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BRUCE HARPER, Claimant/Petitioner, v. UTAH LABOR COMMISSION, ENERGY ENTERPRISES, INC., AND DRIVE LINE, LLC, Respondents/Respondents. : Breif of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BRUCE HARPER, Claimant/Petitioner, v. UTAH LABOR COMMISSION, ENERGY ENTERPRISES, INC., AND DRIVE LINE, LLC, Respondents/Respondents.	**BRIEF OF RESPONDENTS ENERGY ENTERPRISES, INC., AND DRIVE LINE, LLC** Appellate Case No. 20170945 Third District Court Case No. 160901238

On petition for review from Third District Court Judge James Gardner's judicial review of an informal adjudication held at the Wage Claim Unit, Utah Antidiscrimination and Labor Division, Utah Labor Commission

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INTRODUCTION

Bruce Harper was hired by Drive Line, LLC (Drive Line), on June 18, 2014, to drive trucks to deliver cargo on Drive Line's behalf. (*See* Finding of Fact, Conclusions of Law, and Order (Findings & Order) (May 18, 2017), R. at 364, ¶¶ 1, 5. A copy of the Findings & Order is appended hereto at Exhibit A.) Energy Enterprises, Inc., (Energy Enterprises) is an entity that is affiliated with but separate from Drive Line. (R. at 594-95, 633-34. Unless circumstances dictate otherwise, Drive Line and Energy Enterprises shall collectively be referred to hereinafter as "Drive Line.") Mr. Harper voluntarily terminated his employment with Drive Line on September 9, 2018, when he refused to take a load for which he was scheduled to deliver. (*See* R. at 369, ¶¶ 15.g, 15.h, 15.i, 15.j, 16.)

Mr. Harper filed a wage claim on November 6, 2014, with the Wage Claim Unit of the Utah Labor Commission's Antidiscrimination and Labor Division (UALD), claiming only that he was owed $796.25 for "unpaid wages," and falsely claiming that (a) he was employed by Energy Enterprises, (b) that he started employment on April 15, 2014, (c) that he did not quit, (d) that he was paid $22.75 per hour, and (e) that he has not been paid for 35 hours of work. (*See* R. at 370, ¶¶ 19, 20.) After losing the informal adjudicative hearing, Mr. Harper filed a petition for review with the Third Judicial District Court. After a trial *de*

novo, the trial court entered final judgment against Mr. Harper in all respects. (*See* R. at 722-26. A copy of the Judgment is attached hereto as Exhibit B.) After Mr. Harper filed post-judgment motions, the trial court entered an Order denying Mr. Harper's motions and granting Drive Line's motion for a vexatious litigant order finding "by clear and convincing evidence that Mr. Harper is a vexatious litigant" and ordered that "before filing any additional motions, or requesting from this Court any relief related to his initial claim or the supplemental proceedings, Mr. Harper must obtain legal counsel." (*See* R. at 932-35 (Vexatious Litigant Order). A copy of the Vexatious Litigant Order is appended hereto as Exhibit C.)

Drive Line should prevail in this appeal because this court lacks jurisdiction to hear this appeal, and, even if it did, Mr. Harper did not show that the findings of fact entered by the trial court were clearly erroneous and did not show that the trial court abused its discretion in denying Mr. Harper's discovery motions and motion for new trial. Moreover, Drive Line should be awarded its fees and costs on appeal because it was awarded the fees below and because of Mr. Harper's additional vexatious litigation practices.

STATEMENT OF THE ISSUES

I. Does this Court have jurisdiction to hear an appeal of a trial court's review of an informal adjudication of the Wage Claim Division of the UALD?

a. **Standard of Review.** "'Whether appellate jurisdiction exists is a question of law which [the courts] review for correctness . . . .'" *Gailey v. State*, 2016 UT 35, ¶ 8, 379 P.3d 1278 (quoting *Migliore v. Livingston Fin., LLC*, 2015 UT 9, ¶ 15, 347 P.3d 394).

b. **Preservation.** The question of appellate review was not raised below because the issue of appellate review did not arise until Mr. Harper appealed the case to this court.

II. Did the trial court clearly err when it found that Mr. Harper agreed to be paid based upon a fixed amount of mileage rather than actual distance on deliveries he made on a contract Drive Line had with Estes?

a. **Standard of Review.** The courts "review findings of fact for clear error, 'reversing only where the finding is against the clear weight of the evidence, or if [they] otherwise reach a firm conviction that a mistake has been made.'" *Grimm v. DxNA LLC*, 2018 UT App 115, ¶ 12 (quoting *LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867).

III. Did the trial court clearly err when it found that Mr. Harper acted in bad faith during the course of the litigation?

a. **Standard of Review.** The courts "review findings of fact for clear error, 'reversing only where the finding is against the clear weight of the evidence, or if [they] otherwise reach a firm conviction that a

mistake has been made.'" *Grimm v. DxNA LLC,* 2018 UT App 115, ¶ 12 (quoting *LD III, LLC v. BBRD, LC,* 2009 UT App 301, ¶ 13, 221 P.3d 867).

IV. Did the trial court abuse its discretion in denying Mr. Harper's discovery requests and sanctioning Mr. Harper under Rule 37(a)(8) of the Utah Rules of Civil Procedure?

a. Standard of Review. "As a general rule, [appellate courts] grant district courts a great deal of deference in matters of discovery and review discovery orders for abuse of discretion." *Dahl v. Dahl*, 2015 UT 23, ¶ 63, 345 P.3d 566.

V. Did the trial court abuse its discretion in denying Mr. Harper's motion for new trial?

a. Standard of Review. "'[A] large measure of discretion is vested in the trial court in refusing or granting a motion for new trial on the ground that there is an insufficiency of evidence to support . . . the judgment," when the trial court judge who heard the motion is the judge who presided over the case. *Mann v. Fredrickson,* 2006 UT App 475, ¶¶ 5-6, 153 P.3d 768 (quoting *Pollesche v. Transamerican Ins. Co.,* 27 Utah 2d 430, 497 P.2d 236, 238 (Utah 1972)). Moreover, "'The trial court's denial of a motion for a new trial will be reversed only if the evidence to support the [decision] was completely lacking or was so

slight and unconvincing as to make the [decision] plainly unreasonable and unjust." *Id.* ¶ 8.

STATEMENT OF THE CASE

I. FACTS OF THE CASE

Bruce Harper was hired by Drive Line on June 18, 2014. (R. at 364, ¶ 1.) Kim Martino is an owner and officer of Drive Line. (*Id.* ¶ 2.) Greg Ostler was the Fleet Manager for Drive Line at all relevant times. (*Id.* ¶ 3.)

Prior to being hired, Mr. Harper interviewed with Greg Ostler who explained Drive Line's compensation scheme. He explained that Drive Line agreed to pay Mr. Harper $.36 per mile drive, which consisted of a base rate of $.27 per mile, plus a $.09 per mile per-diem rate. This compensation was split in half when working with a team driver. Drivers could also earn an additional $.02 per mile incentive for meeting certain goals on an individual basis, the safety bonus, and an additional $.02 per mile bonus for meeting certain goals on a team basis, the production bonus. (*Id.* ¶ 5(a).)

Mr. Ostler also explained to Mr. Harper that certain routes were compensated for at a fixed amount of mileage no matter the distance actually driven. This fixed compensation was paid on all deliveries made by Drive Line

for one of its customers named Estes. The fixed mileage for the route from Salt Lake City, Utah to Toledo, Ohio was 1,626 round trip miles.[1] (*Id.*¶ 5(b).)

Every pay period Drive Line mailed Mr. Harper (a) a pay statement, (b) a document entitled "Employee Pay Sheet," and, if applicable (c) a hand-written time card. Mr. Harper received all of these documents after they were mailed. The pay statements included the number of miles driven and/or hours worked for non-long haul driving and the regular and per diem rates paid based on those miles and/or hours. Every Employee Pay Sheet included the name of Drive Line LLC at the top. The Employee Pay Sheet identified every trip by trip number and for every long haul trip, it included the amount of mileage credited to the driver, the amount paid at the regular mileage rate and the amount paid at the per diem mileage rate. It also identified the number of hours driven on non-long haul matters, the rate of pay, and the total amount paid. Finally, if an employee had earned any incentives for past trips, the Employee Pay Sheet identified the trip and mileage qualifying for the incentive. (R. at 365, ¶¶ 7(a)-(b).)

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[1] On days when a driver was driving locally (rather than on a long-haul) or attending training, Drive Line compensated drivers on an hourly rate between $10 and $18 per hour depending on the type of work being performed. (R. at 365, ¶ 5(c).)

Sometime after Mr. Harper began working for Drive Line, Drive Line began offering a longevity bonus. The longevity bonus was not offered to Mr. Harper at the time of his employment. The longevity bonus provided that a driver who worked a requisite number of months with Drive Line as a full-time driver was entitled to a bonus. Drive Line never offered a sign-on bonus to any employee at any time. (R. at 365-66, ¶ 8.)

On September 3, 2014, Mr. Harper texted Mr. Ostler to inquire about when his "probation time [was] compleat[2] as far as becoming an owner." (R. at 367, ¶ 15(a).) On September 5, Mr. Harper followed up on his earlier text message: "Was u able to figure my probation time to become an owner op.?" Mr. Ostler responded, explaining that Mr. Harper was eligible at three or six months depending on "how much you want to put down on the truck." (*Id.* at 367-68, ¶ 15(b).) Mr. Harper responded with "O. Ok. So lets negoicate.. Thats if the co. Still Wants me? Lol". (*Id.* at 368, ¶15(c).

The following day, September 6, 2014, Mr. Harper followed up again: "What information did kim give u?" (R. at 368, ¶ 15(c).) On September 7, before

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[2] Because text messages are often written in haste without conforming to grammatical or spelling conventions, all text messages will be quoted as typed without interlineation of *sic* to identify any spelling or grammatical errors.

Mr. Ostler had responded to the inquiry sent the day before, Mr. Harper sent another text message to Mr. Ostler in which he stated:

> Before i go back out on wednesday ineed to resolve and renegociate terms. U stated my income would be.40 a mile.. It is currently .38 a mile.. I want .45 a mile. I need to b paid on actual traveled miles. 1716 a trip.. I want to be assigned truck 33.. If i am with a co. Driver who is unable to do thier half of miles i will recieve the difference of 90 miles (1716 to 1626) to my check.

(*Id.* ¶ 15(e).)

