

1999

Marion Montoya v. Utah Department of Health Division of Health Care Financing : Brief of Appellee

Utah Court of Appeals

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David L. Grindstaff; Attorney for Appellant.

Jean P. Hendrickson; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee.

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MARION MONTOYA,

VS.

Respondent and Appellee.

Priority No. 14

Julia D'Alesandro
Clerk of the Court

MARION MONTOYA,

Petitioner and Appellant,

vs.

UTAH DEPARTMENT OF HEALTH,
DIVISION OF HEALTH CARE
FINANCING,

Respondent and Appellee.

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) **Case No. 990657**
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) **Priority No. 14**
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Appeal from Final Agency Order entered May 24, 1999, by the Director of the Division of Health Care Financing, Utah Department of Health, adopting the Recommended Decision of the administrative law judge to place the Appellant's name on the State Nurse Aid Registry for physical and mental abuse.

Attorneys for Appellee

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MISCELLANEOUS

Utah R. App. P. 24(a) (1999) passim

IN THE UTAH COURT OF APPEALS

MARION MONTROYA,)	
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)	
Petitioner and Appellant,)	Case No. 990657
)	
vs.)	Priority No. 14
)	
UTAH DEPARTMENT OF HEALTH,)	
DIVISION OF HEALTH CARE)	
FINANCING,)	
)	
Respondent and Appellee.)	
)	

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Under Utah Code Ann. § 63-46b-16(1) (1997) “all final agency action[s] resulting from formal adjudicative proceedings” fall under the jurisdiction of either the Supreme Court or the Court of Appeals. Under Utah Code Ann. § 78-2a-3(2)(a) (1997), the Court of Appeals has appellate jurisdiction over this matter.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW
AND STANDARD OF REVIEW**

a. Issues:

1. Whether the agency’s findings were supported by substantial evidence.

2. Whether it was permissible for the ALJ to hear two allegations of abuse at one hearing.

3. Whether this Court should affirm the agency's decision because of Appellant's inadequate briefing.

b. Standard of review:

Issue 1: Agency's findings supported by substantial evidence will be upheld on appeal.

An agency's factual findings will be upheld on appeal if they are supported by substantial evidence based upon the record as a whole. *Zissi v. Utah State Tax Comm'n*, 842 P.2d 848, 852 (Utah 1992). A party seeking to overturn the agency's findings "must *marshall* [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989).

Issue 2: Agency's conduct of hearing permissible; objections to hearing procedures not timely raised are waived on appeal.

If an issue is not timely raised before the administrative agency, the issue is waived on appeal. *Gibson v. Board of Review*, 707 P.2d 675, 677 (Utah 1985); *Brinkerhoff v. Schwendiman*, 790 P.2d 587, 589 (Utah App. 1990). If the issue of hearing two separate incidents at the same scheduled hearing was not raised before the administrative law judge in the hearing below, giving the ALJ an opportunity to consider or correct the alleged error, it may not be raised for the first time on appeal. *Ashcroft v.*

Industrial Comm'n, 855 P.2d 267, 268-69 (Utah App. 1993).

Issue 3: Appellate courts will disregard issues inadequately briefed on appeal.

When appellant's brief is devoid of reasoned analysis and fails to satisfy minimally the requirements of Rule 24 of the Utah Rules of Appellate Procedure, it "has impermissibly shifted the burden of analysis to the reviewing court." *Smith v. Smith*, 1999 UT App 370, ¶¶ 8-9, 995 P.2d 14. Under these circumstances, the reviewing court may disregard or *sua sponte* strike the offending brief. *Id.* at ¶ 8.

DETERMINATIVE PROVISIONS

The interpretation of the following provisions is determinative of, or of central importance to, this Court's consideration of this appeal.

1. **Rule 24, Utah R. App. P. (1999)** (A copy of Rule 24 appears in Addendum A.)

2. **42 C.F.R. § 483.13 (1995). Resident behavior and facility practices.**

(b) Abuse. The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

42 C.F.R. § 483.13 (1995). (A copy of section 483.13 appears in Addendum A.)

3. **42 C.F.R. § 488.301 (1995). Definitions.**

Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

42 C.F.R. § 488.301 (1995). (A copy of section 483.301 appears in Addendum A.)

4. 42 U.S.C.A. § 1395i-3(e) and (g) (Supp. 1998). (A copy of these sections appears in Addendum A.)

STATEMENT OF THE CASE

a. Nature of the case:

The Department of Health, Bureau of Program Certification and Resident Assessment [Department], is responsible for monitoring certified nurse aide programs. 42 U.S.C.A. § 1395i-3(e) (Supp. 1998). Any incidents of suspected abuse against a person while a resident in a certified nursing facility must be investigated by the responsible state agency. 42 U.S.C.A. § 1395i-3(g) (Supp. 1998). Substantiated abuse allegations may be rebutted by the individual at a formal hearing prior to the allegations being formally entered on the Nurse Aide Registry. *Id.* Unrefuted substantiated abuse allegations must be formally entered on the Nurse Aide Registry. 42 U.S.C.A. § 1395i-3(e) (Supp. 1998).

Montoya received written notification dated 9 September 1998 of substantiated abuse allegations and of her right to request a formal hearing to rebut the allegations [R. at 4-5]. Failure to request a hearing and successfully refute the substantiated abuse allegations would result in her name being placed on the Nurse Aide Registry for reported and substantiated abuse of a resident in a long-term care facility. Entry of her name on the Nurse Aide Registry would preclude Montoya from future employment as a nurse aide in any certified nursing facility.

The written notice informed Montoya of an allegation of physical abuse of a resident, reportedly occurring on or about 9 August 1998. At a pre-hearing conducted 14

December 1998 [R. at 12], the administrative law judge, Department representatives and Montoya discussed, among other case management issues, a second allegation of abuse of a resident, which allegedly occurred on or about 8 August 1998 and involved mental abuse of a resident. The case against Montoya concerned her activities on the two dates which caused two reports of substantiated abuse, physical and mental, to be lodged against her.

b. Course of proceedings:

The record reflects a second pre-hearing scheduled for 10 March 1999, with mailed notice to Montoya, her attorney, and Department representatives [R. at 24-25]. Pre-hearing notices inform all parties that the matters to be discussed include (1) the issues, (2) whether the petitioner or the agency wish to amend their requests or notices concerning the issues to be heard, (3) an exchange of witness lists and exhibits, (4) the applicable law and policies, and (5) the setting of the formal hearing. The “Notice of Formal Hearing,” scheduled for 8 April 1999, also was mailed to Montoya, her attorney and the same Department representatives having received the pre-hearing notification [R. at 26-28]. The hearing was conducted as scheduled.

