 22, 23, 26.1, 38, 46, 49, 53, 67	~~Susan Vogel~~	Susan indicated this group was ready to return. Need a new chair of this subcommittee and materials.
Rule 5	~~Susan Vogel~~, Loni Page, Tonya Wright, Keri Sargent, Michael Stahler	5	Loni Page	Rule is out for public comment until Sept. 6
Omnibus	Justin Toth, Tonya Wright, Rod Andreason; Commissioner Conklin	30, 45, 37, 7	Justin Toth	Rules went to SC in July and came back with a few more comments.
Rule 3(a)(2)	Trevor Lee, ~~Susan Vogel~~, ~~Judge Stucki~~, Keri Sargeant, Tonya Wright; Heather Lester; Giovanna Speiss; ~~Jensie Anderson~~; Judge Cornish	3	Trevor Lee	Rule went to SC in July and the judges are going to take time to consider the proposal.
Eviction Expungements	~~Judge Stucki~~, Tonya Wright, ~~Lauren DiFrancesco~~;	?	Heather Lester	Awaiting further update from subcommittee.

	Heather Lester; Crystal Powell			
Rule 60	~~Judge Holmberg~~, Judge Cornish, ~~Susan Vogel~~, Justin Toth	60	Judge Cornish	Rule is out for public comment until Sept. 6
Rule 101	Jim Hunnicutt, ~~Susan Vogel~~, Commissioner Conklin, Tonya Wright, Keri Sergeant, *Samantha Parmley*	101 7 26.1	Jim Hunnicutt	Rule went to SC in July and comments came back that were sent to subcommittee for review.
MSJ Deadline	~~Rod Andreason~~, ~~Jensie Anderson~~, Michael Stahler, Tonya Wright	56	~~Rod Andreason~~	Rule went to SC and came back with comments for the subcommittee to review
Affidavit/Declaration	Ash McMurray, Giovanna Speiss, Bryan Pattison	4, 5, 6, 7A, 7B, 11, 23A, 27, 26.1, 26.2, 43, 45, 47, 54, 55, 56, 58A, 58C, 59, 62, 63, 64, 64A, 64D, 64E, 65A, 65C, 69A, 69C, 73, 83, 101, 102, 104, 105, 108	Ash McMurray	Ash presented on this issue at length and awaiting further update from the subcommittee
Rule 53A - Special Masters	*Brent Salazar-Hall; Nicole Salazar-Hall*; Jim Hunnicut	New rule 53A	Jim Hunnicutt	This rule will return directly to the SC as they had specific

				questions for this group.
Rule 62 (COA opinion)	Jim Hunnicutt, Commissioner Conklin, ~~Susan Vogel, Judge Holmberg~~	62	Jim Hunnicutt	Were initially awaiting a return on cert. Then Jim and *Nicole Salazar-Hall* were going to review further. Awaiting update from subcommittee.
Standard POs	~~Judge Stucki~~, *Judge Oliver*, Bryan Pattison	26(g)	*Judge Oliver*	This subcommittee needs additional members.
Rule 7A v. 37 - Motion for Sanctions	Jim Hunnicut, Judge Cornish, Judge Russell	7A 37	Judge Cornish	Rules went to SC and were approved. Rule 7A is out for public comment until Sept. 6. Rule 37 is awaiting to go out with omnibus rules.
MyCase Transition		76	~~Susan Vogel~~; Nathanael Player	*Nathanael* indicated he would take over the issue from Susan and would get back to the committee with an update.
Rule 5(a)(2) and (b)(3)	~~Susan Vogel~~, Judge Cornish, Commissioner Conklin, Judge Scott, Michael Stahler	5	~~Susan Vogel~~	Awaiting update from subcommittee.
Rule 74	Michael Stahler, Rachel, ~~Susan,~~ Crystal, Keri, Heather, Loni	74	Michael Stahler	Awaiting update from subcommittee
Rule 4	Rachel Sykes, Ash McMurray; Tonay Wright	4	Rachel Sykes	Awaiting update from subcommittee

Rule 42	Loni Page; Keri Sargent; Judge Scott	42	Loni Page	Awaiting update from subcommittee. May need additional members.

Tab 3

Rule 87. In-person, remote, and hybrid hearings; request for different format.

(a) **Definitions**.

(1) "Participant" means a party, an intervenor, a person who has objected to a subpoena, or an attorney for any such persons.

(2) "In-person" means a participant will be physically present in the courtroom.

(3) "In-person hearing" means a hearing where all participants appear in person.

(4) "Remote" or "remotely" means a participant will appear by video conference or other electronic means approved by the court.

(5) "Remote hearing" means no participants will be physically present in the courtroom and all participants will appear remotely.

(6) "Hybrid hearing" means a hearing at which some participants appear in person and others appear remotely.

(b) **Setting hearing format; factors to consider.** The court has discretion to set a hearing as an in-person hearing, a remote hearing, or a hybrid hearing. In determining which format to use for a hearing, the court will consider:

(1) the preference of the participants, if known;

(2) the anticipated hearing length;

(3) the number of participants;

(4) the burden on a participant of appearing in person compared to appearing remotely, including time and economic impacts;

(5) the complexity of issues to be addressed;

(6) whether and to what extent documentary or testimonial evidence is likely to be presented;

(7) the availability of adequate technology to accomplish the hearing's purpose;

(8) the availability of language interpretation or accommodations for communication with individuals with disabilities;

(9) the possibility that the court may order a party, who is not already in custody, into custody;

(10) the preference of the incarcerating custodian where a party is incarcerated, if the hearing does not implicate significant constitutional rights; and

(11) any other factor, based on the specific facts and circumstances of the case or the court's calendar, that the court deems relevant.

(c) **Request to appear by a different format.**

(1) **Manner of request.** A participant may request that the court allow the participant or a witness to appear at a hearing by a different format than that set by the court. Any request must be made verbally during a hearing, by email, by letter, or by written motion, and the participant must state the reason for the request. If a participant is represented by an attorney, all requests must be made by the attorney.

(A) **Email and letter requests.**

(i) An email or letter request must be copied on all parties on the request;

(ii) An email or letter request must include in the subject line, "REQUEST TO APPEAR IN PERSON, Case _____" or "REQUEST TO APPEAR REMOTELY, Case _____;" and

(iii) An email request must be sent to the court's email address, which may be obtained from the court clerk.

(B) **Request by written motion.** If making a request by written motion, the motion must succinctly state the grounds for the request and be

accompanied by a request to submit for decision and a proposed order. The motion need not be accompanied by a supporting memorandum.

(2) **Timing**. All requests, except those made verbally during a hearing, must be sent to the court at least seven days before the hearing unless there are exigent circumstances or the hearing was set less than seven days before the hearing date, in which case the request must be made as soon as reasonably possible.

(d) Resolution of the request.

(1) **Timing and manner of resolution.** The court may rule on a request under paragraph (c) without awaiting a response. The court may rule on the request in open court, by email, by minute entry, or by written order. If the request is made by email, the court will make a record if the request is denied.

(2) **Court's accommodation of participant's preference; factors to consider.** The court will accommodate a timely request unless the court makes, on the record, a finding of good cause to order the participant to appear in the format originally noticed. The court may find good cause to deny a request based on:

(A) a constitutional or statutory right that requires a particular manner of appearance or a significant possibility that such a right would be impermissibly diminished or infringed by appearing remotely;

(B) a concern for a participant's or witness's safety, well-being, or specific situational needs;

(C) a prior technological challenge in the case that unreasonably contributed to delay or a compromised record;

(D) a prior failure to demonstrate appropriate court decorum, including attempting to participate from a location that is not conducive to accomplishing the purpose of the hearing;

(E) a prior failure to appear for a hearing of which the participant had notice;

(F) the possibility that the court may order a party, who is not already in custody, into custody;

(G) the preference of the incarcerating custodian where a party is incarcerated, if the hearing does not implicate significant constitutional rights;

(H) an agreement or any objection of the parties;

(I) the court's determination that the consequential nature of a specific hearing requires all participants to appear in person; or

(J) the capacity of the court, including but not limited to the required technology equipment, staff, or security, to accommodate the request.

(3) **Effect on other participants**. The preference of one participant, and the court's accommodation of that preference, does not:

(A) change the format of the hearing for any other participant unless otherwise ordered by the court; or

(B) affect any other participant's opportunity to make a timely request to appear by a different format or the court's consideration of that request.

Tab 4

Supreme Court's Advisory Committee
on the Rules of Civil Procedure

June 26, 2024

Supreme Court's Advisory Committee
on the Rules of Civil Procedure

Rod Andreason, Esq., Chair
(randreason@kmclaw.com)

Dear Chair Andreason:

The Utah Office of the Attorney General (the "AG's Office") has formed an Administrative Law Committee (the "Committee") comprised of attorneys from different practice groups. The Committee's purposes include the coordination, professional development, and improvement of administrative law processes and procedures on agency and judicial levels. On February 20, 2024, the Committee sent a letter to the Supreme Court's Advisory Committee regarding a proposed Utah R. Civ. P. 65D. This letter supersedes and replaces the February 20, 2024 letter.

The Committee has identified various areas of statutory administrative law involving district court proceedings but where the Utah Rules of Civil Procedure (the "Rules") lack corresponding civil procedures. Rule 1 states that one of the purposes of the Rules is to address all statutory proceedings in a manner that facilitates "the just, speedy, and inexpensive determination of every action." One of the important goals of the Committee is to improve the interface between statutory administrative procedures and the Rules.

In creating the Utah Administrative Procedures Act ("UAPA") in 1987, then Governor Scott Matheson proposed three policy objectives for Utah's administrative procedures:

(1) to provide optimum public access to administrative agencies;
(2) to create greater uniformity among state agencies; and
(3) to maintain the efficient operation of state agencies in performing their statutory functions.

See Alvin Robert Thorup & Stephen G. Wood, *Utah's Administrative Procedures Act: A 20-Year Perspective* (2009). While the authors of UAPA took care to provide certain statutory actions in the act, those procedures are incomplete and no attention was paid to the Rules, leaving persistent procedural gaps and ambiguities. It would be appropriate to keep Governor Matheson's policy objectives in mind when crafting appropriate Rules to implement UAPA.

The first Rules-related issue the Committee would like to address involves Section 63G-4-501 ("Section 501") of UAPA. UAPA grants district courts the jurisdiction for civil enforcement of state agency orders and provides state agencies (or any other person with standing to enforce a state agency order) a procedure to obtain any other available civil remedy. Section 501 provides an outline of procedures applicable to such actions. However, these procedures are incomplete and fail to adequately correlate with other procedures. This has caused confusion and inconsistency regarding the adjudication of Section 501 proceedings in district court.