On September 8, 2014, Mr. Ostler responded to Mr. Ostler's multiple demands and questions. In response to Mr. Harper's demand for different payment terms for his trips, Mr. Ostler stated:

> The only drivers with a .40 base have been with us over a year-all drivers start at .36 with incentives available via safety, operation and very soon fuel bonus'-u are about due for your revue when if you are meeting satandards could see raise to .37 plus incentives.

(R. at 368, ¶ 15(f).) In response to this text message, Mr. Harper stated, "U have my terms. It is obvious that to u i am not worth those terms i will seek new employment or talk with kim about the truck purchase. I have the down payment avilabl." (*Id.* at 369, ¶ 15(g).)

After Mr. Ostler refused to negotiate Mr. Harper's demands for different mileage payment terms, Mr. Harper stated, "Ok. Will u inform steve for me[?]" (R. at 369, ¶ 15(h).) Mr. Ostler wrote another text message in response at 8:22 a.m on September 9th:

> Please let Steve know ASAP if you are taking load with Mike Chadwick tonight at 2 am—he needs to give as much notice as possible for Estes if you aren't going to stay with us-we also need fuel card for 32, we had to rob another truck and change it's # this morning—thanks Bruce. . . . You can drop by office or if you are going out tonight just drop in mailbox at yard—thanks again.

(*Id.* ¶ 15(i).) Three and half hours later, Mr. Harper texted Mr. Ostler telling him, "I put the fuel card in shed." (*Id.* ¶ 15(j).)

Mr. Harper never returned to Drive Line and never delivered another load for Drive Line. (*See* R. at 571, 609-10.) During the entire time Mr. Harper was employed by Drive Line he never claimed that he was owed more money for any work that he had done nor did he complain about not getting paid any bonus he was promised. (*Id.* at 572-73, 610.)

Nevertheless, on November 6, 2014, Mr. Harper filed a wage claim with the Wage Claim Division of the UALD in which he specifically demand payment of $796.25 for "unpaid wages." (*Id.* at 546, 553-54, 572; *id.* at 1051, Respondent's Exhibit (Resp. Ex.) 1 at ENERGY000002.) His claim stated that he was seeking $0 for "Unpaid Bonus," $0 for "Unauthorized Deductions," and $0 for "Other Unpaid Wages." Bruce Harper affixed his electronic signature to this document in which he stated, "I . . . swear that the information contained in this form is true to the best of my knowledge." (*Id.* at 552-54; *id.* at 1051, Resp. Ex. 1 at ENERGY000002-4.)

The wage claim included the following false statements:

- Mr. Harper's employer was Energy Enterprises.
- Mr. Harper started employment on April 5, 2014.
- The "First Date of Owed Wages" was May 14, 2014.
- Mr. Harper did not quit.
- Mr. Harper was paid $22.75 per hour.
- Mr. Harper had not been paid for 35 hours of work.

(R. at 370-71, ¶¶ 20-23.)

On the same date Mr. Harper filed the wage claim, he sent a text to Mr. Ostler in which he stated: "Are you or energy going to pay me for my miles driven through Michigan." (R. at 371, ¶ 24.) He also called Kim Martino and told her that "he had not been paid for the 'extra miles' for the Toledo . . . loads." (*Id.* ¶ 25.)

Drive Line filed its response to the Wage Claim on December 11, 2014. (R. at 1051, Petitioner's Exhibit (Pet. Ex.) 3.) Sometime after that time, Mr. Harper had another telephone conversation with Ms. Martino. In that telephone conversation, Mr. Harper asked Ms. Martino how much she was willing to pay to make the wage claim go away. (*See* R at 371-72, ¶ 27.)

On February 5, 2015, in response to Drive Line's answer to Mr. Harper's wage claim, Mr. Harper, for the first time, claimed he should have been paid $.46 per mile, a $5,000 sign-on bonus, and a flat-fee and a percentage of the Estes contract. (R. at 372, ¶ 28, R. at 1051, Pet. Ex. 3.) During the Wage Claim

Hearing held on Mr. Harper's wage claim, Mr. Harper sought reimbursement for unpaid mileage on the Toledo route, $.46 per mile for the mileage driven on the Toledo route, and a $5,000 sign on bonus. (*See* R. at 8, 722 at ¶ 29.) Further, Mr. Harper argued that "Drive Line never actually terminated his employment and for all he knew they still employed him. Ergo Mr. Harper reasoned that as he ostensibly remained employed by Drive Line, he should be paid the appropriate installments of the 'Longevity Bonus.'" (*See id.* at 11, 722 at ¶ 30.)

On April 22, 2015, the Wage Claim Unit dismissed Mr. Harper's claims with prejudice. (See R. at 8-12, 372, ¶ 31.) In Mr. Harper's Petition for Judicial Review of Final Agency Action filed on February 19, 2016, Mr. Harper asserted claims for $5,846.00 in claims for "dispute over unpaid wages & [inappropriate] deductions on the petitioner['s] checks." (R. at 2, ¶ 4.)

During the trial court proceeding held pursuant to the petition for judicial review, the trial court found that Mr. Harper had engaged in a series of frivolous filings. Specifically,

- On March 14, 2016, he filed a Motion to Disqualify Defendant's Council (sic) (UALD) and Petitioner's Request for Utah States Council (sic) and Representation (R. at 47-50), which the trial court denied ruling that "Petitioner has failed to provide a sufficient legal or factual basis to disqualify the Attorney General's Office." (R. at 63-65.)

- On August 2, 2016, he served Interrogatories and Requests for Production demanding that the Respondents answer and respond

"within three weeks" and then filed a motion to compel on August 26, 2016 (R. at 75), which the trial court denied (i) ruling that (a) "Petitioner's Motion is procedurally improper because it fails to comply with the basic requirements of Rule 37 of the [URCP]," and (b) "Petitioner's First Set of Discovery is untimely," and (ii) cautioning Mr. Harper "that frivolous filings or pleadings could subject Petitioner to sanctions under the [URCP] or an award of attorneys' fees. (R. at 113-116.)

- On September 8, 2016, he served a Motion to Extend Time for Petitioner to Complete Disscovery (sic) (R. at 117), which the trial court denied ruling that Mr. Harper "fail[ed] to comply with the certification requirements in Rule 37" and that the motion was "untimely," and awarding Drive Line attorney fees because the motion "lacked a reasonable legal or factual basis" and was, therefore, frivolous. (*See* R. at 184-87, 240-44.)

- On September 16, 2016, he served a Motion to Amend Petition (R. at 121-123), which the trial court denied ruling that the motion was untimely, and that "the proposed amendments . . . fail[ed] to set forth legally cognizable claims and [sought] relief that is not available, and awarding Drive Line attorney fees because the motion lacked a reasonable legal or factual basis and was, therefore, frivolous. (*See* R. at 184-87, 240-44.)

- On October 25, 2016, he served yet another Motion to Compel Disclosure (R. at 188), which the trial court denied, holding that "[t]he motion fail[ed] to comply with the [URCP]" and "appear[ed] to seek the same relief that Petitioner sought in his previous" motions and again cautioning the Petitioner "that additional frivolous filing may result in sanctions." (R. at 225-27.)

- On March 14, 2017, one week before trial, Mr. Harper submitted a trial brief, in which, for the first time, he claimed, (a) he was owed $300 for allegedly not being reimbursed for a fuel payment and (b) he was owed an additional $300 for his wages. Just one day before the trial, Mr. Harper informed counsel he was withdrawing those claims. (R. at 327-29.)

(R. at 373-74, ¶¶ 37(a)-(e).)

II. PROCEDURAL HISTORY

On November 6, 2014, Mr. Harper filed a wage claim with the Wage Claim Division of the UALD. (R. at 546, 553-54, 572; *id.* at 1051, Resp. Ex. 1 at ENERGY000002.) On April 22, 2015, the Wage and Hour Division dismissed Mr. Harper's claims with prejudice. (R. at 8-12.)

On June 15, 2015, Mr. Harper filed a Petition for Review with this court (*Harper v. Utah Labor Commission Antidiscrimination and Labor Division Wage Claim Unit,* Appeal No 20150474), which was transferred to the Third District Court pursuant to an order dated June, 26, 2015. (*See* Order, Appellate Case No 20150474-CA (June 26, 2015). A copy is appended as Exhibit D.) The petition for review was dismissed without prejudice for failure to serve the parties. (*See* R. at 13-15.)

Mr. Harper then filed a Petition for Judicial Review of Final Agency Action on February 19, 2016. (R. at 1-14.) During the course of the proceeding, Mr. Harper filed a number of pleadings that are relevant to this proceeding that have been discussed in the Statement of the Case section above. After a bench trial was held on March 22, 2017, the trial court entered the Findings and Order on May 17, 2017. (R. at 363-79.) The trial court then entered its Findings of Facts, Conclusions of Law, and Order on Attorneys' Fees and Costs on August 3,

2017, (R. at 465-73, a copy is appended as Exhibit E), and its Judgment on September 6, 2017, (R. at 722-26). After Mr. Harper filed a motion for new trial (*see* R. at 705-716), Drive Line filed a motion for the trial court to enter a vexatious litigant order against Mr. Harper. (*Id.* at 739-54.) On October 18, 2017, the trial court denied Mr. Harper's motion for a new trial and granted Drive Line's motion for entry of a vexatious litigant order. (R. at 932-35.)

Mr. Harper appealed the trial court's judgment by Notice of Appeal dated November 17, 2017. (R. at 994-96.)

III. DISPOSITION BELOW

On November 13, 2017, the trial court entered judgment against Mr. Harper and in favor of Drive Line, awarding $16,285.00 in attorney fees and costs, plus statutory post-judgment interest. R. at 722-26.)

SUMMARY OF THE ARGUMENT

Drive Line should prevail because this court lacks jurisdiction to hear the appeal. Although the Utah Court of Appeals generally has jurisdiction over appeals from a district court review of informal administrative adjudications, *see* Utah Code § 78A-4-103(2)(a)(ii), the general jurisdictional grant does not provide the subject-matter jurisdiction for this appeal. The Court of Appeals jurisdiction is limited in wage claim disputes by a further provision that requires it to comply with the requirements of the Utah Administrative

Procedures Act (UAPA). *Id.* § 78A-4-103(4). Because the UAPA, specifically limits appellate jurisdiction of informal adjudications to the district court and only allows further review "by a higher court" in situations specifically "authorized by statute," *see id.* §§ 63G-4-402(a), and the Payment of Wages Act does not authorize appellate review above the district court level, the UAPA requires that appellate review of informal wage claim adjudicative hearings be limited to the district court trial *de novo*.