The only issue before the ALJ was whether Montoya mentally or physically abused residents of the nursing facility with the effect that her name would be placed on the Nurse Aide Registry [R. at 47]. The ALJ received testimonial and documentary evidence from the witnesses. Each reported incident of abuse was treated separately [Tr. at 9; R. at 51, 54]. Witness testimony through direct and cross-examination and

documentary evidence was segregated for development of the factual elements of each separate incident.

c. Disposition below:

After the formal hearing, the ALJ's written "Recommended Decision" was issued 24 May 1999 [R. at 46-58]. This decision found that by a preponderance of the evidence Montoya had physically and mentally abused residents of the nursing facility and her name should be placed on the State Nurse Aide Registry. The "Recommended Decision" was adopted by the Department which issued the "Final Agency Order" on 24 May 1999 [R. at 44-45]. [Copies of the "Recommended Decision" and the "Final Agency Order" appear in Addendum B.] Montoya filed a "Motion to Reconsider" [R. at 60-65] the agency's "Final Order." In response, on 30 June 1999, the Department issued its affirmation of the "Final Agency Order" [R. at 66-68].

STATEMENT OF FACTS

A. Incident I: Physical Abuse.

Tammy Gentry, a Certified Nurse Assistant with the facility, was present and assisting Montoya [Tr. at 11] when the allegation of physical abuse of a resident occurred. Gentry testified that while she and Montoya were changing the resident's bed, Montoya "pushed really hard on the [resident's] shoulder and shoved her into the railing" [Tr. at 12]. Gentry testified the resident said "ow," but when Gentry brought this to Montoya's attention, Montoya responded that the patient routinely says "ow," and denied that she had hurt the patient [Tr. at 12]. Gentry reported the incident to Debbie

Nickerson, Assistant Director of Nursing at the facility, who performed a physical assessment of the patient and found reddened areas on the resident's cheek and knuckles [Tr. at 39-40]. This incident was investigated and documented [R. at 33-39]. Testimony from other witnesses at the hearing corroborated elements of the reported abuse [R. at 53]. In his "Recommended Decision," the ALJ found that "on or about the morning of August 9, 1998, Ms. Montoya intentionally pushed hard on M.B.'s right shoulder causing M.B. to be shoved into the bed railing" [R. at 47].

B. Incident II: Mental Abuse.

The testimony given by Joanne White, facility Director of Nursing, related the substance of the report she received from a resident's sister, indicating something had happened with her brother. The sister reported her brother called and said someone at the nursing home had been mean to him [R. at 54; Tr. at 129]. Ms. White testified she conducted an investigation by speaking directly with the resident who confirmed "that one of the nurses . . . had gotten really mean with him and that she had thrown him on the bed. . . . [That] [i]t hurt his whole body" [Tr. at 130]. Ms. White further testified that she spoke with the resident's roommate who was in the room when this reported allegation occurred. Ms. White testified the roommate told her he saw and heard what happened [Tr. at 130-31].

The roommate, J.B., appeared by telephone at the administrative hearing [Tr. at 143]. His testimony established he could hear the verbal exchanges between Montoya and his roommate; he also testified he could see everything taking place by a reflection in

his television screen [Tr. at 145]. Relying on the corroborating testimony elicited from J.B. and Montoya, the ALJ set out those factors upon which he could form the basis of his conclusion [R. at 55]. In his “Recommended Decision,” the ALJ found that Montoya “mentally abused M.W. by humiliating him with repeated demands to roll over and simultaneously telling him that he was not even trying. M.W.’s roommate was in the room within hearing distance” [R. at 47].

SUMMARY OF ARGUMENTS

a. The Agency’s findings in support of its final order were supported by substantial evidence.

The ALJ found by a preponderance of the evidence presented that Appellant Montoya had physically and mentally abused residents of a nursing facility. In order to have the agency’s findings overturned on appeal, Montoya must marshal all of the evidence supporting the findings and then establish that notwithstanding that evidence, the findings are not supported by substantial evidence. Failure to marshal the evidence precludes overturning the agency’s findings on appeal.

b. The Agency’s conduct of the hearing to consider two separate abuse incidents was not impermissible; objections to hearing procedures not timely raised are waived on appeal.

An objection to an administrative hearing procedure must be timely raised or it is waived on appeal. *Brinkerhoff v. Schwendiman*, 790 P.2d at 589. Montoya failed to object at any time during the administrative hearing to having both allegations of abuse heard at the same hearing. Appellant Montoya has not pointed to any applicable rule or

statute prohibiting the ALJ from conducting the hearing in the manner done in this case.

c. Appellant's brief is inadequate for purposes of review.

Appellant's brief fails to adequately demonstrate the validity of her positions on the issues. Appellant fails to adequately cite to the record; Appellant fails to adequately cite to applicable authorities in case law and statute. Montoya does not cite to the record transcript showing that issues were preserved at the administrative hearing nor state the grounds for review of issues not preserved for appeal. Utah R. App. P. 24(a)(5)(A) and (B). Appellant's brief fails to comply with the requirements of Rule 24 to a degree necessary for this reviewing Court to consider Appellant's contentions.

ARGUMENT

a. Introduction:

Montoya impliedly asks this Court to overturn the findings of the agency which had the effect of placing her name on the Nurse Aide Registry as required by federal statute. However, Montoya has failed to meet her burden to justify such action.

Simply put, Montoya has not marshaled the evidence required of an appellant seeking to have agency findings overturned. Neither did Montoya timely object at the administrative hearing to having both allegations of abuse heard at one hearing. The transcript is devoid of any reference of impropriety or unfairness in receiving evidence on both allegations of abuse. Nor has Montoya pointed to any applicable authority supporting her position that the ALJ was prohibited from receiving evidence on two events at the same hearing.

Finally, Appellant Montoya “has impermissibly shifted the burden of analysis to the reviewing court in this case.” *Smith v. Smith*, 1999 UT App. 370, ¶ 9, 995 P.2d 14. By failing to follow the “roadmap” provided by Rule 24, Montoya has fundamentally failed in her obligation to inform and convince this Court of the validity of her arguments.

POINT I.

The agency’s findings will not be upset if supported by substantial evidence based upon the record as a whole. Failing to marshal the evidence will preclude ruling for the challenger.

“When reviewing the factual findings made by an administrative agency, an appellate court will generally reverse only if the findings are not supported by substantial evidence.” *Drake v. Industrial Comm’n*, 939 P.2d 177, 181 (Utah 1997). In applying this standard based upon the record as a whole, the reviewing court

must consider not only the evidence supporting the [agency’s] factual findings, but also the evidence that “fairly detracts from the weight of the [agency’s] evidence.” It is also important to note that the “whole record test” necessarily requires that a party challenging the [agency’s] findings of fact must *marshall* [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.