To eliminate this confusion and inconsistency, the Committee proposes that the Supreme Court adopt two related rules arising from Section 501, designated as Utah R. Civ. P. 65D and Utah R. Civ. Pro. 65E (collectively the "Proposed Rules"). Drafts of the Proposed Rules are attached with a figure demonstrating the issues addressed by proposed Rule 65E.

It is apparent from the Utah Code that the Utah Legislature intended that there be judicial mechanisms to enforce state agency orders. There are two different types of remedies related to such orders: (1) injunctive remedies to ensure compliance; and (ii) financial remedies such as the payment of money. The procedures relating to these different types of remedies are different. Thus, the Committee is proposing two different rules.

Injunctive enforcement of agency orders is ultimately based on a district court's civil contempt power. Thus, injunctive enforcement is most analogous to Utah R. Civ. P. 7A (enforcement of court orders and judgments). However, because Section 501 proceedings are unique, a specialized rule is necessary. The proposed Rule 65D represents the Committee's collective best efforts to define a procedure that is as similar to Rule 7A as possible while also complying with the statutory requirements of Section 501. More details regarding the rationale for the proposed rule are provided in the explanatory notes.

In contrast, civil enforcement proceedings regarding the payment of money do not rely on the court's civil contempt powers. Rather, they involve procedures for collecting money judgments. The facts underlying final agency orders will have been "litigated," and monetary remedies will have been awarded (if the state agency has the authority to do so) during the state agency proceeding. Thus, the district court's enforcement of the monetary aspects of state agency orders will be akin to entering a judgment. Consequently, the most analogous procedures currently in the Rules are found in Utah R. Civ. P. 55, albeit with some notable differences.

In sum, a civil enforcement proceeding under Section 501 is, in substance, a post-judgment remedy. There are potentially two different categories of cases that must be addressed. This first category is cases where the agency has the authority to liquidate the amount of the monetary penalty, fine, or damage, and has done so. In these cases, Rules should provide a "bridge" from the agency action to collection procedures. The second category is cases where the agency lacks the authority to order monetary remedies. In these cases, the district court will determine the amount of the penalty, fine, or other allowable monetary remedy. The Rules should allow the district court to do so before moving on to collection. The proposed Rule 65E represents the Committee's best collective efforts to create appropriate procedures for this to happen.

Finally, a variety of other areas of procedural clarity deserve attention, including: (1) the scope of "review by trial de novo" following an informal agency adjudication under Section 63G-4-402; (2) judicial enforcement of administrative subpoenas; and (3) the nature and scope of appeals under the Utah Administrative Rulemaking Act. The Committee would like to work with a sub-committee of the Supreme Court's Advisory Committee to address these issues.

Sincerely,

Steve Gordon

Steve Gordon, Chair
Administrative Law Committee

Supreme Court's Advisory Committee
on the Rules of Civil Procedure

Perri Babalis
Perri Babalis
Committee Member - Administrative Law Committee

Shelley Coudreaut
Shelley Coudreaut
Committee Member - Administrative Law Committee

Christine Hashimoto
Christine Hashimoto
Committee Member - Administrative Law Committee

Mark Holliday
Mark Holliday
Committee Member - Administrative Law Committee

David Mooers-Putzer
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Committee Member - Administrative Law Committee

Robert Moore
Robert Moore
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Stanford Purser
Stanford Purser
Committee Member - Administrative Law Committee

Bret F. Randall
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Committee Member - Administrative Law Committee

Richard Rathbun
Richard Rathbun
Committee Member - Administrative Law Committee

Candace Roach
Candace Roach
Committee Member - Administrative Law Committee

Michael Stahler
Michael Stahler
Committee Member - Administrative Law Committee

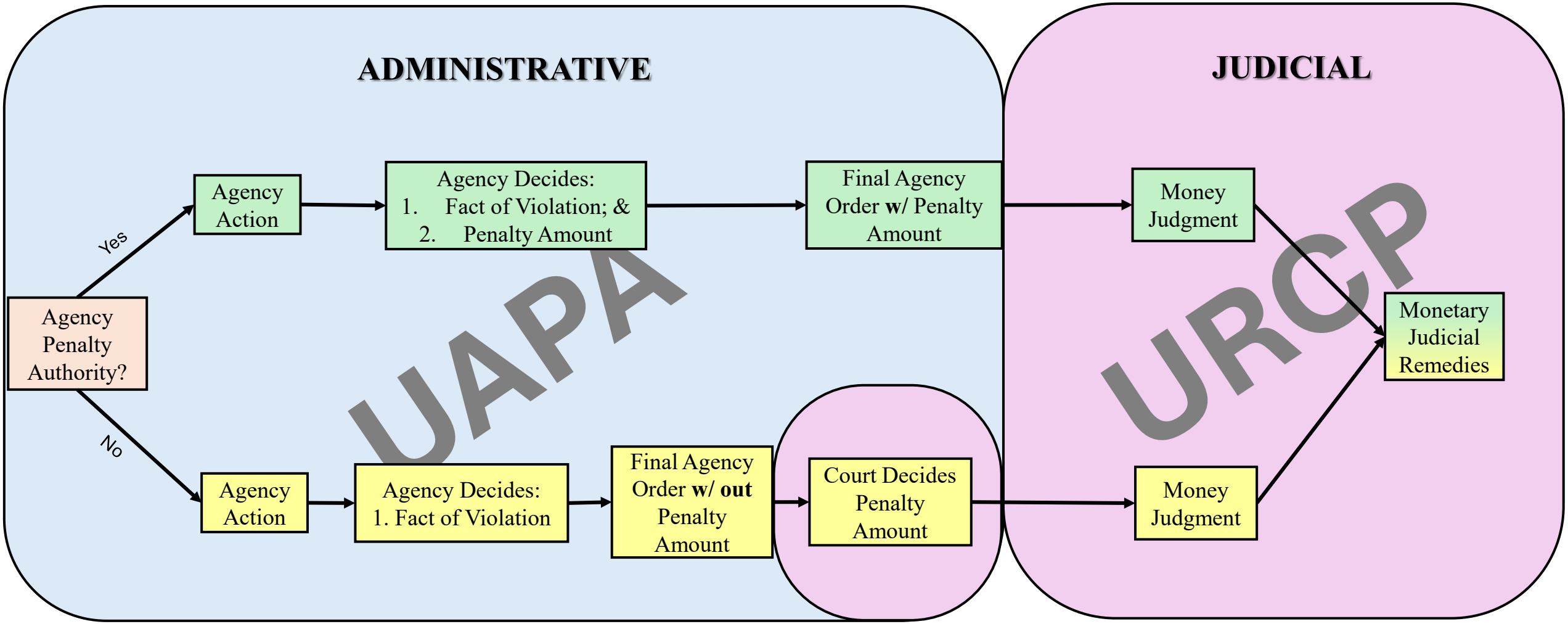
Brian L. Tarbet
Brian L. Tarbet
Committee Member - Administrative Law Committee

Julie Valdes
Julie Valdes
Committee Member - Administrative Law Committee

BFR/srb

cc: Stacy Haacke, Administrative Office of the Courts (stacyh@utcourts.gov)
Michael Stahler, Litigation Division

Civil Enforcement of Agency Orders – Monetary Remedies (URCP 65E)



DRAFT 06/26/2024

Rule 65D. Civil enforcement of agency orders – declaratory or injunctive remedies.

(a) Scope.
(1) This rule governs proceedings for civil enforcement of state agency orders initiated under the Utah Administrative Procedures Act, Utah Code Title 63G, Chapter 4, part 5 seeking declaratory or injunctive remedies. The Act sets forth the manner and extent to which state agencies may obtain judicial enforcement of final agency orders and the defenses that may be brought to defend such actions.
(2) Rules 13, 14, and 18 shall not apply to complaints and answers filed under this Rule 65D, and Rule 15 shall not apply to the final agency order.

(b) Commencement and venue. A proceeding for civil enforcement of state agency orders seeking declaratory or injunctive remedies from district court shall be initiated by filing a complaint that satisfies the requirements of Rule 65D(c) and Rule 3, with the clerk of the district court in the county where the matters addressed in the state agency order arise, or where any defendant resides, unless venue is otherwise provided by law. Except for actions arising under Utah Code Title 73, Chapters 1 through 6, the court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) Contents of complaint.
(1) The complaint shall name as defendants all persons against whom the plaintiff seeks to obtain declaratory or injunctive remedies and shall otherwise be in compliance with the applicable requirements of these Rules.
(2) If the plaintiff is a person whose interests are directly impaired or threatened by the failure of an agency to enforce the agency's order under Section 63G-4-501(2), the complaint shall name as a defendant the state agency whose order the plaintiff is seeking to enforce.
(3) The complaint shall include:
(A) A true, correct, and complete copy of the state agency order the plaintiff seeks to enforce through declaratory or injunctive remedies;
(B) Factual allegations that the state agency had the legal authority to issue the order;
(C) Factual allegations that the state agency complied with relevant requirements of Title 63G, Chapter 4, any other statutes applicable to the state agency, and the agency's rules, in the issuance and service of the order;
(D) Factual allegations that the state agency order is otherwise final and unappealable; and
(E) As applicable, factual allegations that the defendant against whom civil enforcement is sought has violated the state agency order, including facts that would be admissible under the Rules of Evidence and that would support a finding that the defendant has violated the state agency order.
(4) To establish the factual allegations set forth in Rule 65D(c)(3), the complaint must be verified, or the plaintiff must submit at least one supporting affidavit or declaration that is based on personal knowledge and shows that the affiant or declarant is competent to testify on the matters set forth.
(5) The complaint and summons shall be served in accordance with Rule 4.

(d) Answer or other response.
(1) Within the time allowed by law after service of a copy of the complaint and summons upon a defendant, or within such other period as the court may allow, the defendant shall answer or otherwise respond to the complaint in accordance with Rule 12.

(2) If a party seeks to defend against the civil enforcement of the state agency order on any of the grounds set forth in Section 63G-4-501(3), the party shall state, in plain and concise terms, the basis of such defenses.

(e) Discovery. Rule 26 shall not apply to civil enforcement proceedings brought under this rule unless otherwise ordered by the court. For good cause or by stipulation of the parties, the court may allow for reasonable fact discovery related to affirmative defenses raised in the answer or to other relevant matters. In deciding whether to allow for reasonable fact discovery, the court shall consider whether discovery will unreasonably delay civil enforcement of the state agency order.