Even if this court did have jurisdiction, Mr. Harper cannot prevail on any of the issues raised in his appeal. First, Mr. Harper fails to meet his burden to show that the trial court clearly erred with regard to his first two issues for appeal. Mr. Harper arguments are nothing more than complaints that the trial court should have believed his testimony or should have interpreted the testimony and evidence the way that he wanted—he never attempts to meet his burden to show that the trial court's findings were against the clear weight of the evidence. Moreover, Mr. Harper fails to acknowledge with respect to his second issue on appeal that, even if he were to somehow meet his burden to show clear error with respect the single bad-faith factor finding that he challenges, Drive Line was only required to establish one of three bad-faith factors to prevail, and the trial court found that Drive Line proved all three.

Moreover, Mr. Harper failed to meet his burden to show that the trial court abused its discretion in refusing to allow Mr. Harper to conduct discovery in violation of the Utah Rules of Civil Procedure and the trial court's explicit scheduling orders or in refusing to grant Mr. Harper's motion for new trial. Again, Mr. Harper's arguments are simply complaints that the trial court did not agree with him and grant the relief he requested.

Finally, because the trial court awarded attorney fees to Drive Line, this court's long-standing precedent requires it to award attorney fees on appeal. Even if the precedent did not demand an award of fees, Mr. Harper's continuing vexatious litigations practices warrant the imposition of fees.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL

"'Whether appellate jurisdiction exists is a question of law which [the courts] review for correctness . . . .'" *Gailey v. State*, 2016 UT 35, ¶ 8, 379 P.3d 1278 (quoting *Migliore v. Livingston Fin., LLC*, 2015 UT 9, ¶ 15, 347 P.3d 394).

As the appellate courts of this state have frequently discussed, the Utah Court of Appeals is a court of statutory creation. *See Salt Lake City Corp. v. Leahy*, 848 P.2d 179, 181 (Utah Ct. App. 1993) ("The Legislature created the court of appeals under Utah Code Ann. § 78-2a-1 (1992).") "[B]ecause the court of appeals is a statutory court, the Legislature has the power to define [the

court's] jurisdiction." *Id.* When "the Legislature has expressly limited [the court's] jurisdiction," the Court of Appeals cannot exceed that jurisdiction. *Id.*; *accord Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 35, 70 P.3d 47.

In this case, the Utah legislature has expressly provided that this court does not have jurisdiction in this case. As described above, the underlying claim in this case originated as a wage claim brought before the UALD's Wage Claim Unit. The Payment of Wages Act (the Act), Utah Code §§ 34-28-1 to -19 (2017),[3] charges the Wage Claim Unit with "ensur[ing] compliance" with the Act and "determin[ing] the validity of a claim for any violation of [the Act] that is filed with the division by an employee." *Id.* § 34-28-9(1)(a). The Act further authorizes the Wage Claim Unit to "make rules consistent with [the Act] governing wage claims and payment of wages." *Id.* § 34-28-9(1)(b). The Act, however, provides no further direction regarding the appellate rights of a person bringing a wage claim under the Act. In such circumstances the UAPA governs all questions of jurisdiction. *See id.* §§ 63G-4-101(1); 63G-4-105.

In this case, pursuant to its authority to do so under UAPA, *id.* § 63G-3-201(2)(d), and pursuant to the direction of the Payment of Wages Act, *id.* § 34-

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[3] The Payment of Wages Act was substantively amended in 2018. Because all of the court's relevant orders and judgment were entered prior to the revision, this brief refers to the Payment of Wages Act as it existed at the time of the entry of the judgment, November 13, 2017.

28-9(1)(a), the UALD enacted rules governing wage claims. *See* Utah Admin. Code R610-3-1 to -22. In enacting the administrative rules to govern wage claims, the UALD, pursuant to its right to do so under Utah Code § 63G-4-202(1), designated wage claim hearings as presumptively informal, subject to being declared formal by the presiding officer. Utah Admin. Code R610-3-9(A). In this case, the Wage Claim Unit administrative law judge never converted Mr. Harper's claim to a formal adjudication. (*See generally* R. at 8-12.)

Only "[t]he district courts have jurisdiction to review trial de novo . . . final agency actions resulting from informal adjudicative proceedings." Utah Code § 63G-4-402(a). The UAPA provides further that "[d]ecisions on petitions for judicial review of final agency action are reviewable by a higher court if authorized by statute." *Id.* § 63G-4-404(2). Thus, a district court's decision regarding a wage claim is only reviewable by this court if some statute authorizes further appellate review. In this case, the Payment of Wages Act does not authorize further appellate review of a district court's de novo appellate determinate regarding a wage claim. *See generally* Utah Code §§ 34-28-1 to -19.

Moreover, the general jurisdictional grant to the Utah Court of Appeal found in Utah Code § 78A-4-103(2)(a)(ii) does not provide the subject-matter jurisdiction for such an appeal. Although the statute does provide generally for

"appellate jurisdiction" over "an appeal from the district court review of an informal adjudicative proceeding of an agency," it limits the jurisdiction by providing that "[t]he Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings." *Id.* § 78A-4-103(4). Because the UAPA specifically limits appellate jurisdiction to the district court and only allows further review "by a higher court" in situations specifically "authorized by statute," *see id.* §§ 63G-4-402(a), the UAPA requires that appellate review of informal Wage Claim adjudicative hearings be limited to the district court's trial *de novo* review.

Accordingly, because this court does not have appellate jurisdiction, it must dismiss Mr. Harper's appeal. *Leahy*, 848 P.2d at 181. Moreover, as discussed below, even if this court did have jurisdiction, Mr. Harper is not entitled to any relief for the issues that he raises in his appeal.

II. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT MR. HARPER AGREED TO BE PAID BASED UPON A FIXED AMOUNT OF MILEAGE RATHER THAN ACTUAL DISTANCE ON DELIVERIES HE MADE ON AN ESTES CONTRACT.

The first issue Mr. Harper raises in his briefing is a challenge to an amalgamation of factual findings, all of which relate to Mr. Harper's agreed upon rate of pay. (*See* Brief of Appellant at 5-6 (Appellant's Brief).) As will be discussed below, Mr. Harper cannot meet his heavy burden to show that the trial court erred when it made the factual findings.

> When reviewing a challenge to the sufficiency of the evidence [to support a factual finding], [the courts] will not set aside a trial court's factual findings 'unless clearly erroneous,' giving 'due regard to the trial court's opportunity to judge the credibility of the witnesses.'"

Shuman v. Shuman, 2017 UT App 192, ¶ 3, 406 P.3d 258. "A party challenging the sufficiency of the evidence 'will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal' the evidence in support of the challenged finding." *Id.* (quoting *State v. Nielsen*, 2014 UT 10, ¶ 42, 326 P.3d 645). When a party brings an appeal to "a superior court to review the decision of a lower court, Utah appellate rules require the appellant to address reasons why the district court's dismissal of his petition should be overturned." *Allen v. Friel*, 2008 UT 56, ¶ 14, 194 P.3d 903. This means that a party, when challenging factual findings must do more than "reargue [his or] her position" from the lower tribunal. *Welte v. DWS*, 2011 UT App 46, ¶ 4, 249 P.3d 568. When courts "review findings of fact for clear error, [they] 'revers[e] only where the finding is against the clear weight of the evidence, or if [they] otherwise reach a firm conviction that a mistake has been made.'" *Grimm v. DxNA LLC*, 2018 UT App 115, ¶ 12 (quoting *LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 13, 221 P.3d 867).

In Mr. Harper's argument he does not contend that the trial court clearly erred by showing that the findings to which he objects are against the clear

weight of evidence, but instead argues variously the trial testified differently from the trial court's finding and did not "[give] . . . the proper weight of the evidence" Harper submitted. (*See* Appellant's Brief at 20, 35-36.)

Mr. Harper repeatedly cites selectively from the trial transcript and essentially complains that the trial court should have believed his testimony or should have interpreted the testimony and evidence the way that Mr. Harper argued it should have been interpreted. Of course, as discussed above, the relevant question that this court has to answer is not whether the appealing party's testimony could support the appealing party's position, but whether the trial court's finding is against the "clear weight of the evidence."

The specific findings that Mr. Harper is challenging were not entered against the clear weight of the evidence.

A. Finding ¶ 5(a) Was Not Entered Against the Clear Weight of Evidence.

In his statement of issues Mr. Harper complains that the first sentence of Finding ¶ 5(a) was clearly erroneous. However, Mr. Harper spends no time in his brief explaining his opposition to the finding. Accordingly, this court should not consider this argument. *In re Estate of Paul,* 2007 UT App 389, ¶ 17, 174 P.3d 642 (holding that a court may take appropriate measure to sanction a party for his failure to properly argue his brief, including disregarding an issue

not properly briefed). Even if the court were to consider Mr. Harper's arguments regarding Fining ¶ 5(a), the finding was not against the clear weight of the evidence.

The exact language of Finding ¶ 5(a) is:

> Drive Line and Mr. Harper agreed that Mr. Harper would be paid $.36 per mile (which consisted of a base rate of $.27 per mile, plus $.09 per mile per diem). This compensation was split in half when working with a team driver. Drivers could also earn an additional $.02 per mile incentive for meeting certain goals on an individual basis, and an additional $.02 per mile bonus for meeting certain goals on a team basis.

Aside from the testimony of Mr. Ostler[4] and the Payroll Records (R. at 1051, Resp. Ex. 5), Mr. Harper's own text messages demonstrated that he knew he was being paid $.36 per mile as a base and was never told he would receive $.42 to $.44 per mile. (*See* R. at 1051, Resp. Ex. 4.) In his text messages, he claims to being told he would receive $.40 per mile, which he would have received if he had qualified for both bonuses ($.36 + $.02 (individual bonus) +$.02 (team bonus)). Furthermore, Mr. Harper's original wage claim and his text message immediately following the filing of the wage claim asserted only that he had not been paid the full mileage on the Toledo runs—he never claimed he had been underpaid for all of his mileage. These contemporaneous

[4] *See* R. at 596, 601, 608, 617.

communications imply that Mr. Harper never believed that he should have been paid more per mile than he was paid. Accordingly, there was significant evidence supporting Findings ¶ 5(a), and, therefore, Mr. Harper has failed to meet his burden to demonstrate that there was "insufficient evidence to support" it.