Grace Drilling Co. v. Board of Review, 776 P.2d at 68 (citations omitted).

Furthermore, a reviewing court gives deference to the initial trier of fact because “it stands in a superior position from which to evaluate and weigh the evidence and assess the credibility and accuracy of witnesses’ recollections.” *Drake v. Industrial Comm’n*, 939 P.2d at 181.

Since Appellant Montoya has failed to marshal the evidence, it is difficult if not impossible to discover any errors in the decision making of the ALJ. The section of Montoya's brief challenging the sufficiency of the evidence, Appellant's Br. at 5-7, is bereft of any citations to the record. Furthermore, no supporting authority is cited except for the reference to the Utah Criminal Code, citing to the wrong standard to be applied to Montoya's conduct. Montoya erroneously argues that the criminal definition of "willful infliction of injury" should be applied. The correct standard is that set forth in 42 C.F.R. § 488.301 (1995) which describes conduct constituting abuse of a resident. This definition was addressed in *Hearns v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 704 A.2d 1181, 1183 (D.C. 1997), wherein that court stated

[P]etitioner's argument would not prevail. Petitioner argues that she did not intentionally ("willful[ly]") abuse the resident, but the regulation cannot reasonably be understood to mean that she must have acted with a "bad purpose" (i.e., to abuse); rather, "willful" in this regulatory context denotes a conscious decision to do the act which the law forbids. (citation omitted) (except in criminal context where "willful" may require "more . . . than the doing of the act proscribed by the statute," word commonly "denotes an act which is intentional rather than accidental").

In the case before this Court, the ALJ adhered to the guidance provided in a state Medicaid operation manual at Appendix P. (A copy of relevant sections of Appendix P appears in Addendum A.) Designated as "Guidance to Surveyors - Long Term Care Facilities," that Appendix states in relevant part

"Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. This also includes the deprivation by an individual, including a caretaker, of goods and services that are necessary to attain or maintain

physical, mental, and psychosocial well being. This presumes that instances of abuse of all residents, even those in a coma, cause physical harm, or pain or mental anguish.

The ALJ applied the correct interpretation of “abuse” in his decision making [R. at 48, 55-56].

The one paragraph of argument devoted to the abuse of resident M.W., Appellant’s Br. at 7, is absolutely void of meaningful reasoning. The bald statements of Montoya set out within quotation marks are intended to prove Montoya’s position that no abuse occurred because that is her assertion. There is no analytical reasoning, simply bald, conclusory statements. Not only does Montoya apply the wrong standard to the regulatory definition of abuse, she erroneously assumes the characteristics of the resident’s physical and emotional condition are relevant to the abuse analysis in this case.

Montoya cannot prevail on this point.

POINT II.

The ALJ did not impermissibly join two allegations of abuse and Appellant failed to object to the process followed at the hearing.

Montoya cannot complain of unfairness in the conduct of the hearing. Montoya failed to object at any point during the administrative hearing to having both allegations of abuse heard at one hearing. Failing to timely object waives the issue on appeal.

Brinkerhoff v. Schwendiman, 790 P.2d at 589. Moreover, if Montoya had cited to the transcript concerning the conduct of the hearing, it would be evident that the aspect of fairness was taken into consideration [Tr. at 9]. To avoid the potential that evidence

given in one incident might be improperly considered for the other, the two incidents were clearly segregated. Testimony and exhibits presented for one incident were completed before the other incident was considered. This is apparent in the format of the ALJ's "Recommended Decision" [R. at 51-55].

Moreover, Montoya has not pointed to any applicable rule or statute prohibiting the ALJ from hearing testimony on two separate allegations of abuse at the same scheduled hearing.

Montoya cannot prevail on this point.

POINT III.

The inadequacy of Appellant's briefing precludes reasoned review on appeal.

Applying the requirements of Rule 24 to Appellant Montoya's brief, the following observations arise.

A. Under Rule 24, Appellant Montoya's brief fails to adequately state and argue the issues. Appellant's brief does not meet the requirements of subparagraph 24(a)(5) requiring a statement of each issue presented for review along with the standard of appellate review with supporting authority.

Montoya's "Statement of the Issues Presented on Appeal and Standard of Review" consists of only one point. That issue is presented as "[w]hether two cases were improperly combined into a single case and improperly used to prejudice the other case." Appellant's Br. at 2. Additionally, the correct standard of appellate review is not clearly

stated. It is not evident from Montoya's statement of standard of review which, among several possible standards, should be applied. Montoya has not cited to the record showing the issue was preserved for appeal; nor, absent that citation, has she provided a statement of the grounds supporting appeal of an issue not preserved. Utah R. App. P. 24(a)(5)(A) and (B).

Montoya failed to include in the "Statement of Issues" section, Appellant's Br. at 1-2, her second issue. Her second issue, challenging the sufficiency of evidence, appears in the "Arguments" section. Appellant's Br. at 5-7.

B. Appellant's brief fails to state the "[c]onstitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal." Utah R. App. P. 24(a)(6). Appellant's citations provide no useful direction to a reviewing court.

C. Appellant's brief fails to effectively state the "nature of the case," the "course of proceedings," and the "disposition below." Appellant's "Statement of the Facts" contains little more than conclusory statements, along with two references to the two allegations of abuse. It contains no citations to the record. Utah R. App. P. 24(a)(7).

D. Appellant's brief fails to meaningfully summarize the arguments. Appellant's "Summary of the Argument" consists of two sentences. The summary fails to provide adequate structure and direction. Utah R. App. P. 24(a)(8).

E. Appellant's brief does not "contain reasoned analysis based upon relevant legal authority." *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14. The brief lacks a

meaningful statement of facts with citations to the record. Necessarily, this means the brief fails to marshal the evidence. Utah R. App. P. 24(a)(9).

The first part of Montoya's "Arguments" section, addressing the "improper combining of two cases," cites two cases both of which are criminal cases. The two instances of allegedly prejudicial effect are inadequately supported by citations to the record and to applicable authority. Furthermore, Ms. Frank's closing argument statement, Appellant's Br. at 4-5, which Montoya now finds objectionable and prejudicial, was never challenged at the hearing. Montoya does not adequately establish the allegedly prejudicial connection between the closing statement and the outcome of the hearing.