(f) Motion for enforcement; briefing; hearing. In civil actions commenced under Rule 65D(b):
(1) the plaintiff may file a motion for enforcement seeking declaratory or injunctive remedies: (i) at any time after the answer is filed; (ii) at any time after a defendant fails to timely appear or answer; or (iii) if discovery is allowed by the court under Rule 65D(e), at any time upon completion of discovery ordered by the court.
(2) A written opposition is not required, but if filed, must be filed within 14 days of service of the motion for enforcement, unless the court sets a different time, and must follow the requirements of Rule 7.
(3) If the nonmoving party files a written opposition, the moving party may file a reply within 7 days of the filing of the opposition to the motion, unless the court sets a different time. Any reply must follow the requirements of Rule 7.
(4) At the hearing the court may receive evidence, hear argument, and rule upon the motion, or may request additional briefing or hearings. The moving party bears the burden of proof on all claims made in the motion. At the court's discretion, the court may convene a telephone conference or virtual conference before the hearing to preliminarily address any issues related to the motion, including whether the court would like to order a briefing schedule other than as set forth in this rule.

(g) Adoption and enforcement of state agency order.
(1) If the court grants a motion for enforcement under Rule 65D(f), the Court shall issue an appropriate order. In doing so the Court may adopt the state agency's order in whole or in part. The Court's order shall be consistent with Utah Code Section 63G-4-501(1)(d). If the Court issues an order granting a motion for enforcement under this Rule, a separate judgment shall be issued pursuant to Rule 58A. Court orders and judgments entered under this rule shall be enforceable in the same manner and pursuant to the same procedures as any other court order or judgment.
(2) In situations where civil declaratory or injunctive remedies arise from a state agency order that is subject to review by trial de novo in a proceeding commenced under Section 63G-4-402, there is no requirement for the plaintiff to commence a separate civil enforcement action following the procedures set forth in Rule 65D(b) through (f). Rather, if the state agency prevails following the trial de novo under Section 63G-4-402, the court shall issue an appropriate order and judgment as provided in Subsection (1).

DRAFT 06/26/2024

NOTES:

Subsection (a)(1): The Utah Administrative Procedures Act provides that the district courts have jurisdiction to enforce final orders of administrative agencies. The act provides certain procedures for such actions, but the statutory procedures are incomplete. While a judicial proceeding to enforce final agency orders is similar to a proceeding to enforce a court order or judgment under Rule 7A, there are procedural differences that are addressed by Rule 65D.

Subsection (a)(2): Prior to the initiation of an action under Rule 65A, due process will have already been provided in connection with a final state agency order. As a result, the scope of proceedings under the Act to obtain judicial enforcement remedies arising from a final agency order is necessarily limited. It would not be appropriate for such limited proceedings to be used to adjudicate ancillary claims and parties as to which appropriate due process would be required. Hence, the procedures in Rules 13, 14, and 18 do not apply to proceedings under Rule 65D. Ancillary claims, parties, and matters should be adjudicated in separate civil or administrative actions, wherein appropriate due process rights will be provided. For the same reasons, it would not be appropriate to apply Rule 15 to the final agency order itself.

Subsection (b): Section 63G-4-501 provides that actions to obtain civil enforcement of agency orders shall be commenced by the filing of a complaint. This is so because unlike Rule 7A, where a civil action already exists, a new civil action must be initiated to enforce a state agency order. Section 63G-4-501 also states that venue for proceedings under that section shall be in accordance with the Utah Rules of Civil Procedure. Subsection (b) is intended to address the issue of venue.

Subsection (c): Section 63G-4-501(2) provides that non-agency persons whose rights are impaired by the failure of the agency to enforce an order may bring an action for enforcement. In such proceedings, it is appropriate for the plaintiff to name as a defendant the agency whose order the plaintiff is seeking to enforce. All proceedings initiated by the filing of a complaint will involve agency orders that have become final by operation of law. To achieve finality, the agency must have had legal authority to issue the order and must have provided the defendant with appropriate notice of the underlying agency action. These facts are not necessarily self-evident from the face of an agency order.

Proceedings to enforce a court order under Rule 7A, proceedings to enforce a confession of judgment under Rule 58(a)(i), and similar proceedings are initiated by the filing of a verified declaration, affidavit, or statement that presents specific evidence to the court. It is appropriate for an action to enforce agency orders be initiated by a similar process, wherein the plaintiff is required to present to the court a complete copy of the agency's order that is the subject of the proceeding, as well as evidence that the agency properly notified the defendant of, and had legal jurisdiction to take the underlying agency action. These are prima facie elements of the plaintiff's right to judicial enforcement of the state agency order and it is appropriate that the complaint recite and verify these facts and conclusions.

Subsection (d): Section 63G-4-501(3) provides defendants with specific grounds for defending an agency's proceeding under Section 501. In the interest of efficiency and judicial economy, it is appropriate to require the defendant to state the facts upon which it relies to assert such defenses in plain and concise terms so the agency may prepare for a hearing on the merits and evaluate the propriety of seeking a motion for discovery.

Subsection (e): Enforcement proceedings are limited in scope, similar to supplemental proceedings. While discovery would not be expected to be granted in the ordinary course, it must be recognized that an answer may raise questions of fact outside the scope of the order that justify pre-hearing discovery. The rule establishes a good cause standard for limited discovery, in the court's discretion. Discovery should not be used as a delay tactic.

Subsection (f): The motion and hearing process for the enforcement of agency orders is modeled on the procedures for enforcement of court orders under Rule 7A. After the pleadings and any permitted discovery, the agency may file a motion for enforcement at any time. The motion practice and hearing rules are similar to Rule 7A.

Subsection (g)(1): If the agency prevails, the end result of the process is an appropriate court order. The order should generally adopt the agency's order (or the portion thereof affirmed by the court), and implement appropriate remedies. The court's final order is enforceable to the same extent and under the same procedures as any other court order or judgment.

Subsection (g)(2): Judicial enforcement remedies for agency orders arise in one of two possible procedural contexts: (i) when an agency order has become final under the Utah Administrative Procedures Act and the agency desires to obtain judicial enforcement under Section 63G-4-501; or (ii) when an agency order is the subject of a review by trial de novo in district court under Section 63G-4-402, if the agency order is affirmed. In the latter situation, the agency's remedies, if any, will already be part of the district court's review under an action that has already been commenced and adjudicated. Therefore, if the agency prevails, it is not necessary for the agency to initiate a separate proceeding to obtain civil enforcement of the agency order; the court should proceed to civil enforcement of the agency order under Section 501 and Rule 65D(g)(1).

DRAFT 06/26/2024

Rule 65E. Civil enforcement of agency orders – monetary remedies.

(a) Scope.
(1) This rule governs proceedings for civil enforcement of state agency orders initiated under the Utah Administrative Procedures Act, Utah Code Title 63G, Chapter 4, part 5 seeking monetary remedies in the form of fines, penalties, or (as applicable), damages. The Act sets forth the manner and extent to which state agencies may obtain judicial enforcement of final agency orders and the defenses that may be brought to defend such actions.
(2) Rules 13, 14, and 18 shall not apply to complaints and answers filed under this Rule 65E, and Rule 15 shall not apply to the final agency order.

(b) Docketing the final state agency order. Except where another procedure is provided by law, when a final agency order requires that a person pay a sum certain or involves the potential assessment and payment of fines or penalties and that fact is made to appear, the clerk shall enter the final agency order on the court's docket.

(c) Entry of judgment by the clerk.
(1) Judgment on a final agency order involving the payment of money may be entered by the clerk as follows:
(A) Except where another procedure is provided by law, when the final agency order involves the payment of a sum certain that has previously been adjudicated by the state agency, upon request of the plaintiff, the clerk shall enter judgment for the amount claimed against the defendant if:
(i) the agency action involves the payment of money and is final and unappealable;
(ii) the defendant is not an infant or incompetent person;
(iii) the defendant has been personally served pursuant to Rule 4(d)(1); and
(iv) the plaintiff, through a verified complaint, or an unverified complaint supported an affidavit or an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act, sets forth facts necessary to establish the amount of the claim, after deducting all credits to which the defendant is entitled, and verifies the amount is warranted by information in the plaintiff's possession.

(d) Adjudication of damages, fines, and penalties by the court.
(1) Except where another procedure is provided by law, in all other cases, the state agency entitled to a judgment upon a final agency order involving the potential payment of money, damages, fines, or penalties shall apply to the court therefor as follows:
(A) the defendant has been personally served pursuant to Rule 4(d)(1); and
(B) the plaintiff, through a verified complaint, or an unverified complaint supported by an affidavit or an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act, sets forth facts necessary to establish the amount of the claim and the basis for the damages, fine, or penalty.
(2) If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages, fines, or penalties, or to establish the

truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

NOTES:

1. Purpose and Scope. This rule involves final agency actions under Title 63G, Chapter 4, Utah Administrative Procedures Act. The Act provides judicial remedies for civil enforcement of final agency orders but some procedures remain poorly defined. Some state agencies have the statutory authority to assess penalties for violations or to implement other remedies that result in an agency order requiring the payment of money, including damages, fines, and penalties. Due process associated with these agency actions is as provided by code, the act, or both. This rule provides procedures for the collection of money required to be paid under final agency orders. Because the defendant's civil liability will have already been established through agency proceedings, a proceeding to collect money is similar to the procedures that would apply to the entry of default and default judgment under Rule 55. Because an agency order must have been fully adjudicated under the Act prior to entry of the order in a civil action, liability and other matters addressed in the agency order will be final as a matter of law. This is similar to the entry of default, where the question of liability is settled and the only issue remaining is the entry of judgment.

2. Sum Certain. In situations where the agency action results in a final agency order that involves the payment of money in a sum certain, it is appropriate for the clerk to enter the judgment in substantially the same manner as the clerk enters default judgment for a sum certain.

3. Other Damage and Penalty Assessment Hearings. In situations where the agency action results in a final agency order that involves the payment of money that is not in a sum certain, such as penalties for violations, it is appropriate for the court to conduct such hearings as the court deems appropriate to determine the amount of damages or penalties. This proceeding should be akin to a court's entry of default judgment in matters that do not involve the payment of a sum certain.

4. Participation of Defendant in Damages and Penalty Proceedings. Unlike default judgment, where the defendant has failed to appear and defend, actions under Rule 65E should afford defendants with notice and an opportunity to appear and defend the court's calculation of damages or the assessment of penalties, as the case may be.

Tab 5

Rule 26.4 Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.
Request from Probate Rules Subcommittee.
Judge Laura Scott
May 2024

As the Probate Rules Subcommittee was discussing the recently effective recodification of the probate statutes, they realized the need to revise Rule 26.4 to reference "Title 75, 75A, and 75B of the Utah Code" in 26.4(a) Scope; (b) Definition; and (c)(4)(B).

