

MEMORANDUM

TO: SUZETTE FARMER AND ALLYSON PETTLEY, DOPL BUREAU MANAGERS; MARK STEINAGEL, DOPL DIRECTOR

FROM: DAN LAU, ASSISTANT ATTORNEY GENERAL

DATE: TUESDAY, SEPTEMBER 7, 2016

RE: INFORMAL LEGAL OPINION AND CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE PROTECTED DOCUMENT

INTRODUCTION

There has been ongoing conflict between chiropractors and physical therapists over Utah Admin. Rule R156-24b-102(5), which defines “joint mobilization” as “active and passive movements of the joints of a patient, including the spine, to increase the mobility of joint systems; but, *does not include specific vertebral adjustment and manipulation of the articulation of the spine by those methods or techniques which are generally recognized as the classic practice of chiropractic.*” The chiropractors believe the physical therapists are ignoring the agreed upon language in the administrative rule by performing vertebral spine adjustments that are generally recognized as the classic practice of chiropractic. The physical therapists believe that thrust adjustments/joint mobilizations are techniques that PT’s have been using for decades and are techniques that are grounded in traditional medical and physical therapy philosophies and not from a classic chiropractic theory perspective. Lobbyists for both professions have argued their positions with the Division, and DOPL has requested some informal legal advice from the AG’s Office on this issue.

ISSUE PRESENTED

Does the definition of “joint mobilization” in Utah Admin. Rule R156-24b-102(5) limit

the legal scope of a physical therapist's ability to perform a thrust adjustment/joint mobilization?

INFORMAL LEGAL OPINION

Consistent with the analysis set forth below, it is our informal legal opinion that the definition of "joint mobilization" in Utah Admin. Rule R156-24b-102(5) does not effectively limit the legal scope of a physical therapist's ability to perform a thrust adjustment/joint mobilization.

APPLICABLE CASE LAW

It is a well-recognized and a long standing principle of administrative law that "an agency's rules must be consistent with its governing statute." *Sanders Brine Shrimp v. Utah State Commission*, 846 P.2d 1304, 1306 (Utah 1993); accord *Rocky Mountain Energy v. Utah State Tax Commission*, 852 P.2d 284, 287 (Utah 1993) (holding that "[r]ules are subordinate to statutes and cannot confer greater rights or disabilities"). In *Draughon v. Department of Financial Institutions, State of Utah*, 975 P.2d 935, 937 (1999), the Utah Supreme Court held that an administrative rule that conflicts with the design of a statute would in effect amend the statute and should be invalidated.

With respect to the governing statute, it is a well-established principle of statutory construction that "[w]hen interpreting statutes, we first look to the plain language with the primary objective of giving effect to the legislature's intent." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 164 P.3d 384, 396 (Utah 2007). There is a presumption that the legislature used each word in a statute advisedly and in accordance with its ordinary and accepted meaning. *State v. Barrett*, 127 P.3d 682, 689 (Utah 2005). Additionally, statutes should be read as a whole, and their provisions interpreted in harmony with related

provisions and statutes. *Miller v. Weaver*, 66 P.3d 592, 597 (Utah 2003).

When the language of the statute is plain, other interpretive tools are not needed. *Adams v. Swensen*, 108 P.3d 725, 727 (Utah 2005). However, if the language is ambiguous, the court may look beyond the statute to legislative history and public policy to ascertain the statute's intent. *Utah Pub. Employees Ass'n v. State*, 131 P.3d 208, 221 (Utah 2006) (Parrish, J., concurring).

Further, the omission of a certain word or term in a statute can be significant in determining the legislative intent of a statute. *Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*, 361 P.3d 91, 102-103 (Utah 2015). Citing *Biddle v. Wash. Terrace City*, 992 P.2d 875 (Utah 1999), the Utah Supreme Court stated, "In evaluating the language of a statute, we have long held that omissions in statutory language should be taken note of and given effect." *Flowell Elec. Ass'n* at 103; accord *Riggs v. Georgia-Pacific LLC*, 345 P.3d 1219, 1222 (Utah 2015) ("[W]e seek to give effect to omissions in statutory language by presuming [them] purposeful.")

GOVERNING AND RELEVANT STATUTES AND ADMINISTRATIVE RULES

Utah Code Ann. § 58-24b-102(15)(d) states that "therapeutic intervention" includes manual therapy, which includes joint mobilization, as defined by the division, by rule. The administrative rule that defines joint mobilization, Utah Admin. Rule R156-24b-102(5), states that "joint mobilization is the active and passive movements of the joints of a patient, including the spine, to increase the mobility of joint systems; but, does not include specific vertebral adjustment and manipulation of the articulation of the spine by those methods or techniques which are generally recognized as the classic practice of chiropractic."

Utah Code Ann. § 58-24b-402(1)(d) states that a licensed physical therapist shall perform

physical therapy interventions that require immediate and continuous examination and evaluation throughout the intervention. Utah Code Ann. § 58-24b-502(2) defines unprofessional conduct on the part of a physical therapist to include a failure by a licensee to confine the licensee's conduct to that which is within the scope of practice permitted under this chapter or rule.

Utah Code Ann. § 58-73-102(1) of the Utah Chiropractic Physician Practice Act defines the adjustment of the articulation of the spinal column as "performance by a chiropractic physician by the use of passive movements directed toward the goal of restoring joints to their proper physiological relationship of motion and related function, releasing adhesions, or stimulating joint receptors using one or more of four listed techniques." Utah Admin. Rule R156-73-102(5) of the Utah Chiropractic Physician Practice Act Rule defines joint mobilization as "passive movements done by another person, applied as a series of stretches or repetitive movements to individual or combinations of joints, not to exceed the end range of motion and stopping short of the articular elastic barrier."