In her attempt to prove the prejudicial effect of the hearing process, Montoya referenced page 7 [R. at 52] of the "Final Agency Order" [sic] ["Recommended Decision"]. The actual language from the "Recommended Decision" states

On cross examination Ms. Gentry testified that Ms. Montoya acted like she didn't hurt M.B., but it was Ms. Gentry's opinion that Ms. Montoya didn't care that she was hurting someone. Mr. Grindstaff made a motion to strike that statement, but this is an administrative hearing without a jury and the presiding officer finds it relevant to Ms. Montoya's apparent intent, especially in light of the hearing record as a whole, including the incident against M.W.

Montoya's interpretation of the quoted language is incorrect. A reading of the "Recommended Decision" makes it apparent the ALJ considered the factual evidence developed for each separate allegation of abuse. It is also equally apparent that the language Montoya quoted at page 7 of the "Decision" does not prove the ALJ used facts from one incident to improperly buttress his findings and conclusions in the other. The

issue of Montoya's "intent" with respect to both incidents required the ALJ to consider the regulatory definition of "abuse" and the proper interpretation to be given to Montoya's conduct with each resident. As previously explained above, "abuse" in the context of the administrative hearing did not require a "bad purpose" or the mental intent required in a criminal case.

F. Appellant's "Conclusion" fails to state the precise relief sought. Utah R. App. P. 24(a)(10). Montoya's claim in the "Conclusion" that the agency's action was an abuse of discretion is not supported by record citation nor citation to any authority. Appellant provides no legal analysis to support this contention.

G. Appellant Montoya's brief contains a statement that "[a]n addendum is not necessary to this brief." Appellant's Br. at 8. Under the Utah Rules of Appellate Procedure, the addendum would contain "those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged . . . findings of fact and conclusions of law, memorandum decision. . . ." Utah R. App. P. 24(a)(11)(C). At a minimum, Montoya's addendum should contain the findings and order she contests.

The appellate courts of this state have consistently decided they will not address issues which are not adequately briefed. *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998). In *MacKay*, the cross-appellant's brief failed to comply with almost every requirement of Rule 24. The *MacKay* court emphasized its displeasure with inadequately briefed cases by citing to a small sample of the "legion" of cases which have fallen far

short. *MacKay v. Hardy*, 973 P.2d at 948 n.9. In *Child v. Gonda*, 972 P.2d 425, 430-31 (Utah 1998), the court reiterated its stated position in *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988), “this court is not ‘a depository in which the appealing party may dump the burden of argument and research.’” (citation omitted). In *Child*, the petitioner did not provide citations to the record. In so doing, the court could not evaluate the testimony in the context presented, and therefore, would not review the trial court’s decision on appeal.

In the present matter before this Court, Montoya has not adequately briefed the issues. Almost every requirement of Rule 24 has been ignored. In addition to inadequate analysis, Montoya has failed to cite to legal authority in support of her contentions and has, but for two references, failed to cite to the record, thus preventing a reviewing court from addressing any alleged errors.

CONCLUSION

The Department provided Montoya with notice of the allegations against her and of the right to a hearing. The hearing provided each party the opportunity to fully present its case. After careful consideration, the ALJ issued a decision which delineated the law and facts relied upon for the conclusion reached as to each allegation.

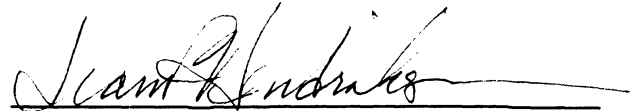
Appellant Montoya claimed she was prejudiced by the consideration of two substantiated allegations of abuse at a single administrative hearing. Yet, she did not object at the hearing. Appellant Montoya also claimed the findings of fact were not supported by substantial evidence. Yet, she did not marshal the evidence.

Appellant Montoya did not follow the "roadmap" provided by Rule 24, thereby failing to take advantage of the method by which she could maximize her claims before this Court.

For the foregoing reasons, the Department's "Final Agency Order" should be affirmed.

Respectfully submitted this 10th day of May 2000.

JAN GRAHAM
Attorney General




Jean P. Hendrickson
Assistant Attorney General
Attorneys for Respondent and Appellee
Utah Department of Health

CERTIFICATE OF DELIVERY

I hereby certify that on the 10th day of May 2000, I caused two true and correct copies of the foregoing Appellee's Brief to be served by first-class mail, postage prepaid, on each of the following:

David L. Grindstaff
455 East 400 South #40
Salt Lake City, Utah 84111
Attorney for Petitioner and Appellant Marion Montoya

DATED this 10th day of May 2000.



Jean P. Hendrickson
Assistant Attorney General

Addenda

Addendum A

**This document has been amended. Use UPDATE.
See SCOPE for more information.**

**UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7—SOCIAL SECURITY
SUBCHAPTER XVIII—HEALTH INSURANCE FOR AGED AND DISABLED
PART A—HOSPITAL INSURANCE BENEFITS FOR AGED AND DISABLED**

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Current through P.L. 106-73, approved 10-19-1999

§ 1395i-3. Requirements for, and assuring quality of care in, skilled nursing facilities

(a) "Skilled nursing facility" defined

In this subchapter, the term "skilled nursing facility" means an institution (or a distinct part of an institution) which--

(1) is primarily engaged in providing to residents--

(A) skilled nursing care and related services for residents who require medical or nursing care, or

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons,

and is not primarily for the care and treatment of mental diseases;

(2) has in effect a transfer agreement (meeting the requirements of section 1395x(l) of this title) with one or more hospitals having agreements in effect under section 1395cc of this title; and

(3) meets the requirements for a skilled nursing facility described in subsections (b), (c), and (d) of this section.

(b) Requirements relating to provision of services

(1) Quality of life

(A) In general

A skilled nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.

(B) Quality assessment and assurance

A skilled nursing facility must maintain a quality assessment and assurance committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility's staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. A State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph.

(2) Scope of services and activities under plan of care

A skilled nursing facility must provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, in accordance with a written plan of care which--

(2) Licensing and Life Safety Code

(A) Licensing

A skilled nursing facility must be licensed under applicable State and local law.

(B) Life Safety Code

A skilled nursing facility must meet such provisions of such edition (as specified by the Secretary in regulation) of the Life Safety Code of the National Fire Protection Association as are applicable to nursing homes; except that--

(i) the Secretary may waive, for such periods as he deems appropriate, specific provisions of such Code which if rigidly applied would result in unreasonable hardship upon a facility, but only if such waiver would not adversely affect the health and safety of residents or personnel, and

(ii) the provisions of such Code shall not apply in any State if the Secretary finds that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects residents of and personnel in skilled nursing facilities.

(3) Sanitary and infection control and physical environment

A skilled nursing facility must--

(A) establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment in which residents reside and to help prevent the development and transmission of disease and infection, and

(B) be designed, constructed, equipped, and maintained in a manner to protect the health and safety of residents, personnel, and the general public.