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

Effective: 1/1/2020

(a) **Scope.** This rule applies to all contested actions arising under Title 75, 75A, and 75B of the Utah Code.

(b) **Definition.** A probate dispute is a contested action arising under Title 75, 75A, and 75B of the Utah Code.

(c) **Designation of parties, objections, initial disclosures, and discovery.**

~~(c)~~(1) **Designation of Parties**. For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party who has made an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared on the record will be treated as a party for purposes of discovery.

~~(c)~~(2) **Objection to the petition**.

~~(c)(2)~~(A) Any oral objection made at a hearing on the petition must then be put into writing and filed with the court within seven~~7~~ days, unless the written objection has been previously filed with the court. The court may for good cause, including in order to accommodate a person with a disability, waive the requirement of a writing and document the objection in the court record.

~~(c)(2)~~(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and any "interested persons," as that term is defined in Utah Code section~~§~~ 75-1-201, unless the written objection has been previously filed with the court.

~~(c)(2)~~(C) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

~~(c)(2)~~(D) The court may modify the timing for making an objection in accordance with Rule 6(b).

~~(c)(2)~~(E) In the event no written objection is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7.

~~(c)~~(3) **Initial disclosures in guardianship and conservatorship matters.**

~~(c)(3)~~(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed:

~~(c)(3)(A)~~(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

~~(c)(3)(A)~~(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

~~(c)(3)~~(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection, and anyone who has requested notice under Title 75 of the Utah Code:

~~(c)(3)~~(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by any other party within 14 days of the date of referral to mediation unless the parties agree to a different date.

~~(c)(3)~~(D) The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b).

~~(c)~~(4) **Initial disclosures in all other probate matters.**

~~(c)(4)~~(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a personal representative or trustee after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

~~(c)(4)~~(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75, 75A, and 75B of the Utah Code.

~~(c)(4)~~(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

~~(c)(4)~~(D)The court may for good cause modify the content and timing of the disclosures required in this rule or in Rule 26(a) in accordance with Rule 6(b).

~~(c)~~(5) **Discovery once a probate dispute arises**. Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures under Rule 26(a)(5).** The term "trial" in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule.

Tab 6

Request regarding the Standards of Professionalism and Civility
From the Supreme Court Advisory Committee on the Rules of Professional Conduct

At the request of the Supreme Court, the Advisory Committee on the Utah Rules of Professional Conduct reviewed the Standards of Professionalism and Civility for any proposed incorporation into other rules. The Committee is requesting the Advisory Committee on the Utah Rules of Civil Procedure review Standard #16 for incorporation into the Utah Rules of Civil Procedure. Included below is the language of Standard 16, along with Utah Supreme Court reference to Standard 16 with the Utah Rules of Civil Procedure. Additionally, the Committee found an example of default language in rules from the State of Arizona. The Committee on the Rules of Professional Conduct appreciates the URCP Committee's review of this issue and looks forward to feedback.

Standard 16 states:

Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

Supreme Court Discussion on Standard #16 and its interplay with the Rules of Civil Procedure
Arbogast Family Trust ex rel. Arbogast v. River Crossings, LLC, 2010 UT 40.

> ¶ 40 We agree with the court of appeals' assessment. A party's counsel can and should simultaneously comply with the rules of civil procedure and the standards of professionalism and civility. Our standards of professionalism and civility often promulgate guidelines that are more rigorous than those required by the Utah Rules of Civil Procedure and the Utah Code of Professional Conduct. Adherence to those standards promotes cooperation and resolution of matters in a "rational, peaceful, and efficient manner." Utah Standards of Professionalism and Civility pmbl. The rules of civil procedure establish minimum requirements that litigants must follow; the standards of professionalism supplement those rules with aspirational guidelines that encourage legal professionals to act with the utmost integrity at all times. *See* Gus Chin, Utah Standards of Professionalism and Civility: *Standard 2—Civility, Courtesy and Fairness,* 18 Utah Bar Journal 34, 35 (2005) (quoting Chief Justice E. Norman Veasey, *Making it Right: Veasey Plans Action to Reform Lawyer Conduct,* Bus. L. Today, Mar.–Apr. 1998, 42, 44) ("Ethics is a set of rules that lawyers must obey. Violations of these rules can result in disciplinary action or disbarment. Professionalism, however, is not what a lawyer must do or must not do. It is a higher calling of what a lawyer should do to serve a client and the public.").
>
> ¶ 41 In this case, we interpret Utah Rule of Civil Procedure 5(a) to require parties to serve notice of pleadings and papers to all parties who have formally appeared before the court in which the matter is pending. Although not required by rule 5, our standards of professionalism and civility further advise lawyers to give notice of default to *known parties* before entering notice of default, whether or not the parties have made a formal appearance. Utah Standards of Professionalism and Civility 14–301(16). Adhering to

such a practice is easy, promotes fairness, and reduces the number of motions to set aside default judgments filed under Utah Rule of Civil Procedure 60.

. . .

¶ 43 We find that requiring attorneys to give opposing parties a final opportunity to make a formal appearance before entering default judgment is urged by our Standards of Professionalism and Civility and is a simple step that promotes fairness and efficiency in our judicial system. We encourage lawyers and litigants to follow this standard, and we caution that lawyers who fail to do so without justification may open themselves to bar complaints or other disciplinary consequences if their conduct also runs afoul of the Utah Rules of Professional Conduct.

Arizona default judgment rule
Link to rule – *here*

(3) *Notice*. For any default entered under Rule 55(a)(1), notice must be provided as follows:

. . .

(B) To the Attorney for a Represented Party. If the party requesting the entry of default knows that the party claimed to be in default is represented by an attorney in the action in which default is sought or in a related matter, a copy of the application also must be mailed to that attorney, whether or not that attorney has formally appeared in the action. A party requesting the entry of default is not required to make affirmative efforts to determine the existence or identity of an attorney representing the party claimed to be in default.

Tab 7

JOINT RESOLUTION AMENDING RULES OF CIVIL PROCEDURE ON CHANGE OF JUDGE AS A MATTER OF RIGHT

2024 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stephanie Gricius

Senate Sponsor: Keith Grover

LONG TITLE

General Description:

This joint resolution amends Rule 63A of the Utah Rules of Civil Procedure regarding the change of judge as a matter of right.

Highlighted Provisions:

This resolution:

- amends Rule 63A of the Utah Rules of Civil Procedure to allow for a change of judge by a party in a civil action; and
- makes technical and conforming changes.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Evidence Affected:

AMENDS:

Rule 63A, Utah Code of Evidence Procedure, as Utah Rules of Civil Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 63A** Utah Rules of Civil Procedure is amended to read:

Rule 63A. Change of judge as a matter of right.

(a) Change of judge by one side of an action.

(a) (1) Right to change a judge by one side of an action.

(a) (1) (A) In a civil action pending in a court in a county with seven or more district

court judges, each side is entitled to one change of judge as a matter of right under this paragraph (a).

(a) (1) (B) Even if two or more parties on one side of a civil action have adverse or hostile interests, the action, whether single or consolidated, must be treated as only having two sides for purposes of a changing judge under this paragraph (a).

(a) (1) (C) A side is not entitled to more than one change of judge under this paragraph (a).

(a) (1) (D) Regardless of when a party joins a civil action, a party is not entitled to a change of judge as a matter of right under this paragraph (a) if the notice of a change of judge is untimely under paragraph (a)(2).

(a) (2) Notice of a change of judge.

(a) (2) (A) A party seeking a change of judge under this paragraph (a) must file a notice of a change of judge with the clerk of the court.

(a) (2) (B) If the notice of a change of judge is timely under this paragraph (a)(2), the notice must be granted.

(a) (2) (C) In filing a notice of a change of judge under this paragraph (a), a party is not required to state any reason for seeking a change of judge, but the party must attest in good faith that the notice is not being filed:

(a) (2) (C) (i) for the purpose to delay any action or proceeding; or

(a) (2) (C) (ii) to change the judge on the grounds of race, gender, or religious affiliation.

(a) (2) (D) The notice must be filed:

(a) (2) (D) (i) on the side of a plaintiff or petitioner, within seven days after the day on which a judge is first assigned to the action or proceeding; or

(a) (2) (D) (ii) on the side of a defendant or respondent, within seven days after the day on which the defendant or respondent is served the complaint or petition, or at the time of the first filing by the defendant or respondent with the court, whichever occurs first.

(a) (2) (E) Failure to file a timely notice of a change of judge under this rule precludes a change of judge under this paragraph (a).

(a) (3) Assignment of action.

(a) (3) (A) Upon the filing of a notice under this paragraph (a), the judge assigned to

the action must take no further action in the case.

(a) (3) (B) The action must be promptly reassigned to another judge within the county.

(a) (3) (C) If the action is unable to be reassigned to another judge within the county, the action may be transferred to a court in another county in accordance with Rule 42.

(a) (4) Exceptions. A party, or a side, is not entitled to change a judge as a matter of right under this paragraph (a):

(a) (4) (A) in any proceeding regarding a petition for post-conviction relief under Rule 65C;

(a) (4) (B) on a petition to modify child custody, child support, or alimony, unless the judge assigned to the action is not the same judge assigned to any of the previous actions between the parties;

(a) (4) (C) in an action before the juvenile court or the Business and Chancery Court;

(a) (4) (D) in an action in which the judge is sitting as a water or tax judge;

(a) (4) (E) in an action on remand from an appellate court; or

(a) (4) (F) if an action is unable to be transferred under paragraph (a)(3)(C) to another county in accordance with Rule 42.

[~~**(a) Notice of change.**~~] **(b) Right to change a judge by agreement of the parties.**

(b) (1) Notice of a change of judge.

(b) (1) (A) Except in actions with only one party, all parties joined in the action may, by unanimous agreement and without cause, change the judge assigned to the action by filing a notice of change of judge.

(b) (1) (B) The parties shall send a copy of the notice to the assigned judge and the presiding judge.

(b) (1) (C) The notice shall be signed by all parties and shall state: (1) the name of the assigned judge; (2) the date on which the action was commenced; (3) that all parties joined in the action have agreed to the change; (4) that no other persons are expected to be named as parties; and (5) that a good faith effort has been made to serve all parties named in the pleadings.

(b) (1) (D) The notice shall not specify any reason for the change of judge.

(b) (1) (E) Under no circumstances shall more than one change of judge be allowed under this [~~rule~~] paragraph (b) in an action.

(b) (2) Time for filing a notice.

(b) (2) (A) Unless extended by the court upon a showing of good cause, the notice must be filed within 90 days after commencement of the action or prior to the notice of trial setting, whichever occurs first.

(b) (2) (B) Failure to file a timely notice precludes any change of judge under this [~~rule~~] paragraph (b).