B. Finding ¶¶ 5(b), 6, 35, and 38(a) Were Not Entered Against the Great Weight of the Evidence.

Next, Mr. Harper argues that the trial court clearly erred when it found that Mr. Harper had agreed to be to be paid at a flat rate based on fixed mileage (rather than actual mileage) on trips to Toledo, Ohio when delivering products for a Drive Line customer named Estes. Specifically, he contends that the trial court should not have entered Findings ¶¶ 5(b), 6, 35, and 38(a) because, Mr. Harper claims, the testimony at trial established (i) that he did not agree to the fixed mileage, (ii) that because the trial court would not allow him to inquire about the profitability of the Estes contracts with Drive Line, he was somehow disadvantaged, and (iii) that somehow this payment arrangement on the fixed mileage was illegal. Each of these arguments is simply wrong.

Not only is there sufficient evidence in the record to support the findings, but the evidence is overwhelming—all evidence Mr. Harper failed to cite to this court. First, aside from the mountain of evidence supporting the route mileage

disclosure,[5] Mr. Harper admitted during the trial that he clearly knew at the time he was hired that he would be compensated only route miles on the route from Salt Lake City to Toledo.

> Q. . . . . You knew, at the time that you were hired, that you would be paid on route mileage to Toledo. That's what they told you, right?
> A. Correct.
> Q. And they told you those miles were 1,626 to Toledo, right?
> A. Yes.
> . . . .
> Q. . . . . They never told you ["]we're going to pay you for your actual miles . . . traveled on those routes,["] right?
> A. No, they never stated that I was going to be doing 100 extra miles.
> . . . .
> Q. . . . . What I asked you is, you knew you were going to be paid on a fixed route, correct?
> A. Correct.

(R. at 567-70.) In fact, as discussed *supra* footnote 5, every single person who testified at the trial testified that the Toledo route was compensated at a fixed amount. Additionally, all but Mr. Jenkins—who was never asked—testified that the total fixed mileage to be compensated for the Toledo run was 1,626 miles.[6]

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[5] *See* R. at 495-96 (Brian Jenkins); *id.* at 601-603, 621-22, 626-27, 632 (Greg Ostler); *id.* at 640, 650-51(Kim Martino).

[6] While Mr. Ostler initially testified that the amount to be paid was a different number because his "memory's not that good," when his memory was refreshed by an exhibit, he corrected his testimony to the correct number. (R. at 602, 632.)

Second, Mr. Harper claims that there was no evidence that there was a contract with Estes. (Appellant's Brief at 30.) While Ms. Martino did testify that Drive Line "did not have a contract," she later explained what she meant—"We were on an at-will dispatch. We could take the loads or another carrier could take the load. It was entirely up to us. We did not have a contract." (R. at 648.) She further stated that she instructed Mr. Ostler to tell all new employees the flat fee mileage rate for the Toledo trips because "[t]hat's how we were paid." (*Id.* at 650-51.) Accordingly, Mr. Martino clearly testified that Drive Line had an agreement with Estes to haul loads for Estes to Toledo at a fixed mileage rate—she only clarified that Drive Line was not obligated to take any loads by contract. Thus, evidence supports the finding in every respect.

Additionally, whether Drive Line made a profit on the Estes loads or how Estes compensated Drive Line is entirely irrelevant to whether Mr. Harper was not paid his wages pursuant to his employment agreement with Drive Line. Obviously, if Drive Line lost money on an Estes run, the loss would have no bearing on whether it was required to pay Mr. Harper the amount it had contracted to pay him for taking the run—even if Drive Line lost money on the Estes contract, it would be required to pay Mr. Harper the amount it had contracted with him to pay.

Finally, Mr. Harper argues that the findings must be incorrect otherwise employers could get away with forcing employees to work hours in a day without compensation. (Appellant's Brief at 35-36.) This was a new theory that Mr. Harper never raised until he filed his motion to amend findings and for a new trial on insufficiency of evidence. (R. at 1-14, 327-29, 668-69, 709.) Raising such issues after trial, of course, is prohibited. *See Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986) (stating that a "motion to amend should [not] be employed . . . to advance new theories"). Even if it were not a new theory improperly raised after trial, Mr. Harper's argument fails because he provides no legal basis for his argument as required by the appellate rules, *see In re Estate of Paul,* 2007 UT App 389, ¶ 17 (holding that a court may take appropriate measure to sanction a party for his failure to properly argue his brief, including disregarding an issue not properly briefed) and his argument is filled with logical fallacies and false premises in any event. A person who is paid on a task basis, which is clearly permitted under the law, *see, e.g.,* Utah Code § 34-28-2(1)(a)(i) ("'Wages' means the amounts due the employee for labor or services, whether the amount is fixed or ascertained on a time, task, piece, commission basis . . ."), is paid by the task, not the hour. Accordingly, an employee cannot claim he has been denied his promised payment because it took him longer to complete the task than he expected.

Because there was significant evidence supporting the findings, Mr. Harper has failed to meet his burden to demonstrate that Findings ¶¶ 5(a), 6, 35, and 38(a) were against the clear weight of evidence. Additionally, Mr. Harper's argument regarding the unfairness of the payment raised for the first time on a motion for a new trial was an improper attempt to raise new theories on a Rule 52(b) and 59(a)(6) motion, and the law does not support Mr. Harper's contentions in any event.

C. Conclusion

Based upon the foregoing, this court should affirm the entry of Findings ¶¶ 5(a), 5(b), 6, 35, and 38(a).

III. THE TRIAL COURT DID NOT CLEARLY ERR WHEN IT FOUND THAT MR. HARPER ACTED IN BAD FAITH DURING THE COURSE OF THE LITIGATION.

Mr. Harper next contends that the trial court erred when it found that Mr. Harper had acted in bad faith during the course of the litigation. (*See* Appellant's Brief at 38-39.) Specifically, he challenges Findings ¶¶ 27, 39(a), 39(b), 39(c), and Conclusions ¶ 10 and then claims that "[f]inding that Harper took an unconscionable advantage of Drive Line is clearly erroneous." (Appellant's Brief at 17.) While Mr. Harper identifies these findings and conclusions in his statement of the issue, his argument deals exclusively with the court's finding that Mr. Harper called Ms. Martino and asked her "what she

was willing to pay to make the whole case go away." (*Id* at 16-17, 36-39.) This is a critical oversight.

Utah Code § 78B-5-825(1) authorizes a trial court to award "reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith[.]" "According to the plain language of section [78B-5-825], three requirements must be met before the court shall award attorney fees: (1) the party must prevail, (2) the claim asserted by the opposing party must be without merit, and (3) the claim must not be brought or asserted in good faith." *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1225 (Utah Ct. App. 1991).

In this case, Mr. Harper only challenges the question regarding whether he brought the claim in bad faith, and "[t]o find that a party acted in 'bad faith,' the trial court must find that *one* or more of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others." *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998); *accord Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶¶ 11-12, 122 P.3d 556. Thus, in order to show bad faith, a trial court need only make a finding of one of the above factors. In its Findings and Order, the trial court

found that Drive Line had proven all three factors in this case. (*See* R. at 375, ¶¶ 39(a)-(c).) Accordingly, even if Mr. Harper's argument had merit with respect to the one factor he challenges, it would make no difference as to the finding of bad faith given that the two other factors that Mr. Harper has not challenged would still justify a finding of bad faith.

Even if Mr. Harper's argument could somehow reverse the bad-faith finding, Mr. Harper's argument is simply without merit. While acknowledging that there was testimony that supported the finding that Mr. Harper had "an intention to take unconscionable advantage of the Respondents . . . by filing the factually baseless claims and then demanding a payment from Kim Martino to make the wage claim 'go away," Mr. Harper argues only that "[h]ad the Court believed in Harper's testimony and his affidavit, the Court would have not believed that Harper was attempting to take unconscionable advantage of . . . Ms. Martino." (Appellant's Brief at 38.) This argument, of course, is precisely the kind of argument that the appellate court's reject when a party challenges a factual finding—"[w]hen reviewing a bench trial '[appellate courts] accord deference to the trial court's ability and opportunity to evaluate credibility and demeanor.'" *State v. Bingham*, 2015 UT App 103, ¶ 12, 348 P.3d 730 (quoting *State v. Goodman*, 763 P.2d 786, 787 (Utah 1988).

As discussed above, when challenging factual findings must do more than "reargue [his or] her position" from the lower tribunal. *Welte,* 2011 UT App 46, ¶ 4. When courts "review findings of fact for clear error, [they] 'revers[e] only where the finding is against the clear weight of the evidence, or if [they] otherwise reach a firm conviction that a mistake has been made.'" *Grimm,* 2018 UT App 115, ¶ 12 (citations omitted).

Mr. Harper acknowledges there was evidence upon which the trial court based its decision. (*See* Appellant's Brief at 36-38.) While it is true that Mr. Harper testified that he never made a threat to Ms. Martino, Ms. Martino testified that he did. (*See* R. at 643-44.) More significantly, the trial court explicitly weighed the credibility of Mr. Harper against Ms. Martino and specifically found that it "finds Ms. Martino's testimony to be credible," and determined that Mr. Harper did make the threat. (R. at 371, ¶ 27.)

Thus, Mr. Harper has failed to meet his burden to establish that the trial court's finding is against the clear weight of evidence. Drive Line, therefore, requests that Mr. Harper's appeal be denied.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. HARPER'S DISCOVERY REQUESTS AND SANCTIONING MR. HARPER UNDER RULE 37(a)(8).

Mr. Harper's arguments with respect to the denial of his discovery requests is scattered and difficult to follow. However, it appears that he is

arguing that the trial court abused its discretion when it refused to compel Drive Line to respond to certain discovery requests that Mr. Harper propounded late in the discovery period. (*See* Appellant's Brief at 18-19, 39-43.)[7]

"As a general rule, [appellate courts] grant district courts a great deal of deference in matters of discovery and review discovery orders for abuse of discretion." *Dahl v. Dahl*, 2015 UT 23, ¶ 63, 345 P.3d 566. "'The choice of an appropriate discovery sanction is primarily the responsibility of the trial judge and will not be reversed absent an abuse of discretion." *Rawlings v. Rawlings*, 2015 UT 85, ¶ 13, 358 P.3d 1103 (quoting *First Fed. Sav. & Loan Ass'n v. Schamanek*, 684 P.2d 1257, 1266 (Utah 1984)).