(4) Miscellaneous

(A) Compliance with Federal, State, and local laws and professional standards

A skilled nursing facility must operate and provide services in compliance with all applicable Federal, State, and local laws and regulations (including the requirements of section 1320a-3 of this title) and with accepted professional standards and principles which apply to professionals providing services in such a facility.

(B) Other

A skilled nursing facility must meet such other requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary.

(e) State requirements relating to skilled nursing facility requirements

The requirements, referred to in section 1395aa(d) of this title, with respect to a State are as follows:

(1) Specification and review of nurse aide training and competency evaluation programs and of nurse aide competency evaluation programs

The State must--

(A) by not later than January 1, 1989, specify those training and competency evaluation programs, and those competency evaluation programs, that the State approves for purposes of subsection (b)(5) of this section and that meet the requirements established under subsection (f)(2) of this section, and

(B) by not later than January 1, 1990, provide for the review and reapproval of such programs, at a frequency and using a methodology consistent with the requirements established under subsection (f)(2)(A)(iii) of this section.

The failure of the Secretary to establish requirements under subsection (f)(2) of this section shall not relieve any State of its responsibility under this paragraph.

(2) Nurse aide registry

(A) In general

By not later than January 1, 1989, the State shall establish and maintain a registry of all individuals who have satisfactorily completed a nurse aide training and competency evaluation program, or a nurse aide competency evaluation program, approved under paragraph (1) in the State, or any individual described in subsection (f)(2)(B)(ii) of this section or in subparagraph (B), (C), or (D) of section 6901(b)(4) of the Omnibus Budget Reconciliation Act of 1989.

(B) Information in registry

The registry under subparagraph (A) shall provide (in accordance with regulations of the Secretary) for the inclusion of specific documented findings by a State under subsection (g)(1)(C) of this section of resident neglect or abuse or misappropriation of resident property involving an individual listed in the registry, as well as any brief statement of the individual disputing the findings, but shall not include any allegations of resident abuse or neglect or misappropriation of resident property that are not specifically documented by the State under such subsection. The State shall make available to the public information in the registry. In the case of inquiries to the registry concerning an individual listed in the registry, any information disclosed concerning such a finding shall also include disclosure of any such statement in the registry relating to the finding or a clear and accurate summary of such a statement.

(C) Prohibition against charges

A State may not impose any charges on a nurse aide relating to the registry established and maintained under subparagraph (A).

(3) State appeals process for transfers and discharges

The State, for transfers and discharges from skilled nursing facilities effected on or after October 1, 1989, must provide for a fair mechanism for hearing appeals on transfers and discharges of residents of such facilities. Such mechanism must meet the guidelines established by the Secretary under subsection (f)(3) of this section; but the failure of the Secretary to establish such guidelines shall not relieve any State of its responsibility to provide for such a fair mechanism.

(4) Skilled nursing facility administrator standards

By not later than January 1, 1990, the State must have implemented and enforced the skilled nursing facility administrator standards developed under subsection (f)(4) of this section respecting the qualification of administrators of skilled nursing facilities.

(5) Specification of resident assessment instrument

Effective July 1, 1990, the State shall specify the instrument to be used by nursing facilities in the State in complying with the requirement of subsection (b)(3)(A)(iii) of this section. Such instrument shall be--

(A) one of the instruments designated under subsection (f)(6)(B) of this section, or

(B) an instrument which the Secretary has approved as being consistent with the minimum data set of core elements, common definitions, and utilization guidelines specified by the Secretary under subsection (f)(6)(A) of this

The Secretary shall establish criteria for assessing a skilled nursing facility's compliance with the requirement of subsection (d)(1) of this section with respect to--

(A) its governing body and management,

(B) agreements with hospitals regarding transfers of residents to and from the hospitals and to and from other skilled nursing facilities,

(C) disaster preparedness,

(D) direction of medical care by a physician,

(E) laboratory and radiological services,

(F) clinical records, and

(G) resident and advocate participation.

(6) Specification of resident assessment data set and instruments

The Secretary shall--

(A) not later than January 1, 1989, specify a minimum data set of core elements and common definitions for use by nursing facilities in conducting the assessments required under subsection (b)(3) of this section, and establish guidelines for utilization of the data set; and

(B) by not later than April 1, 1990, designate one or more instruments which are consistent with the specification made under subparagraph (A) and which a State may specify under subsection (e)(5)(A) of this section for use by nursing facilities in complying with the requirements of subsection (b)(3)(A)(iii) of this section.

(7) List of items and services furnished in skilled nursing facilities not chargeable to the personal funds of a resident

(A) Regulations required

Pursuant to the requirement of section 21(b) of the Medicare-Medicaid Anti- Fraud and Abuse Amendments of 1977, the Secretary shall issue regulations, on or before the first day of the seventh month to begin after December 22, 1987, that define those costs which may be charged to the personal funds of residents in skilled nursing facilities who are individuals receiving benefits under this part and those costs which are to be included in the reasonable cost (or other payment amount) under this subchapter for extended care services.

(B) Rule if failure to publish regulations

If the Secretary does not issue the regulations under subparagraph (A) on or before the date required in such subparagraph, in the case of a resident of a skilled nursing facility who is eligible to receive benefits under this part, the costs which may not be charged to the personal funds of such resident (and for which payment is considered to be made under this subchapter) shall include, at a minimum, the costs for routine personal hygiene items and services furnished by the facility.

(g) Survey and certification process

(1) State and Federal responsibility

(A) In general

Pursuant to an agreement under section 1395aa of this title, each State shall be responsible for certifying, in

accordance with surveys conducted under paragraph (2), the compliance of skilled nursing facilities (other than facilities of the State) with the requirements of subsections (b), (c), and (d) of this section. The Secretary shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compliance of State skilled nursing facilities with the requirements of such subsections.

(B) Educational program

Each State shall conduct periodic educational programs for the staff and residents (and their representatives) of skilled nursing facilities in order to present current regulations, procedures, and policies under this section.

(C) Investigation of allegations of resident neglect and abuse and misappropriation of resident property

The State shall provide, through the agency responsible for surveys and certification of nursing facilities under this subsection, for a process for the receipt and timely review and investigation of allegations of neglect and abuse and misappropriation of resident property by a nurse aide of a resident in a nursing facility or by another individual used by the facility in providing services to such a resident. The State shall, after providing the individual involved with a written notice of the allegations (including a statement of the availability of a hearing for the individual to rebut the allegations) and the opportunity for a hearing on the record, make a written finding as to the accuracy of the allegations. If the State finds that a nurse aide has neglected or abused a resident or misappropriated resident property in a facility, the State shall notify the nurse aide and the registry of such finding. If the State finds that any other individual used by the facility has neglected or abused a resident or misappropriated resident property in a facility, the State shall notify the appropriate licensure authority. A State shall not make a finding that an individual has neglected a resident if the individual demonstrates that such neglect was caused by factors beyond the control of the individual.