[~~(c)~~] **(b) (3) Assignment of action.**

(b) (3) (A) Upon the filing of a notice of change, the assigned judge shall take no further action in the case.

(b) (3) (B) The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action.

(b) (3) (C) If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the associate presiding judge, to another judge of the district, or to any judge of a court of like jurisdiction, who shall determine whether the notice is proper and, if so, shall reassign the action.

[~~(d)~~] **(b) (4) Nondisclosure to court.** No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

[~~(e)~~] **(c) Rule 63 unaffected.** [~~This rule does not affect any rights under Rule 63.~~] Nothing in this rule precludes the right of any party to seek disqualification of a judge under Rule 63.

Section 2. **Effective date.**

(1) In accordance with Utah Constitution, Article VIII, Section 4, the amendments in this resolution pass upon approval by a two-thirds vote of all members elected to each house.

(2) After passage of this resolution under Subsection (1), the amendments in this resolution take effect on January 1, 2025.

Tab 8

Rule 35 Physical and mental examination of persons.
Court of Appeals Opinion – *Stage Department Store v. Labor Commission*, 2024 UT App 85

This decision was flagged for the committee by Nick Stiles, the appellate court administrator. It was requested that the Committee review the opinion and Rule 35 to determine if amendments were necessary. In a recent opinion the Utah Court of Appeals mentions URCP Rule 35 on page 20 and in footnote 8 as follows:

IV. Denial of Magnuson's Objections
¶43 Magnuson's final argument is that the Appeals Board should have allowed her objections to Stage's medical examiners labeling themselves as "independent" and should have instructed the Panel that the reports from those examiners were not in fact independent. Magnuson took particular issue with Dr. Theiler's report.

¶44 Magnuson argues that her objection should have been sustained because, under rule 35 of the Utah Rules of Civil Procedure, use of the phrase "independent medical examiner" (IME) is discouraged. *See* Utah R. Civ. P. 35 advisory committee's note to 2017 amendment ("The parties and the trial court should refrain from the use of the phrase 'independent medical examiner,' using instead the neutral appellation 'medical examiner,' 'Rule 35 examiner,' or the like."). Magnuson contends that because the Commission has no specific rules regarding this issue, rule 35 applies. She cites *Barker v. Labor Commission*, 2023 UT App 31, 528 P.3d 1260, *cert. denied*, 534 P.3d 751 (Utah 2023), to support this conclusion. *Id.* ¶ 11 (holding that rule 35's recording provision applied because it was not in conflict with the Commission's rules, which are silent on the issue). However, this reasoning does not compel a change in the result here.

¶45 Magnuson is correct that an IME is far from independent due to the conflict of interest arising between the medical examiners and the insurance companies paying their bills. However, in the context of Commission cases, as recognized by Utah caselaw, this is a very common term—one any member of an experienced medical panel would be familiar with and understand the complexities of. Our supreme court has explained that "the purpose of an IME, in the workers' compensation setting, is to provide the carrier, and potentially the relevant fact finder, with independent information on the claimant's injuries." *Kirk v. Anderson*, 2021 UT 41, ¶ 13, 496 P.3d 66. The court continued that IMEs "play a vital role in the overall administration of health care benefits and workers' compensation benefits" as IMEs offer "an unbiased opinion assessing specifically whether the patient's work-related injury requires treatment, while the injured person's own health care provider is able to administer care without influence by insurance companies." *Id.* ¶ 23. Through IMEs, "patients enjoy unbiased care while the insurance companies still benefit from the opinions of medical professionals." *Id.*7

¶46 In denying Magnuson's objection, the Appeals Board correctly pointed to the fact that while these IMEs were completed on behalf of Stage and were "therefore not independent," "this misnomer is well-recognized in the workers' compensation setting." We agree with the Appeals Board's reasoning that "there is no indication that the veteran members of the [Panel] were confused" by the use of the label "independent." The difference between Magnuson's treating and consulting physicians and those retained by Stage "was clear from the records" the Panel reviewed. Magnuson attempts in her reply ***301** brief to point us to evidence in the record

supporting the Panel's alleged confusion over the role of Stage's medical examiners. But we find this evidence both unconvincing and inappropriately raised for the first time in her reply brief.

¶47 Thus, the Appeals Board did not abuse its discretion when it denied Magnuson's objections.[8]

Footnote 8
Still, we recognize that the reasons that the advisory committee gave for moving away from identifying adverse medical exams as independent, *see* Utah R. Civ. P. 35 advisory committee's note to 2017 amendment, may also be relevant here, although the chance of prejudice is far more removed in a proceeding before an ALJ or the Commission than it would be before a jury. The Commission might be well-served to adopt a rule using different nomenclature for such exams.

THE UTAH COURT OF APPEALS

STAGE DEPARTMENT STORE AND
NEW HAMPSHIRE INSURANCE COMPANY,
Petitioners and Cross-respondents,
v.
SHELLY MAGNUSON,
Respondent and Cross-petitioner,
v.
LABOR COMMISSION,
Respondent.

Opinion
No. 20220825-CA
Filed June 6, 2024

Original Proceeding in this Court

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and Cross-respondents

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Respondent and Cross-petitioner

JUDGE DAVID N. MORTENSEN authored this Opinion, in which
JUDGES GREGORY K. ORME and AMY J. OLIVER concurred.

MORTENSEN, Judge:

¶1 Shelly Magnuson fell at work and suffered injuries. She made a claim for workers' compensation benefits, ultimately claiming that she was permanently disabled. In light of her years-long history of significant pain complaints and a material dispute in medical opinions from various physicians concerning her diagnosis and the cause or causes of her symptoms, a medical panel was appointed. Subsequently, an administrative law judge (ALJ) confirmed a period of temporary disability but otherwise largely ruled against Magnuson, whereupon she sought review with the Appeals Board of the Utah Labor Commission (Appeals

Board). The Appeals Board confirmed the ALJ's determinations but extended the term of temporary disability by one year. Both the employer and Magnuson brought petitions for judicial review. We decline to disturb the order of the Appeals Board.

BACKGROUND[1]

Pre-accident Medical Conditions

¶2 Magnuson has suffered for many years from "chronic pain symptoms affecting various parts of her body, including her back, joints, arms, and legs." In 2010, a doctor described her as having an "off and on" history over the previous ten years with Sweet's syndrome, which caused "pain in her back, arms and legs." Magnuson was also diagnosed with Hashimoto's disease and fibromyalgia and had undergone several surgeries to her lower leg for an Achilles tendon injury. Magnuson's pain, "primarily in [her] lower extremities," continued for several years. While the cause was unknown, the pain was associated with Sweet's syndrome. Following several years of increased dosages of pain medication—reaching a point where they no longer provided "relief for her chronic pain diagnosis," Magnuson's primary care physician referred her to a pain-management expert, Dr. Spencer Wells. In her initial visits with Dr. Wells, Magnuson described "low-back pain, joint pain, . . . joint swelling, leg pain, muscle cramps, muscle pain, and muscle weakness." Dr. Wells prescribed her a "new pain-medication regimen for what [Magnuson]

1. "In reviewing an order from the Commission, we view the facts in the light most favorable to the Commission's findings and recite them accordingly." *C.R. England v. Labor Comm'n*, 2021 UT App 108, n.1, 501 P.3d 109 (cleaned up). As such, our recitation of the facts and quotations are largely drawn from the Appeals Board's order.

described as pain over her entire body and bilateral leg pain rated at a seven" out of ten.

¶3 In May 2014, just over six months before the accident at issue in this case, Dr. Wells diagnosed Magnuson with myofascial-pain syndrome, chronic pain syndrome, and chronic fatigue syndrome. Then in November 2014, just a month before the accident, Magnuson again described pain radiating "throughout her entire body," which "did not vary with the time of day." She described her leg pain as eight out of ten and as ten out of ten while working.

Accident and Post-accident Work

¶4 In December 2014, Magnuson was working as a store manager for Stage Department Store (Stage). In mid-December, she was in the back of the store receiving freight and sorting boxes. As she stepped off a pallet that was "six to eight inches" high, her right foot caught on some plastic wrap. Magnuson "fell backwards onto a metal clothing rack before landing on the concrete floor." As she fell, her back "struck the leg of the clothing rack," her "left buttock" hit one of the rack's wheels, and her right arm "got caught on the rack." Magnuson immediately felt pain in her back and lay "prone on the floor for about 15 minutes" before rolling onto her side and crawling down the hall to the break room, where another employee eventually helped her to a chair.

¶5 This accident occurred on the weekend and early the following week, an injury report was completed, and Magnuson returned to work. Until about May 25, 2015, she worked "light duty," before stopping entirely and receiving "paid temporary benefits" until June 1, 2015.

Post-accident Medical Care

¶6 Below we recount the medical care and evaluations Magnuson received following the accident.

¶7 **Dr. Brooks.** A few days after the accident, Magnuson sought treatment from Dr. David Brooks for "pain in her right arm and low back." She was diagnosed with "contusions on her right arm and left buttock." Dr. Brooks released Magnuson to "light-duty work." Later that month at a follow-up appointment, Magnuson reported her pain as nine out of ten, with "low-back pain radiating to her left leg," while the pain in her right arm was improving and the contusion discolorations were fading. She again received a "light-duty" work release and was prescribed physical therapy. In January 2015, she was "diagnosed with a coccyx sprain."

¶8 **Dr. Allen.** Also in January 2015, Magnuson saw Dr. Lex Allen for "low-back symptoms." An MRI revealed "severe facet degeneration bilaterally" and "moderate . . . spinal canal narrowing" in portions of her spine. Dr. Allen noted tenderness in Magnuson's hips and administered injections, which were unsuccessful in providing her relief.

¶9 **Dr. Wells.** Magnuson continued to receive treatment from Dr. Wells, the pain management physician she saw before her fall. In February 2015, she saw him for "low-back and bilateral leg pain." Dr. Wells diagnosed her with—among other things—low-back pain, lumbar spinal stenosis, and Sweet's syndrome. Magnuson received steroid injections in her lumbar spine, which again did not provide relief. Dr. Wells increased the dosage of her pain medication. At another visit in April 2015, Magnuson said that her pain had worsened. Dr. Wells recommended she get a surgery consultation.[2] Dr. Wells also recommended a further increase in her pain medication dosage, a new medication, and pool therapy. In January 2016, Dr. Wells noted that Magnuson did not respond well to the new medication or the pool therapy and

2. Magnuson received two surgical consultations, neither of which resulted in a recommendation of surgery as treatment.

that she rated her low-back pain at eight out of ten. He opined that she "could not work in her condition."