In this case, the trial court acted well within its discretion in denying Mr. Harper's motion to compel discovery. On March 2, 2016, soon after the first answer to Mr. Harper's Petition for Judicial Review was filed, the trial court entered a document entitled "Notice of Event Due Dates" (Notice) that

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[7] Interestingly, Mr. Harper's complaint centers on Drive Line's purported failure to give him copies of "the trip envelopes" in response to his discovery requests. (*See* Appellant's Brief at 18, 40.) However, Mr. Harper had complete copies of those items since the Wage Claim hearing as they were exhibits in the hearing. (R. at 1051, Resp. Ex. 5.) Further, the payroll records were provided to him in the Pretrial Disclosures. (*See* R. at 273-74.) Mr. Harper also briefly complains about not receiving a copy of the Estes contract but makes no further mention of it in his argument.

establishing dates for discovery completion and completion dates. Additionally, the Notice provided that "[t]hese dates will constitute the schedule for disclosures, fact discovery, expert discovery, ADR and readiness for trial." It identified the date that "Fact discovery [should be] completed" as "11-Aug-16." (R. at 38.)

On August 2, 2016, Mr. Harper served a document on Drive Line entitled "Plaintiff's First Set of Interrogatories and Request for Production of Documents by mail and demanded that "said documents and interrogatories are to be answered . . . within 3 weeks." (R. at 97-100.) On August 23, 2016, Mr. Harper filed a motion to compel, (R. at 75), to which Drive Line objected because (1) the discovery requests sought discovery that would be completed outside of the discovery cut-off, (2) the discovery demanded responses in less time than permitted by Rules 33(b) and 34(b)(2) of the Utah Rules of Civil Procedure, (3) the discovery included more interrogatories and requests for production than permitted by Rule 26(c)(5), and Mr. Harper brought the motion to compel discovery without complying with Rule 37(a)(1). (R. at 89-108.)

On September 2, 2016, the trial court denied the motion to compel by Minute Entry dated September 2, 2016. (R. at 113-16.) In the Minute Entry, the trial court stated, *inter alia*:

> . . . Petitioner's Motion is procedurally improper because it fails to comply with the basic requirements of Rule 37. . . . Rule 37 requires a party who is alleging a discovery dispute to file a "Statement of Discovery Issues" with the Court. . . . Petitioner's Motion does not include the necessary elements required by the Rule, including "a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action."
>
> . . . Even if the Motion was procedurally proper, the Motion is denied on the alternative basis that Petitioner's First Set of Discovery is untimely.
>
> . . . . While the Court understands that the Petitioner is pro se . . ., the Court cautions Petitioner in this case that frivolous filings or pleadings could subject Petitioner to sanctions under the Utah Rules of Civil Procedure or an award of attorneys' fees.

(R. at 114-15.)

Six days after the court issued this decision, Mr. Harper filed a motion to enlarge time to complete discovery, claiming that he "ha[d] experienced oppositions and objections from the respondents as per discovery requests." (R. at 117.) Mr. Harper sought an additional 120 days to complete discovery. (*Id.*) Mr. Harper included a Statement of Discovery Issues which stated in its entirety:

> Comes Now (sic) the Petitioner and respectfully files this statement Pursuant (sic) to Rule 37a(1)a (sic), as the Respondents have not brought forth any of the Petitioner's Discovery Request do (sic) date pursuant to Rule 26.

(R. at 118.) Drive Line objected raising the same objections it had before when the trial court had denied the first motion and sought attorney fees. (R. at 124-31.)

Undeterred, Mr. Harper filed a motion to amend his petition on September 16, 2016. (R. at 121-23.) Drive Line objected to that motion because (1) the motion was untimely, (2) it improperly attempted to add the shareholders of Energy Enterprises as defendants in violation of *Heaps v. Nuriche, LLC*, 2015 UT 26, ¶ 18, 345 P.3d 655, and (3) it improperly attempted to add a purported violation of the Federal Motors Carrier Act. Once again, Drive Line sought its attorney fees. (R. at 144-52.) In an order dated October 19, 2016, the trial court denied the motion to extend discovery and the motion to amend the petition and granted Drive Line's request for attorney fees because "the Motion for Extraordinary Discovery and the Motion to Amend lack a reasonable legal or factual basis." (R. at 184-87.)

Less than a week later, Mr. Harper filed another motion "to compel the Respondents to [c]omply with the Petitioners [sic] request for discovery." (R. at 188.) Drive Line once again objected, joining the Utah Labor Commission's motion. (*Id.* at 216-217.) The trial court once again denied Mr. Harper's motion and warned him about his frivolous filing practices. (*Id.* at 225-27.)

Mr. Harper's argument on appeal, however, entirely ignores this factual history and instead focuses on Mr. Harper's unsupported and entirely irrelevant argument that the "documents [he requested] were relevant and necessary to" his case. (Appellant's Brief at 43.) Whether documents are relevant and necessary to a case has no bearing on whether the trial court abused its discretion in denying Mr. Harper's requests for discovery that are submitted in violation of the trial court's scheduling orders and the Utah Rules of Civil Procedure. "Because the trial judge deals directly with the parties and the discovery process, he or she has great latitude in determining the most efficient and fair manner to conduct the court's business." *A.K. & R. Whipple Plumbing & Heating v. Aspen Const.*, 1999 UT App 87, ¶ 36, 977 P.2d 518. Judges are "allow[ed] to impose various sanctions if 'a party . . . fails to obey a scheduling or pretrial order.'" *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶ 11, 241 P.3d 375 (quoting Utah R. Civ. P. 37(b)(2)(B)-(C)).

In this case, Mr. Harper clearly violated the trial court's scheduling orders, minute entries, discovery orders, and the Utah Rules of Civil Procedure. As discussed above, the trial court entered an order establishing dates for discovery completion and completion dates. It identified, among other things, the date that "Fact discovery [should be] completed" as "11-Aug-16." The Utah courts have long held that "it would be inappropriate and untimely under the

Utah Rules of Civil Procedure to serve a discovery request . . .within [28 days][8] of the discovery deadline, because the responding party would not have adequate time to respond, *i.e.,* to complete discovery in the time permitted by rule." *Dahl v. Harrison*, 2011 UT App 389, ¶34, 265 P.3d 139, *distinguished on other grounds, R.O.A General, Inc. v. Dai*, 2014 UT App 124, ¶ 11 n.5, 327 P.3d 1233.

In this case, the interrogatories and requests for production were served on August 2, 2016, by mail. Under Rules 33(b) and 34(b)(2) of the Utah Rules of Civil Procedure, a responding party is entitled to twenty-eight days after service to respond to interrogatories and requests for production. When discovery is served by mail, the responding party is entitled to an additional three days to respond. Given that Mr. Harper served his discovery request only nine days before the fact discovery completion date, the requests were untimely. Drive Line filed a timely objection to the requests. Accordingly, the trial court did not abuse its discretion in denying Mr. Harper's motion to compel.

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[8] At the time of the decision, the Utah Rules of Civil Procedure provided for a thirty day response time. The Rules have since been amended to twenty-eight days. *Compare Dahl v. Harrison*, 2011 UT App 389, ¶34, 265 P.3d 139, *distinguished on other grounds, R.O.A General, Inc. v. Dai*, 2014 UT App 124, ¶ 11 n.5, 327 P.3d 1233, *with* Utah R. Civ. P. 33(b)(3), 34 (b)(2).

The trial court's scheduling order also provided that the discovery tier applicable to this case would be tier 1 under Rule 26(c)(5). Under tier 1, a party is entitled to use no interrogatories and is only permitted 5 requests for production. In this case, Mr. Harper propounded nine interrogatories[9] and six requests for production.[10] (*See* R. at 97-100.) Accordingly, pursuant to Rules 33(b) and 34(b)(2), Mr. Harper's interrogatories and requests for production violated the rule. Drive Line timely objected to the interrogatories and requests for production. Thus, the trial court did not abuse its discretion in denying Mr. Harper's motion to compel.

Moreover, although Rule 37(a)(1) permits a party to seek an order "compelling discovery," in order to do so he must provide a "[s]tatement of discovery issues that includes "[a] certification" that he "conferred or attempted to confer" in good faith to resolve the dispute, include a statement regarding proportionality, and, "if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a

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[9] Although Mr. Harper did not identify his list of discovery requests as interrogatories or requests for production, items identified as 3, 4, 5, 6, 9, 10, 11, B, and C were interrogatories.

[10] Although Mr. Harper did not identify his list of discovery requests as interrogatories or requests for production, items identified as 1, 2, 6, 7, 8, and A were requests for production. Item 6 asked questions and also requested the production of documents. It is accordingly listed twice.

discovery budget." Utah R. Civ. P. 37(a)(2). In this case, Mr. Harper did not provide a statement of discovery issues that included all of the necessary elements. Accordingly, the trial court did not abuse its discretion in denying Mr. Harper's motion to compel.

Not only did the trial court properly exercise its discretion in denying the motion to compel, but it properly exercised its discretion in denying the motion to extend the discovery deadline. Rule 26(c)(6) allows a party "[t]o obtain discovery beyond the limits established in paragraph (c)(5)" only "before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules" by filing "a request for extraordinary discovery under Rule 37(a)." Thus, Mr. Harper's motion to extend discovery was improper because (1) he filed his motion almost a month after the close of standard discovery and (2) he had not reached the limits of standard discovery before filing the motion.[11] Additionally, Mr. Harper failed to comply with the

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[11] Mr. Harper engages in some equivocation when he claims that because the trial court held that he "had not reached limits of standard discovery" that the trial court had concluded that standard discovery was still ongoing. (*See* Appellant's Brief at 43.) The trial court's order was clear, however, that Mr. Harper "waited until after the close of standard discovery" to file his motion to extend. (*See* R. at 184.) The reference to "limits of standard discovery" was clearly referencing the fact that he had not, "before the close of standard discovery . . . reach[ed] the limits of standard discovery," i.e., the number of interrogatories and requests for production allowed. Utah R. Civ. P. 26(c)(6).

requirements of Rule 37(a)(1) when seeking his extraordinary discovery. Rule 37(a)(1) requires that a certification include, among other things, a "[s]tatement of discovery issues that includes "[a] certification" that he "conferred or attempted to confer" in good faith to resolve the dispute, include a statement regarding proportionality, and, "if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget." Utah R. Civ. P. 37(a)(2). In this case, Mr. Harper's statement of discovery issues entirely ignored all of these elements. Although Mr. Harper appears to have recognized the deficiency by filing a document entitled "Petitioner's Certification Pursuant to Utah R. Civ. P. 37(a)(2)(B),"[12] even this filing did not fully comply as it included no statement regarding proportionality or that Mr. Harper had reviewed and approved a discovery budget. Accordingly, the trial court did not abuse its discretion in denying the motion to extend discovery and Mr. Harper's appeal should be denied.