(D) Removal of name from nurse aide registry

(i) In general

In the case of a finding of neglect under subparagraph (C), the State shall establish a procedure to permit a nurse aide to petition the State to have his or her name removed from the registry upon a determination by the State that--

(I) the employment and personal history of the nurse aide does not reflect a pattern of abusive behavior or neglect; and

(II) the neglect involved in the original finding was a singular occurrence.

(ii) Timing of determination

In no case shall a determination on a petition submitted under clause (i) be made prior to the expiration of the 1-year period beginning on the date on which the name of the petitioner was added to the registry under subparagraph (C).

(E) Construction

The failure of the Secretary to issue regulations to carry out this subsection shall not relieve a State of its responsibility under this subsection.

(2) Surveys

(A) Standard survey

(i) In general

Each skilled nursing facility shall be subject to a standard survey, to be conducted without any prior notice to the

facility. Any individual who notifies (or causes to be notified) a skilled nursing facility of the time or date on which such a survey is scheduled to be conducted is subject to a civil money penalty of not to exceed \$2,000. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title. The Secretary shall review each State's procedures for the scheduling and conduct of standard surveys to assure that the State has taken all reasonable steps to avoid giving notice of such a survey through the scheduling procedures and the conduct of the surveys themselves.

(ii) Contents

Each standard survey shall include, for a case-mix stratified sample of residents--

(I) a survey of the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary and nutrition services, activities and social participation, and sanitation, infection control, and the physical environment,

(II) written plans of care provided under subsection (b)(2) of this section and an audit of the residents' assessments under subsection (b)(3) of this section to determine the accuracy of such assessments and the adequacy of such plans of care, and

(III) a review of compliance with residents' rights under subsection (c) of this section.

(iii) Frequency

(I) In general

Each skilled nursing facility shall be subject to a standard survey not later than 15 months after the date of the previous standard survey conducted under this subparagraph. The Statewide average interval between standard surveys of skilled nursing facilities under this subsection shall not exceed 12 months.

(II) Special surveys

If not otherwise conducted under subclause (I), a standard survey (or an abbreviated standard survey) may be conducted within 2 months of any change of ownership, administration, management of a skilled nursing facility, or the director of nursing in order to determine whether the change has resulted in any decline in the quality of care furnished in the facility.

(B) Extended surveys

(i) In general

Each skilled nursing facility which is found, under a standard survey, to have provided substandard quality of care shall be subject to an extended survey. Any other facility may, at the Secretary's or State's discretion, be subject to such an extended survey (or a partial extended survey).

(ii) Timing

The extended survey shall be conducted immediately after the standard survey (or, if not practicable, not later than 2 weeks after the date of completion of the standard survey).

(iii) Contents

In such an extended survey, the survey team shall review and identify the policies and procedures which produced such substandard quality of care and shall determine whether the facility has complied with all the requirements described in subsections (b), (c), and (d) of this section. Such review shall include an expansion of the size of the

sample of residents' assessments reviewed and a review of the staffing, of in-service training, and, if appropriate, of contracts with consultants.

(iv) Construction

Nothing in this paragraph shall be construed as requiring an extended or partial extended survey as a prerequisite to imposing a sanction against a facility under subsection (h) of this section on the basis of findings in a standard survey.

(C) Survey protocol

Standard and extended surveys shall be conducted--

(i) based upon a protocol which the Secretary has developed, tested, and validated by not later than January 1, 1990, and

(ii) by individuals, of a survey team, who meet such minimum qualifications as the Secretary establishes by not later than such date.

The failure of the Secretary to develop, test, or validate such protocols or to establish such minimum qualifications shall not relieve any State of its responsibility (or the Secretary of the Secretary's responsibility) to conduct surveys under this subsection.

(D) Consistency of surveys

Each State and the Secretary shall implement programs to measure and reduce inconsistency in the application of survey results among surveyors.

(E) Survey teams

(i) In general

Surveys under this subsection shall be conducted by a multidisciplinary team of professionals (including a registered professional nurse).

(ii) Prohibition of conflicts of interest

A State may not use as a member of a survey team under this subsection an individual who is serving (or has served within the previous 2 years) as a member of the staff of, or as a consultant to, the facility surveyed respecting compliance with the requirements of subsections (b), (c), and (d) of this section, or who has a personal or familial financial interest in the facility being surveyed.

(iii) Training

The Secretary shall provide for the comprehensive training of State and Federal surveyors in the conduct of standard and extended surveys under this subsection, including the auditing of resident assessments and plans of care. No individual shall serve as a member of a survey team unless the individual has successfully completed a training and testing program in survey and certification techniques that has been approved by the Secretary.

(3) Validation surveys

(A) In general

The Secretary shall conduct onsite surveys of a representative sample of skilled nursing facilities in each State, within 2 months of the date of surveys conducted under paragraph (2) by the State, in a sufficient number to allow

inferences about the adequacies of each State's surveys conducted under paragraph (2). In conducting such surveys, the Secretary shall use the same survey protocols as the State is required to use under paragraph (2). If the State has determined that an individual skilled nursing facility meets the requirements of subsections (b), (c), and (d) of this section, but the Secretary determines that the facility does not meet such requirements, the Secretary's determination as to the facility's noncompliance with such requirements is binding and supersedes that of the State survey.

(B) Scope

With respect to each State, the Secretary shall conduct surveys under subparagraph (A) each year with respect to at least 5 percent of the number of skilled nursing facilities surveyed by the State in the year, but in no case less than 5 skilled nursing facilities in the State.

(C) Remedies for substandard performance

If the Secretary finds, on the basis of such surveys, that a State has failed to perform surveys as required under paragraph (2) or that a State's survey and certification performance otherwise is not adequate, the Secretary shall provide for an appropriate remedy, which may include the training of survey teams in the State.

(D) Special surveys of compliance

Where the Secretary has reason to question the compliance of a skilled nursing facility with any of the requirements of subsections (b), (c), and (d) of this section, the Secretary may conduct a survey of the facility and, on the basis of that survey, make independent and binding determinations concerning the extent to which the skilled nursing facility meets such requirements.