¶10 **Dr. Callahan (Stage Medical Consultant).** In July 2015, Magnuson was examined by Dr. Michael Callahan at the request of Stage. He diagnosed her with, among other things, a "possible" bone contusion or fracture "hidden from x-rays." Dr. Callahan noted that Magnuson's "complaints of ongoing low-back pain radiating into her left leg had not improved as expected." He concluded that the pain was "medically caused by a direct blow to her lumbosacral area on the date of the accident." He determined that she was "not medically stable" due to the work injury.

¶11 **Dr. Vroenen.** In January 2016, after Dr. Wells's note about pool therapy, Magnuson saw Dr. Diane Vroenen, who noted that "most of . . . Magnuson's pain symptoms were localized to the sacral area." Dr. Vroenen prescribed steroid patches, which successfully helped with pain control. She also recommended physical therapy, which Magnuson attended. Magnuson was prescribed medication for chronic arthritis and muscle pain. Dr. Vroenen did not opine on the medical cause of Magnuson's pain but opined that Magnuson had "reached maximum medical improvement in a treatment note dated March 31, 2016."

¶12 **PA Torgerson.** In April 2016, Magnuson attended an annual checkup with Karl Torgerson, a physician assistant. Torgerson described Magnuson as "doing much better compared to a year prior" and noted that Magnuson "was pleased with the pain-management care" she received from Dr. Vroenen. He additionally noted that Magnuson felt "her pain was well tolerated and that she could walk without difficulty, but still had pain while sitting." There was no mention of low-back pain in the notes from this appointment. In a July 2016 follow-up visit, Magnuson mentioned difficulty walking because of back pain. And in November 2016, there was a note of low-back pain and a prescription for pain medication.

¶13 **Dr. Fotheringham (Stage Medical Consultant).** In June 2016, Dr. Bart Fotheringham evaluated Magnuson at the request of Stage. He recommended she stop using narcotic pain medication. He opined that muscle relaxers and non-steroidal anti-inflammatory medications were a better alternative. Dr. Fotheringham concluded that Magnuson "qualified for a 5% whole-person impairment rating due to her work injury." However, he noted that "he was not aware of the entirety of . . . Magnuson's prior history or conditions that would warrant apportionment of the rating."

¶14 **Dr. West.** In August 2017, Magnuson visited Dr. Kristoffer West for low-back and hip pain. In addition to other diagnoses, he diagnosed her with chronic low-back and leg pain. Dr. West recommended a spinal-cord stimulator trial.

¶15 **Dr. Workman.** Dr. Ryan Workman, a physician in Dr. Wells's office, also recommended the spinal-cord stimulator trial. He placed the stimulator in Magnuson in January 2018. "Magnuson reported pain relief at a rate of 60%." The stimulator was permanently placed in March 2018, with Magnuson receiving continued follow-up appointments for adjustments to the stimulator with Dr. Workman. In May 2018, Magnuson still rated her pain as eight out of ten.

¶16 For several years, Magnuson received pain-management care, including steroid injections, narcotic prescriptions, a lidocaine infusion, and a ketorolac injection. While Magnuson experienced a "varying level of relief from the injections," neither those nor the physical therapy provided "lasting relief." And her reported pain level remained at eight out of ten.

¶17 **Dr. Theiler (Stage Medical Consultant).** Dr. Anthony Theiler evaluated Magnuson on behalf of Stage in November 2017 and again in April 2021. After the later evaluation, he opined that Magnuson's work accident medically caused "only a gluteal contusion that had resolved." He further concluded that

Magnuson sustained no permanent impairment due to the accident and, thus, no ongoing medical care was necessary for the injury. Dr. Theiler explained, "Magnuson's pre-existing conditions, including degenerative disc disease in her lumbar spine, warranted a 5% whole-person impairment rating on a non-industrial basis, but the work accident did not contribute to or aggravate such conditions." He noted that "Magnuson's medical records showed that she maintained an elevated level of pain complaints leading up to the accident and continuing long after . . . with no significant improvement of symptoms with any of the various treatments or interventions she underwent."

¶18 **Drs. Hicken.** In September 2021, Magnuson met with Dr. Gregory Hicken, an orthopedic surgeon, and Dr. Jeffrey Hicken, a chiropractor, for "a permanent impairment rating evaluation." The report listed her pain as a level eight to nine out of ten, with low-back pain and swelling and numbness in her feet. The doctors' report stated that her MRI results from 2015 to 2017 "showed worsening of spinal stenosis with greater neuroforaminal narrowing in her lumbar spine." The report concluded that Magnuson "qualified for a 17% whole-person impairment rating without apportionment for her work injury based on her persistent low-back symptoms." The report emphasized that the doctors reviewed "more than 400 pages of medical records" as part of Magnuson's medical history, but the report did not mention Magnuson's chronic low-back complaints, Sweet's syndrome, or other diagnoses she had prior to the accident. The Appeals Board pointed out that the report instead relied on Magnuson's denial of "'any prior work-related or significant low back injury . . . ' as the basis for attributing the entire impairment rating to work-related factors."

Procedural History

¶19 In December 2020, Magnuson filed an application for hearing with the Utah Labor Commission (Commission). She alleged that the work accident caused injury to her spine, left hip,

sacrum, and buttocks, which caused back and hip pain that had not "improved or subsided" despite treatment. Magnuson sought permanent total disability compensation, temporary total disability compensation until medical stability, or permanent partial disability compensation.

¶20 In October 2021, the case proceeded to a hearing before an ALJ. The ALJ issued an interim order and referred the case to a medical panel (Panel) for consideration in accordance with the applicable provision of the Utah Administrative Code. *See* Utah Admin. Code R602-2-2.

¶21 The Panel consisted of two medical doctors—an orthopedic surgeon and a family medicine practitioner. The Panel "carefully reviewed" all of Magnuson's medical records from both before and after the accident, interviewed and examined Magnuson, and relied on the ALJ's findings of fact from the interim order. The Panel concluded in its report that as a result of the accident, Magnuson (1) "sustained contusions to her right arm and left buttock, including a hematoma," and (2) was "noted to have sacral tenderness and a possible fracture . . . evidenced by tenderness . . . and localized swelling . . . that expectantly resolved over the following few weeks." When asked whether the accident lit up, combined with, contributed to, accelerated, prolonged, worsened, or made symptomatic a preexisting condition, the Panel concluded that Magnuson had a "preexisting condition of musculoskeletal/joint inflammation associated with Sweet's syndrome that was causing . . . lower extremity and back pain" and had been receiving ongoing treatment for four years prior to the industrial incident. The Panel also highlighted that examinations after her work injury revealed "degenerative disc and facet changes in the lumbosacral areas," which would "certainly have predated her industrial mishap." The report also noted that Magnuson received "extensive" treatment of leg, thigh, and back pain before the accident in an effort to relieve "chronic inflammatory joint pain." The Panel concluded,

> It is difficult to interpret which joint pain was suffered because of chronic inflammation and which pain was superimposed by her industrial accident. As her pain intensity was at level 8/10 in November 2014 prior to her injury, and was requiring additional pain medication, it becomes very difficult to differentiate it from the claimed 8/10 level of pain afterwards, following the 2014 accident.
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> . . . .
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> [T]he problems caused by the industrial accident: right arm contusion, left superior buttock contusion, and sacral contusion, combined with her previous inflammatory problem of the back and lower extremities to cause a constellation of symptoms including, low back pain, . . . sacral swelling, . . . and lumbar pain . . . . The manifestation of the problems caused by the industrial accident was left thigh and hip pain and right arm pain, mild sacral pain which were temporary. No sacral fracture was identified and these problems resolved as expected in up to three months. The remaining complaints, problems, and treatments have been caused by her chronic inflammatory condition.

The Panel determined that Magnuson became medically stable, or in other words had reached maximum medical improvement, by March 31, 2014. Magnuson filed two objections to the Panel's report, requesting (1) that the Panel clarify how it separated injuries and conditions related to the accident from those that were preexisting and (2) that the Panel "be directed to disregard" the medical reports from Dr. Theiler due to alleged errors they contained and then issue a new report because the Panel may have been "improperly influenced" by Dr. Theiler's report.

¶22 In April 2022, the ALJ issued her final order and denied Magnuson's objections. The ALJ first determined that the Panel "relied on objective evidence and clearly set[] out its opinions." Therefore, there was no ambiguity in the report in need of correction. Second, she concluded that there was no basis to strike Dr. Theiler's report. The ALJ determined that Magnuson established medical causation for the "left thigh, hip, right arm, and mild sacral pain" she suffered from the accident and that she reached medical stability from these conditions on March 31, 2015. The order dismissed outright Magnuson's claims for permanent partial and total disability compensation as the ALJ found there were no permanent injuries or functional restrictions as a result of the accident. The ALJ also dismissed Magnuson's claim for temporary total disability because Magnuson worked through May 26, 2015, and reached medical stability on March 31 of that same year.

¶23 Magnuson challenged the ALJ's order and asked the Appeals Board to review the denial. The Appeals Board issued an order modifying the ALJ's decision. The order upheld the ALJ's decision except for extending the date of medical stability, or "maximum medical improvement," to March 31, 2016—a year later than the ALJ's determination. The Appeals Board reasoned that the evidence showed a "discrete change in . . . Magnuson's condition following" the treatment she received from Dr. Vroenen, at which point Dr. Vroenen pronounced Magnuson to reach maximum improvement on March 31, 2016. The Appeals Board found this evidence was "a more compelling indicator of medical stability." Magnuson once again raised critiques of the Panel's conclusions, particularly any reliance on Dr. Theiler's opinion and the use of the term "independent medical evaluation" by Stage's hired medical examiners. The Appeals Board determined these critiques were "unavailing" and dismissed them. Due to the change in date of medical stability, the Appeals Board determined that Magnuson was entitled to temporary total disability from June 1, 2015, to March 31, 2016.

¶24 Stage petitions for judicial review, and Magnuson cross petitions for judicial review.

ISSUES AND STANDARDS OF REVIEW

¶25 Stage argues that the Appeals Board erred in setting aside the ALJ's determination that Magnuson reached medical stability by March 31, 2015.[3] The Appeals Board's finding on medical stability is a factual determination, *Waste Mgmt. & Indem. Ins. of N. Am. v. Labor Comm'n*, 2012 UT App 339, ¶ 5, 293 P.3d 384, which

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3. In this proceeding for judicial review, Stage also argues that the Appeals Board erred by ordering benefits to Magnuson without crediting Stage for any benefits it may have already paid to Magnuson, thus resulting in her receiving a double benefit. Magnuson concedes that "to the extent the Appeals Board's order required duplicate payment of . . . benefits it should be set aside." We do not believe it is necessary for our court to address this issue, as it can still be fully resolved between the parties in further administrative proceedings. The Appeals Board's order states that Stage is to "pay temporary total disability compensation to . . . Magnuson for the period of June 1, 2015, to March 31, 2016, a period of 43.43 weeks, at a rate of $390 per week for a total of $16,937.70." There is still plenty of room within the order for Stage to, for example, subtract any amount that has already been paid from the required total when complying with the order. Therefore, if the order does in fact require Stage to pay double benefits, the Appeals Board may address that issue how it sees fit.