[12] It bears noting that Mr. Harper's description of the discussion with counsel for Drive Line was and is still disputed by counsel for Drive Line. (*See* R. at 128, n.4.)

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. HARPER'S MOTION FOR A NEW TRIAL.

Mr. Harper argues that the district court abused its discretion in denying his motion for a new trial because he "filed an affidavit in support of his motion," "testified under penalty of perjury [that] he did not call Ms. Martino . . . [and did] not . . . attempt to [extort or] take an unconscionable advantage of Ms. Martino," and "filed a [r]eply to [Drive Line's] opposition" to Mr. Harper's motion for new trial. (Appellant's Brief at 44.) Thus, Mr. Harper argues, the trial court must have been wrong when in its order denying the motion for new trial the court concluded that "Mr. Harper only selectively quotes from portions of the bench trial and ignores evidence that supports the Court's findings" and "Mr. Harper failed to discuss any of the supporting evidence in his New Trial Motion." (*Id.* at 43-44.) Aside from the fact that Mr. Harper's claims regarding what he did in his motion for new trial actually supports the trial court's conclusions, the claim is irrelevant to whether the trial court abused its discretion.

"'[A] large measure of discretion is vested in the trial court in refusing or granting a motion for new trial on the ground that there is an insufficiency of evidence to support . . . the judgment," when the trial court judge who heard the motion is the judge who presided over the case. *Mann v. Fredrickson,* 2006 UT

App 475, ¶¶ 5-6, 153 P.3d 768 (quoting *Pollesche v. Transamerican Ins. Co.*, 27 Utah 2d 430, 497 P.2d 236, 238 (Utah 1972)). Moreover, "'[t]he trial court's denial of a motion for a new trial will be reversed only if the evidence to support the [decision] was completely lacking or was so slight and unconvincing as to make the [decision] plainly unreasonable and unjust." *Id.* ¶ 8.

In this case, even assuming that Mr. Harper did as he argues in his brief, he does not argue nor attempt to show that the evidence was so slight or unconvincing as to make the trial court's decision to deny his motion for new trial plainly unreasonable and unjust. Mr. Harper even concedes in his brief that his motion for new trial did "not have many [sic] of the supporting evidence." (Appellant's Brief at 44.) There was significant and compelling evidence that supported every finding and conclusion Mr. Harper challenged in his motion for new trial. (*See* R. at 755-828.) Accordingly, Mr. Harper's appeal of the motion for new trial should be denied.

ATTORNEY FEES

Drive Line and Energy Enterprises also respectfully request that they be awarded attorney fees and costs on appeal. This court has repeatedly stated that "'[w]hen a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.'" *I-D Electric Inc. v.*

Gillman, 2017 UT App 144, ¶ 49, 402 P.3d 802 (quoting *Valcarce*, 961 P.2d at 319).

Moreover, in this case, an award of attorney fees is especially warranted. As discussed in the fact section above, the trial court awarded attorney fees against Mr. Harper because of his bad faith litigation tactics, repeatedly warned him before sanctioning him, and then entered a vexatious litigant order against him pursuant to Rule 83 of the Utah Rules of Civil Procedure. Even after the order was entered against him, Mr. Harper continued his bad faith litigation tactics, including presenting "arguments . . . to the [trial court that] were without basis in fact or law" in filings submitted in response to writs of garnishment that "presented no relevant objections or exemptions." (R. at 1044.)

Moreover, Mr. Harper's conduct in the appellate proceeding has been similar to his conduct in the trial court below. As this court docket details, on March 29, 2018, this court sent the parties a briefing schedule that set the time for the submission of Mr. Harper's brief to be May 8, 2018. Mr. Harper failed to file a brief on May 8th. Consequently, this court dismissed the case pursuant to an Order of Dismissal dated May 16, 2018, subject to the condition that Mr. Harper's appeal would be reinstated if he filed a brief within ten days. Rather than file a brief, Mr. Harper requested a motion for extension of time on May

18, 2018. The court granted the motion for extension on May 23, 2018, ordering Mr. Harper's brief to be filed by June 18, 2018. Before filing that brief, Mr. Harper requested to supplement the record to include transcripts from the underlying informal adjudication held at the Wage Claim Division. This court granted that motion by Order dated June 5, 2018. On June 7, 2018, this court gave Mr. Harper an additional extension of time to July 17, 2018, to file his brief.[13] On July 6, 2018, Mr. Harper filed another motion seeking another extension of time and stating only that "[t]he record has been supplemented and I need more time to compleat [sic] the brief." This, of course, violated the requirements of Utah Rules of Appellate Procedure Rule 22(b).

Moreover, the Appellant's Brief filed by Mr. Harper contains argument that ignore the standards for appellate review and long-standing precedent of this court and has simply reargued the same arguments that he repeatedly presented to the trial court below for which he was sanctioned. Although this court may be tempted to view this behavior as the simple mistake of a *pro se* litigant, as detailed in the record below, besides the vexatious litigant order

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[13] The Court's letter resetting the briefing schedule states that the "Court Order of June 5, 2018, . . . suspended [the briefing schedule] with directions that the due date for appellant's brief would be re-established following this Court's receipt of the necessary supplemental record." However, the June 5, 2018, Order does not include such language, and, Mr. Harper never requested an extension for the filing of the brief.

entered against Mr. Harper entered in this case, Mr. Harper has had two other vexatious litigant orders entered against him in two other proceedings. (*See* R. at 740, 748-54.) Accordingly, he is very familiar with the court process and has been warned repeatedly to stop his improper behavior.

Drive Line does not have unlimited resources to defend itself, yet Mr. Harper's behavior has unreasonably increased the cost to Drive Line. His original claim filed with the Wage Claim Division was for slightly less than $800. Before that date, he had never claimed that Drive Line owed him any money even though he quit his job two months prior to his filing the claim. It was clear that he intended to leverage the wage claim into a settlement when he called Kim Martino and asked her how much she would pay him to make it go away. His behavior since that date demonstrates that he was fully prepared to carry through on the implicit threat to cause Drive Line unreasonable legal cost and disrupt its business.

CONCLUSION

Based upon the foregoing, Drive Line requests that this court conclude that it lacks jurisdiction to hear this appeal, or, even if it did, to deny Mr. Harper's appeal. Furthermore, Drive Line requests that it be awarded its attorney fees and costs in this appeal and remand the case to the trial court for

a determination of the reasonable attorney fees and costs incurred in this appeal.

Dated August 22, 2018.

/s/ D. Scott Crook
D. Scott Crook
scott@crooktaylorlaw.com
CROOK & TAYLOR LAW PLLC
Attorneys for Respondents Energy Enterprises, Inc., and Drive Line, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, I certify that the foregoing **BRIEF OF RESPONDENTS ENERGY ENTERPRISES, INC., AND DRIVE LINE, LLC**, relying upon the word count function found in Microsoft Word, the word processing program used in the drafting of the brief, the brief contains 12,096 words (including the table of contents, table of authorities, and certifications), which is less than the 14,000 word limit set by Rule 24(g)(1) of the Utah Rules of Appellate Procedure. Additionally, I have complied with the requirements of Rule 21(g) of the Utah Rules of Appellate Procedure and this filing contains no non-public information.

Dated August 22, 2018.

/s/ D. Scott Crook
D. Scott Crook
scott@crooktaylorlaw.com
CROOK & TAYLOR LAW PLLC
Attorneys for Respondents Energy Enterprises, Inc., and Drive Line, LLC

CERTIFICATE OF SERVICE

On August 22, 2018, I caused to be served two copies of the foregoing **BRIEF OF RESPONDENTS ENERGY ENTERPRISES, INC., AND DRIVE LINE, LLC** by causing the same to be mailed to the following:

Brent A. Burnett
brentburnett@agutah.gov
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/s/ D. Scott Crook
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CROOK & TAYLOR LAW PLLC
Attorneys for Respondents' Energy Enterprises, Inc., and Drive Line, LLC

APPENDIX

Exhibit	Title
A	Finding of Fact, Conclusions of Law, and Order (May 18, 2017)
B	Judgment (September 1, 2017)
C	Order Denying New Trial Motion and Granting Vexatious Litigant Motion (Oct. 18, 2017}
D	Order, Appellate Case No 20150474-CA (June 26, 2015)
E	Findings of Facts, Conclusions of Law, and Order on Attorneys' Fees and Costs (August 3, 2017)

Tab A

EXHIBIT A

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

BRUCE HARPER, Petitioner, vs. UTAH LABOR COMMISSION, ENERGY ENTERPRISES, INC., and DRIVE LINE, LLC, Respondents.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Case No. 160901238 Judge James D. Gardner

A bench trial was held in this matter on March 22, 2017. Petitioner Bruce Harper appeared before the court and represented himself. Respondents Energy Enterprises, Inc., and Drive Line, LLC also appeared and were represented by D. Scott Crook. Respondent Utah Labor Commission also appeared and was represented by David M. Wilkins. On or about April 17, 2017, the parties submitted proposed findings of fact and conclusions of law to the Court. The Court, having considered the testimony of the parties and witnesses, received exhibits, heard the arguments of counsel regarding the issues tried in this case, and for good cause appearing in the record and in the admitted evidence, hereby makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Bruce Harper was hired by Drive Line, LLC (Drive Line), on June 18, 2014.

2. On the date of his hire, Mr. Harper received a copy of Drive Line's Substance Abuse Policies and Procedures.

3. Kim Martino is an owner and officer of Drive Line.

4. Greg Ostler was the Fleet Manager for Drive Line at all relevant times.

5. Prior to being hired, Mr. Harper interviewed with Greg Ostler. The Court finds credible the testimony of Mr. Ostler that he explained Drive Line's compensation policies to Mr. Harper. The Court finds the following was the agreed upon compensation between Mr. Harper and Drive Line:

a. Drive Line and Mr. Harper agreed that Mr. Harper would be paid $.36 per mile (which consisted of a base rate of $.27 per mile, plus $.09 per mile per-diem). This compensation was split in half when working with a team driver. Drivers could also earn an additional $.02 per mile incentive for meeting certain goals on an individual basis, and an additional $.02 per mile bonus for meeting certain goals on a team basis.

b. Drive Line and Mr. Harper agreed that on certain routes that Mr. Harper would be compensated for a fixed amount of mileage no matter the actual distance driven. This compensation was pursuant to a contract that Drive Line had with another company named Estes. The fixed mileage for the route from Salt Lake City, Utah, to Toledo, Ohio was 1,626 trip miles.

c. On days when a driver was driving locally (rather than on a long-haul) or attending training, Drive Line and Mr. Harper agreed that he would be compensated on an hourly rate of between $10 to $18 per hour, depending on the type of work being performed.