(4) Investigation of complaints and monitoring compliance

Each State shall maintain procedures and adequate staff to--

(A) investigate complaints of violations of requirements by skilled nursing facilities, and

(B) monitor, on-site, on a regular, as needed basis, a skilled nursing facility's compliance with the requirements of subsections (b), (c), and (d) of this section, if--

(i) the facility has been found not to be in compliance with such requirements and is in the process of correcting deficiencies to achieve such compliance;

(ii) the facility was previously found not to be in compliance with such requirements, has corrected deficiencies to achieve such compliance, and verification of continued compliance is indicated; or

(iii) the State has reason to question the compliance of the facility with such requirements.

A State may maintain and utilize a specialized team (including an attorney, an auditor, and appropriate health care professionals) for the purpose of identifying, surveying, gathering and preserving evidence, and carrying out appropriate enforcement actions against substandard skilled nursing facilities.

(5) Disclosure of results of inspections and activities

(A) Public information

Each State, and the Secretary, shall make available to the public--

(i) information respecting all surveys and certifications made respecting skilled nursing facilities, including statements of deficiencies, within 14 calendar days after such information is made available to those facilities, and approved plans of correction,

- (ii) copies of cost reports of such facilities filed under this subchapter or subchapter XIX of this chapter,
- (iii) copies of statements of ownership under section 1320a-3 of this title, and
- (iv) information disclosed under section 1320a-5 of this title.

(B) Notice to ombudsman

Each State shall notify the State long-term care ombudsman (established under title III or VII of the Older Americans Act of 1965 [42 U.S.C.A. § 3021 et seq. or § 3058 et seq.] in accordance with section 712 of the Act [42 U.S.C.A. § 3058g]) of the State's findings of noncompliance with any of the requirements of subsections (b), (c), and (d) of this section, or of any adverse action taken against a skilled nursing facility under paragraph (1), (2), or (4) of subsection (h) of this section, with respect to a skilled nursing facility in the State.

(C) Notice to physicians and skilled nursing facility administrator licensing board

If a State finds that a skilled nursing facility has provided substandard quality of care, the State shall notify--

- (i) the attending physician of each resident with respect to which such finding is made, and
- (ii) the State board responsible for the licensing of the skilled nursing facility administrator at the facility.

(D) Access to fraud control units

Each State shall provide its State medicaid fraud and abuse control unit (established under section 1396b(q) of this title) with access to all information of the State agency responsible for surveys and certifications under this subsection.

(h) Enforcement process

(1) In general

If a State finds, on the basis of a standard, extended, or partial extended survey under subsection (g)(2) of this section or otherwise, that a skilled nursing facility no longer meets a requirement of subsection (b), (c), or (d) of this section, and further finds that the facility's deficiencies--

(A) immediately jeopardize the health or safety of its residents, the State shall recommend to the Secretary that the Secretary take such action as described in paragraph (2)(A)(i); or

(B) do not immediately jeopardize the health or safety of its residents, the State may recommend to the Secretary that the Secretary take such action as described in paragraph (2)(A)(ii).

If a State finds that a skilled nursing facility meets the requirements of subsections (b), (c), and (d) of this section, but, as of a previous period, did not meet such requirements, the State may recommend a civil money penalty under paragraph (2)(B)(ii) for the days in which it finds that the facility was not in compliance with such requirements.

(2) Secretarial authority

(A) In general

With respect to any skilled nursing facility in a State, if the Secretary finds, or pursuant to a recommendation of the State under paragraph (1) finds, that a skilled nursing facility no longer meets a requirement of subsection (b), (c), (d), or (e) of this section, and further finds that the facility's deficiencies--

- (i) immediately jeopardize the health or safety of its residents, the Secretary shall take immediate action to remove

**CODE OF FEDERAL REGULATIONS
TITLE 42--PUBLIC HEALTH
CHAPTER IV--HEALTH CARE FINANCING
ADMINISTRATION, DEPARTMENT OF
HEALTH AND
HUMAN SERVICES
SUBCHAPTER G--STANDARDS AND
CERTIFICATION
PART 483--REQUIREMENTS FOR STATES
AND LONG TERM CARE FACILITIES
SUBPART B--REQUIREMENTS FOR LONG
TERM CARE FACILITIES**

Current through February 15, 2000; 65

FR 7675

§ 483.13 Resident behavior and facility practices.

(a) Restraints. The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

(b) Abuse. The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

(c) Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

(1) The facility must--

(i) Not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion;

(ii) Not employ individuals who have been--

(A) Found guilty of abusing, neglecting, or mistreating residents by a court of law; or

(B) Have had a finding entered into the State nurse

aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property; and

(iii) Report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the State nurse aide registry or licensing authorities.

(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).

(3) The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.

(4) The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with State law (including to the State survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

[56 FR 48870, Sept. 26, 1991; 57 FR 43924, Sept. 23, 1992]

<General Materials (GM) - References, Annotations,
or Tables>

42 C. F. R. § 483.13

42 CFR § 483.13

END OF DOCUMENT

**CODE OF FEDERAL REGULATIONS
TITLE 42--PUBLIC HEALTH
CHAPTER IV--HEALTH CARE FINANCING
ADMINISTRATION, DEPARTMENT OF
HEALTH AND
HUMAN SERVICES
SUBCHAPTER G--STANDARDS AND
CERTIFICATION
PART 488--SURVEY, CERTIFICATION, AND
ENFORCEMENT PROCEDURES
SUBPART E--SURVEY AND CERTIFICATION
OF LONG-TERM CARE FACILITIES
Current through April 1, 2000; 65 FR 17413**

§ 488.301 Definitions.

As used in this subpart--

Abbreviated standard survey means a survey other than a standard survey that gathers information primarily through resident-centered techniques on facility compliance with the requirements for participation. An abbreviated standard survey may be premised on complaints received; a change of ownership, management, or director of nursing; or other indicators of specific concern.

Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

Deficiency means a SNF's or NF's failure to meet a participation requirement specified in the Act or in part 483, subpart B of this chapter.

Dually participating facility means a facility that has a provider agreement in both the Medicare and Medicaid programs.

Extended survey means a survey that evaluates additional participation requirements subsequent to finding substandard quality of care during a standard survey.

Facility means a SNF or NF, or a distinct part SNF or NF, in accordance with § 483.5 of this chapter.

Immediate family means husband or wife; natural or adoptive parent, child or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild.

Immediate jeopardy means a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

Misappropriation of resident property means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent.

Neglect means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

Noncompliance means any deficiency that causes a facility to not be in substantial compliance.

Nurse aide means an individual, as defined in § 483.75(e)(1) of this chapter.

Nursing facility (NF) means a Medicaid nursing facility.

Partial extended survey means a survey that evaluates additional participation requirements subsequent to finding substandard quality of care during an abbreviated standard survey.

Skilled nursing facility (SNF) means a Medicare nursing facility.