We note that on the facts of the record, it does not appear that there will even be an issue of double payments. The Appeals Board found that Stage paid Magnuson "temporary benefits" until June 1, 2015. The order requires payment of benefits starting on June 1, 2015, which would not create any overlap in benefit payments. If the date from the court's findings is incorrect, Stage should have addressed that mistake in its briefing, which it did not do.

we will only disturb "if it is not supported by substantial evidence when viewed in light of the whole record," *Zepeda v. Labor Comm'n*, 2021 UT App 140, ¶ 20, 504 P.3d 712 (cleaned up).

¶26 Magnuson raises several issues in her cross-petition for judicial review. First, she asserts that the Appeals Board applied the incorrect legal standard for medical causation. "Whether the Commission has applied the correct legal standard in reaching its medical causation finding is a legal question, which we review for correctness." *Cox v. Labor Comm'n*, 2017 UT App 175, ¶ 12, 405 P.3d 863 (cleaned up).

¶27 Second, she asserts that the Appeals Board's determination that the accident did not in any way aggravate, worsen, or accelerate Magnuson's preexisting conditions is not supported by substantial evidence. "[A] challenge to an administrative agency's finding of fact is reviewed for substantial evidence." *Provo City v. Utah Labor Comm'n*, 2015 UT 32, ¶ 8, 345 P.3d 1242.

¶28 Third, she asserts that the Appeals Board erred when it denied Magnuson's objection and did not instruct the Panel that Stage's medical examiners were not independent. We review such decisions "under an abuse of discretion standard, providing relief only if a reasonable basis for that decision is not apparent from the record." *Bade-Brown v. Labor Comm'n*, 2016 UT App 65, ¶ 8, 372 P.3d 44 (cleaned up).[4]

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4. As Stage points out, Magnuson's briefs did not abide by our rules of appellate procedure, which require the party to provide a citation to the record for each issue "showing that the issue was preserved for review . . . or a statement of grounds for seeking review of an issue not preserved." Utah R. App. P. 24(a)(5)(B); *see also id.* R. 24A(c). Furthermore, Magnuson makes no effort in her reply brief to address this issue, even when identified and highlighted by Stage. Magnuson's failure is grounds enough for

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ANALYSIS

I. Date of Medical Stability

¶29 As discussed, we will overturn a factual determination of the Appeals Board only where no substantial evidence exists to support the decision. *See Zepeda v. Labor Comm'n*, 2021 UT App 140, ¶ 20, 504 P.3d 712. This is a relatively high bar for an appellant to meet. While "substantial evidence is more than a mere scintilla of evidence," it is still "something less than the weight of the evidence." *Cook v. Labor Comm'n*, 2013 UT App 286, ¶ 14, 317 P.3d 464 (cleaned up). A decision by the Appeals Board "meets the substantial evidence test when a reasonable mind might accept as adequate the evidence supporting the decision." *Id.* (cleaned up).

¶30 Stage and Magnuson each argue that the Appeals Board's decision was not supported by substantial evidence. Stage argues that the evidence supports the earlier 2015 date recommended by the Panel and adopted by the ALJ. Magnuson argues that the Appeals Board "ignored" evidence supporting a "longer period of medical instability and a greater permanent impairment rating." To support their arguments, the parties each outline in their briefing significant variations in the evidence and medical reports. We acknowledge that there is evidence on both sides of this issue—but that fact does not necessitate reversal. *See Hutchings v. Labor Comm'n*, 2016 UT App 160, ¶ 30, 378 P.3d 1273 ("We will not reweigh the evidence and independently choose which inferences we find to be most reasonable; rather, we defer to the Commission's findings when reasonably conflicting views arise, as it is the Commission's province to draw the inferences and resolve these conflicts." (cleaned up)). All that is required here is substantial evidence that "a reasonable mind might accept as adequate the evidence supporting the decision." *Id.* (cleaned

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us to dismiss her second and third claims as unpreserved; nevertheless, we will address the claims on the merits as at least some aspects of them do appear to be preserved.

up). That does not mean that the decision must be the only possible conclusion someone could reach based on the evidence—rather, it means only that the decision must be a reasonable one. In some cases, there may be more than one possible reasonable conclusion supported by the evidence.

¶31 We conclude—just as the Appeals Board did—that a reasonable mind very well might accept as adequate the evidence supporting a change to the date of medical stability. In its order, the Appeals Board extended the date of medical stability in the ALJ's order from March 31, 2015, to March 31, 2016. The ALJ had relied on the recommendation of the Panel when it concluded that the 2015 date was appropriate. In contrast, the Appeals Board determined that "other medical evidence [was] more persuasive than the [Panel's] opinion." The Appeals Board reasoned that Dr. Vroenen's report in Magnuson's medical record showed "a discrete change" in her condition after undergoing Dr. Vroenen's targeted treatments of her sacral symptoms. These treatments included steroid patches that provided "excellent pain control." Dr. Vroenen concluded that Magnuson "reached maximum improvement in a treatment note dated March 31, 2016." The Appeals Board found this evidence was "a more compelling indicator of medical stability" than the Panel's "general expectation for the condition to have resolved within three months of the injury without specific medical evidence to support such date." When looking at Magnuson's medical record, this conclusion is one that a reasonable person very well may determine is adequately supported. Thus, because the Appeals Board's decision to modify the date of medical stability was a reasonable conclusion supported by substantial evidence, we will not disturb it.

II. Applicable Legal Standard for Medical Causation

¶32 Under the Utah Workers' Compensation Act, an employee injured "by accident arising out of and in the course of the employee's employment" is entitled to "compensation for loss

sustained on account of the injury." Utah Code § 34A-2-401(1). "We have recognized that this statute creates two prerequisites for a finding of a compensable injury. First, the injury must be 'by accident.' Second, the language 'arising out of and in the course of employment' requires . . . a causal connection between the injury and the employment." *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 44, 308 P.3d 461 (cleaned up) (quoting Utah Code § 34A-2-401(1)). The first prerequisite is not at issue here, so we turn directly to the second.

¶33 To establish the required causal connection, a party must show that the workplace's "conditions or activities . . . were both the medical cause and the legal cause of [the] injury." *Id.* ¶ 45. The issue raised by Magnuson concerns only the medical cause of her injury.

¶34 Magnuson argues that the Appeals Board applied the incorrect legal standard to its medical causation analysis. She contends that the Appeals Board should have applied the two-part test for medical causation laid out in *Cox v. Labor Commission*, 2017 UT App 175, 405 P.3d 863. To recover under *Cox*, the claimant must show that

> (1) the industrial accident contributed in any degree to the claimant's condition, such as by aggravating a preexisting condition, and (2) the aggravation is permanent, i.e., the claimant's medical condition never returned to baseline, meaning the claimant's condition immediately before the accident.

Id. ¶ 20. However, in *Morris v. Labor Commission*, 2021 UT App 131, 503 P.3d 519, our court clarified that health issues and developments which prevent a claimant from returning to baseline but are exclusively the result of a preexisting condition rather than industrial factors do not entitle the claimant to recovery. *Id.* ¶ 21.

¶35 Magnuson misconstrues the Appeals Board's analysis. The Appeals Board did in fact explicitly lay out both the test from *Cox* and the clarification from *Morris*. It then correctly applied both these legal standards to Magnuson's case—though it admittedly could have done so a bit more clearly. The Appeals Board determined "the medical evidence show[ed] that [Magnuson] was experiencing significant and chronic pain for years leading up to the 2014 work accident and that she continued to experience the same symptoms for several years after the accident." The Appeals Board rejected Magnuson's theory that the "effects of the work injury combined with her pre-existing condition such that her subsequent complaints" were related to the accident. After "carefully" reviewing the Panel's reasoning, the Appeals Board concluded that Magnuson's current condition was "separate from her work injuries and not causally connected to the work accident." Thus, although it did not explicitly say so, the Appeals Board determined that Magnuson did not satisfy the first step of *Cox* as her current condition was due to her preexisting conditions rather than work-related injuries. Magnuson even concedes in her brief that the Appeals Board concluded "that the work accident medically caused acute contusions to . . . Magnuson's right arm, back, left buttock, and sacrum, which returned to their baseline status."[5] These injuries are the only injuries that the Appeals Board determined were a result of the accident and are—as determined by the Panel and adopted by the Appeals Board—all unrelated to her preexisting conditions. Magnuson further

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5. We acknowledge that the Appeals Board confusingly used the phrase "returned to their baseline" when it did not need to move to step two of the *Cox* analysis. However, when viewed in the context of the Appeals Board's order, it is clear it was discussing an acute injury rather than aggravation of a preexisting condition. Furthermore, even if this were a discussion of a preexisting condition, the Appeals Board determined that the condition had returned to baseline, which would satisfy the second step of *Cox*; thus, Magnuson's claim would still fail.

concedes this point when she states in her brief, "The Appeals Board found that the industrial accident in no way caused any degree of worsening or progression of . . . Magnuson's pre-existing condition."

¶36 Magnuson argues that this conclusion conflicts with the Appeals Board's adoption of the Panel's statement that these injuries "combined" with her preexisting conditions "to cause a constellation of symptoms." But this statement from the Panel was a global one explaining that Magnuson had a "constellation" or myriad of health conditions, which is not the same as saying that the preexisting conditions were aggravated or worsened by the accident. While the panel inventoried her chronic conditions, it specifically opined that the only "manifestation of the problems caused by the industrial accident was left thigh and hip pain and right arm pain, mild sacral pain," all of which it explained were "temporary."

¶37 Accordingly, we reject Magnuson's assertion that the Appeals Board applied the wrong standard.

III. Preexisting Conditions

¶38 Magnuson next argues that even if the Appeals Board "adequately addressed the medical causation requirements," substantial evidence does not support the "factual determination that . . . Magnuson's pre-existing conditions were not aggravated or worsened to any degree under the first step of *Cox*." *See Cox v. Labor Comm'n*, 2017 UT App 175, ¶ 20, 405 P.3d 863. As we have noted, the Appeals Board's factual determinations are given a high level of deference because the substantial evidence test is met "when a reasonable mind might accept as adequate the evidence supporting the decision." *Cook v. Labor Comm'n*, 2013 UT App 286, ¶ 14, 317 P.3d 464 (cleaned up). Our court will not "reweigh the evidence and independently choose which inferences we find to be most reasonable; rather, we defer to the Commission's findings when reasonably conflicting views arise." *Hutchings v. Labor*

Comm'n, 2016 UT App 160, ¶ 30, 378 P.3d 1273 (cleaned up). Magnuson's argument fails as there are no grounds to overturn the strong deference given to the Appeals Board's factual determination.