6. The Court finds that the compensation arrangements as testified to by Mr. Ostler was the agreed upon wages between the parties.

7. Every pay period, Drive Line mailed Mr. Harper (a) a pay statement, (b) a document entitled "Employee Pay Sheet," and, if applicable (c) a hand-written time card. Mr. Harper acknowledged that he received all of these documents after they were mailed.

a. The pay statements included the number of miles driven and/or hours worked for non-long haul driving and the regular and per diem rates paid based on those miles and/or hours.

b. Every Employee Pay Sheet included the name of Drive Line at the top. The Employee Pay Sheet identified every trip by trip number and for every long haul trip, it included the amount of mileage credited to the driver, the amount paid at the regular mileage rate and the amount paid at the per diem mileage rate. It also identified the number of hours driven on non-long haul matters, the rate of pay, and the total amount paid. Finally, if an employee had earned any incentives for past trips, the Employee Pay Sheet identified the trip and mileage qualifying for the incentive.

8. Sometime after Mr. Harper began working for Drive Line, Drive Line began offering a longevity bonus. The Court finds that the longevity bonus was not offered to Mr. Harper at the time of his employment. The longevity bonus provided that a driver who worked a

requisite number of months with Drive Line as a full-time driver was entitled to a bonus. The bonus was as follows:

Months of Service	Bonus Amount
6	$500
12	$500
18	$500
24	$500
30	$500
36	$500
42	$1,000
48	$1,000

9. The Court finds that Drive Line did not offer a sign-on bonus to Mr. Harper at the time he was hired.

10. The Court finds credible the testimony of Mr. Ostler that Drive Line did not offer sign-on bonuses.

11. Mr. Harper never made a claim that he was owed any money during the time that he was employed by Drive Line.

12. During the time that Drive Line employed Mr. Harper, neither Ms. Martino nor Mr. Ostler received any demand for additional payment from Mr. Harper.

13. Mr. Harper presented no evidence that he ever made a demand to anyone at Drive Line for wages he was owed but not paid during his employment tenure.

14. In text messages that were exchanged between Mr. Harper and Mr. Ostler from September 3, 2014, to September 9, 2014, Mr. Harper never claimed that (a) he was owed more money for the mileage he had driven, (b) he should have been compensated for actual mileage rather than route mileage, or (c) he should be paid a sign-on bonus. The text messages evidence only that Mr. Harper wanted to renegotiate the pay he was receiving.

15. Although Mr. Harper claims that the text messages provided to the Court during the trial did not include a complete record of the text messages exchanged between Mr. Ostler and Mr. Harper, Mr. Harper never disputed the content or accuracy of the text messages that were supplied. Additionally, Mr. Harper never claimed that any text message allegedly not provided contained any claim to being owed any additional wages—he claimed only that they included complaints about safety conditions or co-drivers.[1] Specifically, the Court references the following text messages as support for these findings:

a. On September 3, 2014, Mr. Harper inquired about when his "probation time [was] compleat[2] as far as becoming an owner."

b. On September 5th, Mr. Harper followed up on his earlier text message: "Was u able to figure my probation time to become an owner op.?" Mr. Ostler responded,

[1] Because these allegations are not relevant to Mr. Harper's wage claim, the Court makes no finding as to whether any safety violations occurred. The Court notes that testimony from Mr. Ostler and Ms. Martino disputed these claims.

[2] Because text messages are often written in haste without conforming to grammatical or spelling conventions, all text messages will be quoted as typed without interlineation of *sic* to identify any spelling or gramatical errors.

explaining that Mr. Harper was eligible at three or six months depending on "how much you want to put down on the truck."

c. Mr. Harper responded with "O. Ok. So lets negoicate. . Thats if the co. Still Wants me? Lol".

d. The following day, September 6, 2014, Mr. Harper followed up again: "What information did kim give u?" Mr. Ostler did not immediately respond to this inquiry.

e. On September 7, 2014, before Mr. Ostler had responded to the inquiry sent the day before, Mr. Harper sent another text message to Mr. Ostler in which he stated:

> Before i go back out on wednesday ineed to resolve and renegociate terms. U stated my income would be.40 a mile.. It is currently .38 a mile.. I want .45 a mile. I need to b paid on actual traveled miles. 1716 a trip.. I want to be assigned truck 33.. If i am with a co. Driver who is unable to do thier half of miles i will recieve the difference of 90 miles (1716 to 1626) to my check.

f. On September 8, 2014, Mr. Ostler responded to Mr. Ostler's multiple demands and questions. In response to Mr. Harper's demand for different payment terms for his trips, Mr. Ostler stated:

> The only drivers with a .40 base have been with us over a year-all drivers start at .36 with incentives available via safety, operation and very soon fuel bonus'-u are about due for your revue when if you are meeting satandards could see raise to .37 plus incentives.

g. In response to this text message, Mr. Harper stated, "U have my terms. It is obvious that to u i am not worth those terms i will seek new employment or talk with kim about the truck purchase. I have the down payment avilabl."

h. After Mr. Ostler refused to negotiate Mr. Harper's demands for different mileage payment terms, Mr. Harper stated, "Ok. Will u inform steve for me".

i. When Mr. Ostler inquired further about what Mr. Harper wanted Mr. Ostler to tell Steve, Mr. Ostler wrote another text message at 8:22 a.m on September 9th:

> Please let Steve know ASAP if you are taking load with Mike Chadwick tonight at 2 am—he needs to give as much notice as possible for Estes if you aren't going to stay with us-we also need fuel card for 32, we had to rob another truck and change it's # this morning—thanks Bruce. . . . You can drop by office or if you are going out tonight just drop in mailbox at yard—thanks again.

j. Three and half hours later, Mr. Harper texted Mr. Ostler telling him, "I put the fuel card in shed."

16. The Court finds that Mr. Harper was not terminated from Drive Line, but instead that he quit his job.

17. During his three-month tenure of employment with Drive Line, Mr. Harper was paid a total of $11,315.64.

Pay Period	Payday	Amount
June 16 – June 29, 2014	July 3, 2014	$1,283.22
June 30 – July 13, 2014	July 18, 2014	$1,821.00
July 14 – July 27, 2014	August 1, 2014	$1,555.44

Pay Period	Payday	Amount
July 28 – August 10, 2014	August 15, 2014	$2,363.24
August 11 – August 24, 2014	August 29, 2014	$1,866.26
August 25 – September 7, 2014	September 12, 2014	$2,406.48
	TOTAL:	$11,315.64

18. The Court finds that the payments made to Mr. Harper as identified above were full payment of all wages owed to Mr. Harper for his work and that Mr. Harper has failed to prove that Drive Line owes him any unpaid wages.

19. Mr. Harper filed a wage claim on November 6, 2014. Mr. Harper's wage claim specifically demands payment of only $796.25 for "unpaid wages." He indicated he was seeking $0 for "Unpaid Bonus," $0 for "Unauthorized Deductions," and $0 for "Other Unpaid Wages." Bruce Harper affixed his electronic signature to this document in which he stated, "I . . . swear that the information contained in this form is true to the best of my knowledge."

20. The Court finds that the wage claim included the following false or incorrect statements:

a. Mr. Harper's employer was Energy Enterprises.

b. Mr. Harper stated that he started employment on April 5, 2014.

c. Mr. Harper stated that the "First Date of Owed Wages" was May 14, 2014.

d. Mr. Harper stated he did not quit.

e. Mr. Harper stated that he was paid $22.75 per hour.

f. Mr. Harper stated that he had not been paid for 35 hours of work.

21. Although Mr. Harper claimed in trial that he intended to correct these false or incorrect statements when an investigator contacted him, he knew that the statements were false or incorrect at the time he affixed his signature to the wage claim.

22. The Court finds that when Mr. Harper filed his wage claim that he had documentation (including monthly pay statements) that showed he started work in June 2014 and not in April 2014.

23. Additionally, the Court finds that Mr. Harper knew that his employer was Drive Line and he also knew that he quit his job.

24. After filing the wage claim, Mr. Harper sent a text to Mr. Ostler on that same date in which he stated: "Are you or energy going to pay me for my miles driven through Michigan."

25. He also called Kim Martino on that same date and told her that "he had not been paid for the 'extra miles' for the Toledo . . . loads."

26. Prior to November 6, 2014, the Court finds that Mr. Harper had not made any claim to Drive Line as to any specific amounts owed to him for his work. Additionally, on November 6, 2014, it appears that Mr. Harper's sole claim was for allegedly not being paid for miles or hours of work that he claimed he should have been paid for on the Toledo to Salt Lake City routes.

27. Sometime after Drive Line filed its "Employer's Response," Mr. Harper had another telephone conversation with Ms. Martino. Ms. Martino testified at trial that in that telephone conversation, Mr. Harper asked Ms. Martino how much she was willing to pay to make the wage claim go away. The Court finds Ms. Martino's testimony to be credible.

28. On February 5, 2015, in response to Drive Line's answer to Mr. Harper's wage claim, Mr. Harper, for the first time, claimed he should have been paid $.46 per mile, a $5,000 sign-on bonus, and a flat-fee and a percentage of the Estes contract.

29. During the Wage Claim Hearing held on Mr. Harper's wage claim, Mr. Harper sought only reimbursement for unpaid mileage on the Toledo route, $.46 per mile for the mileage driven on the Toledo route, and a $5,000 sign on bonus. (*See Order of* Dismissal, Wage Claim No. 15-00862 (April 22, 2015), appended to Petition for Judicial Review of Final Agency Action.)

30. During the Wage Claim Hearing, Mr. Harper argued that "Drive Line never actually terminated his employment and for all he knew they still employed him. Ergo Mr. Harper reasoned that as he ostensibly remained employed by Drive Line, he should be paid the appropriate installments of the 'Longevity Bonus.'" (*See id.* at 4.)

31. On April 22, 2015, the Wage and Hour Division dismissed Mr. Harper's claims with prejudice.

32. In Mr. Harper's Petition for Judicial Review of Final Agency Action filed with this Court on February 19, 2016, Mr. Harper asserted claims for $5,846.00 in claims for "dispute over unpaid wages & [inappropriate] deductions on the petitioner['s] checks." (Petition for Judicial Review of Final Agency Action ¶ 4.)