LEGAL ANALYSIS

I. *Does the fact that R156-24b-102(5) actually defines the term joint mobilization conflict with its governing statute? No.*

The fact that Utah Admin. Rule R156-24b-102(5) actually defines what joint mobilization is does not conflict with its governing statute, Utah Code Ann. § 58-24b-102(15)(d), which states that joint mobilization will be defined by the division, by rule.

II. *Does R156-24b-102(5) confer greater rights or disabilities to physical therapists than was intended by the governing statute? Yes.*

Where this administrative rule becomes problematic is in the area of conferring greater

disabilities to physical therapists than the Physical Therapist Practice Act intended. Utah Code Ann. § 58-24b-102(10)(a)(v) states that physical therapy means, among other things, treating or alleviating a physical impairment by designing, modifying, or implementing a therapeutic intervention. It does not state that it means implementing a therapeutic intervention up to a subjective boundary line of when the classic practice of chiropractic starts. Utah Code Ann. § 58-24b-102(10)(b) specifically lists five things that physical therapy does not include (diagnosing disease, performing surgery, performing acupuncture, taking x-rays and prescribing or dispensing drugs). Noticeably absent from this list is joint mobilization or thrust adjustments. Further, Utah Code Ann. § 58-24b-402(1)(d) states that a licensed physical therapist shall perform physical therapy interventions that require immediate and continuous examination and evaluation throughout the intervention. It does not state that a licensed physical therapist shall perform interventions up to a subjective boundary line of when the classic practice of chiropractic starts. If R156-24b-102(5) were read in a manner that prohibited physical therapists from doing joint mobilizations that were generally recognized as the classic practice of chiropractic, the rule would conflict with Utah Code Ann. § 58-24b-102(10)(a) and (b); and Utah Code Ann. § 58-24b-402(1).

III. *Is the language in R156-24b-102(5) clear and unambiguous?* No.

Further complicating this issue is the subjectivity of what a joint mobilization procedure is. The chiropractors define this procedure as *passive* movements, applied as a series of stretches or repetitive movements to individual or combinations of joints, not to exceed the end range of motion and stopping short of the articular elastic barrier. Utah Admin. Rule R156-73-102(5). Physical therapists define the procedure as *active and passive movements* of the joints of a

patient, including the spine, to increase the mobility of joint systems. Utah Admin. Rule R156-24b-102(5). Of course, the most vexing portion of this administrative rule is the section which includes the “classic practice of chiropractic” language in the joint mobilization definition. Instead of clarifying the rule, this language actually muddies it up even more, adding differing interpretations of what the “classic practice of chiropractic” is and more layers of subjectivity to this issue.

IV. *How should the Division resolve this problem with the ambiguous language in R156-24b-102(5)? By applying established principles of statutory construction and public policy.*

In 2005, the Utah Supreme Court held in *State v. Barrett* that the legislature used each word in a statute advisedly and in accordance with its ordinary and accepted meaning. 127 P.3d 682, 689. The contested language in R156-24b-102(5) does not say physical therapists shall not perform joint mobilizations. It states that joint mobilizations do not include the *specific* vertebral adjustment and manipulation of the articulation of the spine by those methods or techniques *which are generally recognized as the classic practice of chiropractic*. That language could be interpreted to mean that physical therapists can perform joint mobilizations that are similar to chiropractic vertebral adjustments but are not the specific adjustments that are recognized as the classic practice of chiropractic. Further, the Chiropractic Physician Practice Act defines the adjustment of the articulation of the spinal column as performance by a chiropractic physician by the use of *passive movements* directed toward the goal of restoring joints to their proper physiological relationship of motion and related

function. Physical therapists define joint mobilization as *active and passive movements* of the joints of a patient. The differences between the definitions for vertebral adjustments and joint mobilizations again support a conclusion that physical therapists can perform joint mobilizations that are similar to chiropractic vertebral adjustments but are not the specific adjustments that are recognized as the classic practice of chiropractic.

A 2006 concurring opinion in the *Utah Pub. Employees Ass'n* case stated that a court may look to public policy arguments to ascertain a statute's (in this case, an administrative rule's) meaning. 131 P.3d 208, 221. In *Adams v. Swenson*, the Utah Supreme Court held that its "clear preference is the reading that reflects sound public policy, as we presume that must be what the legislature intended." 108 P.3d 725, 728 (2005). There is a strong public policy argument that supports the proposition that physical therapists should be allowed to perform joint mobilizations because prohibiting physical therapists from performing certain types of joint mobilizations could (a) eliminate patient choice, (b) remove competition and (c) ultimately hurt patients. That being the case, it is our informal legal opinion that both professions be permitted to perform joint mobilizations and vertebral adjustments, but that the language in R156-24b-102(5) be changed to define "joint mobilization" as "active and passive movements of the joints of a patient, including the spine, to increase the mobility of joint systems as defined by the APTA." (This change would omit the "classic practice of chiropractic" language from the administrative rule.) This revision

would be consistent with the governing statutes and provide both professions with a clearer distinction between them. This definition would hopefully put an end to the turf war that continues between these two professions, not reduce the professional scope of either profession and, most importantly, continue to allow for patient choice and beneficial competition in the healthcare market place, which ideally would lead to better care for patients.

CONCLUSION

For all of the previously mentioned reasons, it is our informal legal opinion that the definition of "joint mobilization" in Utah Admin. Rule R156-24b-102(5) does not effectively limit the legal scope of a physical therapist's ability to perform a thrust adjustment/joint mobilization.