¶39 Magnuson argues that the Appeals Board relied entirely on the Panel's report but that the report does not support a conclusion that the "accident in no way caused any degree of worsening or progression" of her preexisting conditions. To support this contention, Magnuson misquotes the Panel's response to this question: did the accident "light up, combine with, contribute to, accelerate, prolong, worsen, or make symptomatic a preexisting condition to any degree?" Among other errors, Magnuson adds the adverb "very" to the Panel's answer that it "is difficult to interpret which joint pain was suffered because of chronic inflammation and which pain was superimposed by [Magnuson's] industrial accident." The Panel continued that because Magnuson's "pain intensity was at a level 8/10 in November 2014 prior to her injury, and was requiring additional pain medication, it becomes very difficult to differentiate it from the claimed 8/10 level of pain afterwards, following the 2014 accident." Magnuson argues that the Panel noted both that at her first examination post-accident she claimed her "low back hurt the most" and that the pain continued while her other symptoms, i.e., the contusions, resolved. Magnuson contends that the Panel provided no information as to whether it was able to differentiate Magnuson's post-accident and preexisting conditions nor what the cause was of what it interpreted as the progression of her preexisting conditions.

¶40 But this is not an accurate characterization of the Panel's report. The Panel did in fact explain how it differentiated between Magnuson's conditions. The Panel reasoned that the "fact that her pain, though somewhat migratory, has been persistent, and is unrelenting, supports progression of her chronic inflammatory disorder, Sweet's syndrome, as the proximate cause of her persistent pain and functional complaints." The Panel

emphasized that Magnuson had "suffered similar problems for four years prior" to the accident and that after the injury, she had received treatments for ailments such as sacroiliitis, "lumbar radiculopathy, . . . hip pain and generally inflammation" and had "never reduced her pain below level 8/10, the level of chronic inflammatory pain prior to injury." These symptoms are separate and apart from the contusions the Panel clearly marked as the only injuries resulting from the work accident. Furthermore, the Appeals Board's reliance on the Panel's report does not require the Panel to determine the cause of any progression in her preexisting conditions, only that the progression was not a result of the accident. Even if there is conflicting evidence here, which we are not convinced there is, we do not reweigh the evidence but defer to the Appeals Board's findings, which appropriately relied on the Panel's report. *See id*.

¶41 To further her argument that the Appeals Board erred, Magnuson attempts at length to educate us on the definition of and symptoms associated with Sweet's syndrome.[6] Magnuson claims that the Panel's conclusion that her current symptoms and limitations are a result of Sweet's syndrome is further evidence of the unreliability of the report because the disease's symptoms manifest differently than described by the Panel. Magnuson took

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6. Magnuson appears to also argue that the Panel members were unqualified to opine on the role Sweet's syndrome played in Magnuson's health. Magnuson contends that because neither of the two Panel members specialized in dermatology or had related experience, they were unqualified to offer opinions on the effect Sweet's syndrome had on Magnuson's health. Magnuson provides us with no record citation where she raised this issue below. Objection to a medical panel's report, including a complaint against their competency, must be made within 20 days of the report being served on the parties. Utah Adim. Code R602-2-2(B). This argument is therefore unpreserved, and we will not address it further.

a similar approach with the Appeals Board. The Appeals Board correctly noted that the information Magnuson provided was of "little evidentiary value," and the Appeals Board instead relied on the Panel's explanation supported by the treatment notes of numerous treating physicians and examiners—including those Magnuson hired. Moreover, the medical information Magnuson provided and opined on in her brief is inappropriate for this court to consider because she provided it through briefing by her counsel rather than through the medical reporters provided to the Appeals Board. *Cf. Hymas v. Labor Comm'n*, 2008 UT App 471, ¶ 11, 200 P.3d 218 (declining to disturb the Commission's decision to exclude lay testimony offered in support of medical causation).

¶42 Thus, Magnuson's arguments are unavailing, and her claim fails as the Appeals Board's decision is supported by substantial evidence.

IV. Denial of Magnuson's Objections

¶43 Magnuson's final argument is that the Appeals Board should have allowed her objections to Stage's medical examiners labeling themselves as "independent" and should have instructed the Panel that the reports from those examiners were not in fact independent. Magnuson took particular issue with Dr. Theiler's report.

¶44 Magnuson argues that her objection should have been sustained because, under rule 35 of the Utah Rules of Civil Procedure, use of the phrase "independent medical examiner" (IME) is discouraged. *See* Utah R. Civ. P. 35 advisory committee's note to 2017 amendment ("The parties and the trial court should refrain from the use of the phrase 'independent medical examiner,' using instead the neutral appellation 'medical examiner,' 'Rule 35 examiner,' or the like."). Magnuson contends that because the Commission has no specific rules regarding this issue, rule 35 applies. She cites *Barker v. Labor Commission*, 2023 UT App 31, 528 P.3d 1260, *cert. denied*, 534 P.3d 751 (Utah 2023), to

support this conclusion. *Id.* ¶ 11 (holding that rule 35's recording provision applied because it was not in conflict with the Commission's rules, which are silent on the issue). However, this reasoning does not compel a change in the result here.

¶45 Magnuson is correct that an IME is far from independent due to the conflict of interest arising between the medical examiners and the insurance companies paying their bills. However, in the context of Commission cases, as recognized by Utah caselaw, this is a very common term—one any member of an experienced medical panel would be familiar with and understand the complexities of. Our supreme court has explained that "the purpose of an IME, in the workers' compensation setting, is to provide the carrier, and potentially the relevant fact finder, with independent information on the claimant's injuries." *Kirk v. Anderson*, 2021 UT 41, ¶ 13, 496 P.3d 66. The court continued that IMEs "play a vital role in the overall administration of health care benefits and workers' compensation benefits" as IMEs offer "an unbiased opinion assessing specifically whether the patient's work-related injury requires treatment, while the injured person's own health care provider is able to administer care without influence by insurance companies." *Id.* ¶ 23. Through IMEs, "patients enjoy unbiased care while the insurance companies still benefit from the opinions of medical professionals." *Id.*[7]

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7. Magnuson argues that this language from *Kirk v. Anderson*, 2021 UT 41, 496 P.3d 66, in fact supports her argument as the case addressed whether a physician-patient relationship existed between an IME and the examined worker. *Id.* ¶ 10. The court concluded that to "impose a categorical duty of care running from the independent medical examiner to the subject would put the examiner in an untenable position, if not create an outright conflict of interest" due to the independent medical examiner's contractual relationship with the employer or insurer. *Id.* ¶ 25. (continued…)

¶46 In denying Magnuson's objection, the Appeals Board correctly pointed to the fact that while these IMEs were completed on behalf of Stage and were "therefore not independent," "this misnomer is well-recognized in the workers' compensation setting." We agree with the Appeals Board's reasoning that "there is no indication that the veteran members of the [Panel] were confused" by the use of the label "independent." The difference between Magnuson's treating and consulting physicians and those retained by Stage "was clear from the records" the Panel reviewed. Magnuson attempts in her reply brief to point us to evidence in the record supporting the Panel's alleged confusion over the role of Stage's medical examiners. But we find this evidence both unconvincing and inappropriately raised for the first time in her reply brief.

Magnuson argues that this reasoning—the conflict of interest—is exactly why Dr. Theiler and others hired by Stage were incorrectly labeled as "independent." However, the court's reasoning in *Kirk* continues that it can "safely say that an independent medical examiner who has otherwise conducted an [examination] in good faith and has met their standard of care has fulfilled their duty, regardless of whether the results were favorable to the insurer or to the . . . subject." *Id.* Thus, in meeting the standard of care, the independent medical examiner must reach a conclusion regardless of, or in other words, independent of, which party those results favor. We therefore see *Kirk* as helpful and applicable in making our determination that the Appeals Board correctly overruled Magnuson's objection to use of the word "independent." Furthermore, to the extent that true independence is impossible due to this conflict of interest, use of the term IME is one which members of a medical panel would be well-versed in. This term would not cause confusion for seasoned panel members familiar with the nature of such examinations.

¶47 Thus, the Appeals Board did not abuse its discretion when it denied Magnuson's objections.[8]

CONCLUSION

¶48 For the foregoing reasons, we conclude that the Appeals Board's order modifying the ALJ's decision was sound and the Appeals Board did not abuse its discretion by denying Magnuson's objections. We, therefore, decline to disturb the Appeals Board's order.

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8. Still, we recognize that the reasons that the advisory committee gave for moving away from identifying adverse medical exams as independent, *see* Utah R. Civ. P. 35 advisory committee's note to 2017 amendment, may also be relevant here, although the chance of prejudice is far more removed in a proceeding before an ALJ or the Commission than it would be before a jury. The Commission might be well-served to adopt a rule using different nomenclature for such exams.

Rule 35. Physical and mental examination of persons.

Effective: 5/1/2017

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing must be served on a nonparty to be examined. The order must specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination must disclose a detailed written report of the examiner within the shorter of 60 days after the examination or 7 days prior to the close of fact discovery, setting out the examiner's findings, including results of all tests performed, diagnoses, and other matters that would routinely be included in an examination record generated by a medical professional. If the party requesting the examination wishes to call the examiner as an expert witness, the party must disclose the examiner as an expert in the time and manner as required by Rule 26(a)(4), but need not provide a separate Rule 26(a)(4) report if the report under this rule contains all the information required by Rule 26(a)(4).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule 37(b), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

The committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination.

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations.

A report must be provided for all examinations under this rule. The Rule 35 report is expected to include the same type of content and observations that would be included in a medical record generated by a competent medical professional following an examination of a patient, but need not otherwise include the matters required to be included in a Rule 26(a)(4) expert report. If the examiner is going to be called as an expert

witness at trial, then the designation and disclosures under Rule 26(a)(4) are also required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the expert's report or deposition under Rule 26(a)(4)(C). The rule permits a party who furnishes a report under Rule 35 to include within it the expert disclosures required under Rule 26(a)(4) in order to avoid the potential need to generate a separate Rule 26(a)(4) report later if the opposing party elects a report rather than a deposition. But submitting such a combined report will not limit the opposing party's ability to elect a deposition if the Rule 35 examiner is designated as an expert.