Standard survey means a periodic, resident-centered inspection which gathers information about the quality of service furnished in a facility to determine compliance with the requirements for participation.

Substandard quality of care means one or more deficiencies related to participation requirements under § 483.13, Resident behavior and facility practices, § 483.15, Quality of life, or § 483.25, Quality of care of this chapter, which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm.

Substantial compliance means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

Validation survey means a survey conducted by the Secretary within 2 months following a standard survey, abbreviated standard survey, partial extended survey, or extended survey for the purpose of monitoring State survey agency performance.

<General Materials (GM) - References, Annotations,

or Tables>

42 C. F. R. § 488.301

42 CFR § 488.301

END OF DOCUMENT

Addendum B

**WEST'S UTAH RULES OF COURT
UTAH RULES OF APPELLATE PROCEDURE
TITLE V. GENERAL PROVISIONS**

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Current with amendments received through 11-1-1999

RULE 24. BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, including the contents of the addendum, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(A) citation to the record showing that the issue was preserved in the trial court; or

(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for

reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

(10) A short conclusion stating the precise relief sought.

(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in Briefs to the Record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers.

If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of Briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in Cases Involving Cross-Appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this rule are exclusive of table of contents, table of authorities, and addenda and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown.

(h) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(i) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(j) Requirements and Sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(k) Brief Covers. The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

[Amended effective July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999.]

Advisory Committee Note

Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. [Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling] duty ..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Rules App. Proc., Rule 24

UT R RAP Rule 24

END OF DOCUMENT

APPENDIX P
SURVEY PROTOCOL
FOR LONG TERM CARE FACILITIES

PART I

Survey Procedures for Long Term Care Facilities

- I. Introduction**
- II. Survey Tasks**
 - o Task 1 - Offsite Survey Preparation
 - o Task 2 - Entrance Conference/Onsite Preparatory Activities
 - o Task 3 - Initial Tour
 - o Task 4 - Sample Selection
 - o Task 5 - Information Gathering
 - A - General Observations of the Facility
 - B - Kitchen/Food Service Observation
 - C - Resident Review
 - D - Quality of Life Assessment
 - E - Medication Pass
 - F - Quality Assessment and Assurance Review
 - G - Abuse Prevention Review
 - o Task 6 - Information Analysis for Deficiency Determination
 - o Task 7 - Exit Conference
- III. The Partial Extended and Extended Survey**
- IV. Writing the Statement of Deficiencies**
- V. Deficiency Categorization**
- VI. Post Survey Revisit (Follow-up)**
- VII. Abbreviated Standard Surveys**
 - A. Complaint Investigations
 - B. Substantial Changes in a Facility's Organization and Management
- VIII. Confidentiality and Respect for Resident Privacy**
- IX. Information Transfer**
- X. Additional Procedures for Medicare Participating Facilities**

SURVEY PROCEDURES FOR LONG TERM CARE FACILITIES

Part II

Guidance to Surveyors - Long Term Care Facilities

Column I	Tag Number
Column II	Regulation
Column III	Guidance to Surveyors (Guidelines and Survey Procedures and Probes)

GUIDANCE TO SURVEYORS - LONG TERM CARE FACILITIES

TAG NUMBER	REGULATION	GUIDANCE TO SURVEYORS
F221 F222 (Cont.)		<ol style="list-style-type: none"> 1. What are the symptoms that led to the consideration of the use of restraints? 2. Are these symptoms caused by failure to: <ol style="list-style-type: none"> a. Meet individual needs in accordance with section III of the MDS, Customary Daily Routines (MDS version 2.0 section AC), in the context of relevant information in sections I and II of the MDS (MDS version 2.0 sections AA and AB)? b. Use aggressive rehabilitative/restorative care? c. Provide meaningful activities? d. Manipulate the resident's environment, including seating? 3. Can the cause(s) be removed? 4. If the cause(s) cannot be removed, then has the facility attempted to use alternatives in order to avoid a decline in physical functioning associated with restraint use? (See Physical Restraints Resident Assessment Protocol (RAP), paragraph I). 5. If the alternatives have been tried and found wanting, does the facility use the least restrictive restraint for the least amount of time? Does the facility monitor and adjust care to reduce negative outcomes while continually trying to find and use less restrictive alternatives? 6. Did the resident make an informed choice about the use of restraints? Were risks, benefits, and alternatives explained? 7. Does the facility use the Physical Restraints RAP to evaluate the appropriateness of restraint use? 8. Has the facility re-evaluated the need for the restraint, made efforts to eliminate its use and maintained resident's strength and mobility? <p>If responses to these questions indicate that restraint use may not comply with these requirements, is there evidence of restraints used for staff convenience: restrained residents left alone for long periods, not toileted and not provided with exercise. Refer to MDS sections Customary Daily Routine, K, N, E, H, L, (MDS version 2.0 sections AC, J, M, G, E and K respectively) and relevant RAPS, and to notes from other health professionals to determine if restrained residents have maintained their physical, mental, psychosocial and functional status; or if the use of restraints has been associated with an increase in falls, urinary or fecal incontinence, pressure sores, loss of muscle tone, loss of independent mobility, increased agitation, loss of balance, symptoms of withdrawal or depression, reduced social contact, or decreased appetite</p> <p>Refer to §483.20, Resident Assessment, §483.25, Quality of Care, and §483.15, Quality of Life to assist in determining compliance with this requirement.</p>

GUIDANCE TO SURVEYORS - LONG TERM CARE FACILITIES

TAG NUMBER	REGULATION	GUIDANCE TO SURVEYORS
F223	(b) Abuse. The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.	<p>Intent: 5483.13(b) Each resident has the right to be free from abuse, corporal punishment, and involuntary seclusion. Residents must not be subjected to abuse by anyone, including, but not limited to, facility staff, other residents, consultants or volunteers, staff of other agencies serving the resident, family members or legal guardians, friends, or other individuals.</p> <p>Guidelines: 5483.13(b) and (c) "Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." (42 CFR 488.301)</p> <p>This also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. This presumes that instances of abuse of all residents, even those in a coma, cause physical harm, or pain or mental anguish.</p> <p>"Verbal abuse" is defined as the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability. Examples of verbal abuse include, but are not limited to: threats of harm; saying things to frighten a resident, such as telling a resident that he/she will never be able to see his/her family again.</p> <p>"Sexual abuse" includes, but is not limited to, sexual harassment, sexual coercion, or sexual assault.</p> <p>"Physical abuse" includes hitting, slapping, pinching and kicking. It also includes controlling behavior through corporal punishment.</p> <p>"Mental abuse" includes, but is not limited to, humiliation, harassment, threats of punishment or deprivation.</p>