33. On March 14, 2017, one week before trial, Mr. Harper submitted a trial brief, in which, for the first time in the entire two year history of his wage claim, he claimed, (a) he was owed $300 for allegedly not being reimbursed for a fuel payment and (b) he was owed an additional $300 from his wages. Just one day before the trial, Mr. Harper informed counsel he

was withdrawing those claims. In addition, Mr. Harper claimed, despite his wage claim filing, that his employment had been "inappropriately terminated."

34. The Court finds that Mr. Harper has not met his burden in this case that he is owed any money from Drive Line.

35. The Court finds that Drive Line has paid Mr. Harper all amounts that he was owed based on his employment.

36. The Court finds that Energy Enterprises, Inc. and Drive Line are the prevailing parties in this litigation.

37. Although Mr. Harper is representing himself in this matter and some deference is given to *pro se* litigants, the Court nevertheless finds that Mr. Harper filed a number of frivolous or borderline frivolous filings during the course of this litigation. Specifically, the Court finds the following filings were not filed in good faith:

a. On or about March 14, 2016, Mr. Harper filed a Motion to Disqualify Defendant's Council (sic) (UALD) and Petitioner's Request for Utah States Council (sic) and Representation, which this Court denied ruling that "Petitioner has failed to provide a sufficient legal or factual basis to disqualify the Attorney General's Office." (Minute Entry (July 12, 2016).)

b. On or about August 2, 2016, Mr. Harper served Interrogatories and Requests for Production demanding that the Respondents answer and respond "within three weeks" and then filed a motion to compel on August 26, 2016, which this Court denied (i) ruling that (a) "Petitioner's Motion is procedurally improper because it fails to comply with the basic requirements of Rule 37 of the [URCP]," and (b) "Petitioner's

First Set of Discovery is untimely," and (ii) cautioning Mr. Harper "that frivolous filings or pleadings could subject Petitioner to sanctions under the [URCP] or an award of attorneys' fees. (Minute Entry (Sept. 2, 2016).)

c. On or about September 8, 2016, Mr. Harper filed a Motion to Extend Time for Petitioner to Complete Disscovery (sic), which this Court denied ruling that Mr. Harper "fail[ed] to comply with the certification requirements in Rule 37" and that the motion was "untimely," and awarding Drive Line attorney fees because the motion "lacked a reasonable legal or factual basis" and was, therefore, frivolous. (*See* Order (Oct. 19, 2016) & Order on Request for Attorney Fees (Dec. 16, 2016).)

d. On or about September 16, 2016, Mr. Harper filed a Motion to Amend Petition, which this Court denied ruling that the motion was untimely, and that "the proposed amendments . . . fail[ed] to set forth legally cognizable claims and [sought] relief that is not available, and awarding Drive Line attorney fees because the motion lacked a reasonable legal or factual basis and was, therefore, frivolous. (*See* Order (Oct. 19, 2016) & Order on Request for Attorney Fees (Dec. 16, 2016).)

e. On or about October 25, 2016, Mr. Harper filed yet another Motion to Compel Disclosure, which this Court denied, holding that "[t]he motion fail[ed] to comply with the [URCP]" and "appear[ed] to seek the same relief that Petitioner sought in his previous" motions and again cautioning the Petitioner "that additional frivolous filing may result in sanctions."

38. The Court finds that Mr. Harper's claims in this case are without merit.

a. Mr. Harper testified that he agreed, at the time he was hired, to be compensated at a flat rate for all trips to Toledo on the Estes Contract.

b. Mr. Harper's own text messages make clear that he never believed that he was entitled to $.46 per mile as claimed in this case.

c. Mr. Harper never believed he was entitled to a $5,000 sign-on bonus. There was no credible testimony that Drive Line ever offered a $5,000 sign-on bonus. In fact, the only $5,000 bonus testified about at the hearing was a longevity bonus that was instituted after Mr. Harper was hired.

39. Based upon the foregoing findings, this Court finds that, in pursuing this appeal of his wage claim, Mr. Harper brought this action in bad faith. Specifically,

a. Mr. Harper did not honestly believe in the propriety of his claims at the time that he filed them;

b. Mr. Harper had an intention to take unconscionable advantage of the Respondents in this case by filing the factually baseless claims and then demanding a payment from Kim Martino to make the wage claim "go away;" and

c. Mr. Harper had an intention and knowledge that by filing this wage claim and the other frivolous pleadings in this case would have the effect of hindering, delaying, and defrauding the Respondents in this action.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby enters the following Conclusions of Law:

1. This Court has jurisdiction over this case and venue is proper.

2. Mr. Harper filed this matter as an appeal of a wage claim filed with the Utah Wage Claim Division of the Utah Labor Commission pursuant to the Payment of Wages Act, Utah Code Ann. §§34-28-1 to -19. After an informal adjudicative proceeding held before an administrative law judge at the Wage Claim Division, Mr. Harper's wage claim was dismissed. He filed this appeal pursuant to Utah Admin. Code R610-3-13 and Utah Code § 63G-4-402. (*See* Petition for Judicial Review of Agency Action, Utah 3rd Dist. Court Case No. 160901238 (February 26, 2016).) This Court has jurisdiction to "award damages or compensation only to the extent expressly authorized by statute." *Id.* § 63G-4-404(1)(a). Since the Payment of Wages statute entitles an individual to pursue claims for unpaid wages only, *see* Utah Code § 34-28-9, Mr. Harper's claim is limited to a trial de novo on the issue of whether he is entitled to the wages he claimed under the Payment of Wages Act. Wages are defined by the statute to mean "the amounts due the employee for labor or services, whether the amount is fixed or ascertained on a time, task, piece, commission or other method of calculating such amount." *Id.* § 34-28-2(1)(i).

3. Mr. Harper had the burden to prove that his employer failed to pay him "amounts due . . . for [his] labor or service."

4. Drive Line was Mr. Harper's only employer under the statute. Energy Enterprises, Inc., was not Mr. Harper's employer.

5. Mr. Harper did not prove that he was owed any unpaid wages for the services he performed.

6. Respondents Energy Enterprises, Inc., and Drive Line are the prevailing parties in this litigation.

7. Utah Code Ann. § 78B-5-825(1) authorizes the court to award "reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith[.]" Utah Code Ann. § 78B-5-825(1). "According to the plain language of section [78B-5-825], three requirements must be met before the court shall award attorney fees: (1) the party must prevail, (2) the claim asserted by the opposing party must be without merit, and (3) the claim must not be brought or asserted in good faith." *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1225 (Utah Ct. App. 1991) (citing *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983)).

8. "To determine whether a claim is without merit, [the court] look[s] to whether it was frivolous or of little weight or importance having no basis in law or fact." *Matthews v. Olympus Const., LC*, 2009 UT 29, ¶ 30, 215 P.3d 129 (internal quotation and citation omitted). As set forth above, Mr. Harper's claim had no basis in law or fact and the Court determines that it was brought without merit.

9. A finding of bad faith requires "a factual determination of a party's subjective intent." *Valcarce v. Fitzgerald*, 961 P.2d 305, 315–16 (Utah 1998). To find that a party acted in bad faith, the court must conclude that at least one of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. *Id.* at 316. As set forth above, the Court finds each of these factors present in this case.

10. Thus, pursuant to Utah Code § 78B-5-825(1), the Court determines that Mr. Harper filed his wage claim in bad faith and that Respondents are entitled to their reasonable attorney's fees in defense of this action.

11. As the prevailing party, Respondents are also entitled to an award of costs. *See* Utah R. Civ. P. 54.

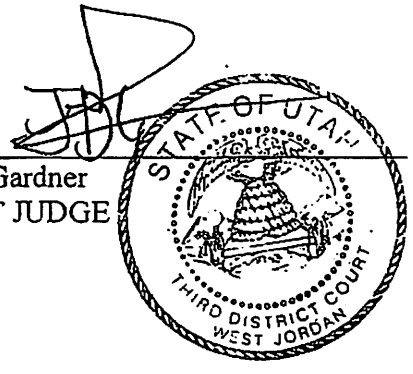
12. The Court reserves a determination of the amount of attorney's fees and costs Respondents are entitled to in this action. Within fourteen (14) days of this order, Respondents shall file and serve a request and an affidavit of attorney's fees and costs in compliance with Rule 73 of the Utah Rules of Civil Procedure setting forth the amount of attorney's fees and costs being sought. The briefing on any such motion will proceed in compliance with the rules of civil procedure.

13. After a determination of the amount attorney's fees and costs, the Court will direct Respondents to submit a form of a judgment consistent with these preceding Findings of Fact and Conclusions of Law, pursuant to Rule 58A of the Utah Rules of Civil Procedure.

14. This is the order of the Court, and no further order is required with respect to the issues set forth herein.

DATED this 16th day of May, 2017.

BY THE COURT:



James D. Gardner
DISTRICT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160901238 by the method and on the date specified.

MAIL: BRUCE HARPER 5308 CYGNUS HILL COVE WEST JORDAN, UT 84081
MAIL: D SCOTT CROOK 2150 S 1300 E STE 500 SALT LAKE CITY UT 84106
MAIL: DAVID M WILKINS 160 E 300 S 5TH FL STE 201 PO BOX 140857 SALT LAKE CITY UT 84111

Date: 05/17/2017 /s/ BRENDA L KLEINLEIN

Deputy Court Clerk

Tab B

EXHIBIT B

The Order of the Court is stated below:
Dated: September 01, 2017 04:45:56 PM
/s/ JAMES GARDNER
District Court Judge

D. Scott Crook (7495)
scott@crooktaylorlaw.com
CROOK & TAYLOR LAW PLLC
2150 South 1300 East, Suite 500
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Attorneys for Respondents Energy Enterprises, Inc., and Drive Line, LLC

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH – WEST JORDAN

BRUCE HARPER, Petitioner, vs. UTAH LABOR COMMISSION, ENERGY ENTERPRISES, INC., and DRIVE LINE, LLC, Respondents.	**JUDGMENT** Case Number 160901238 Judge James Gardner

This matter came before the Court for trial on March 22, 2017. Petitioner, Bruce Harper, was present and represented himself. The Respondents Energy Enterprises, Inc., and Drive Line, LLC, were present and were represented by D. Scott Crook of Crook and Taylor Law PLLC. The Respondent Utah Labor Commission was represented by David M. Wilkins, Assistant Utah Attorney General. Having heard the arguments of counsel and the testimony of witnesses and the exhibits admitted in open Court, having entered its Order on Request for Attorney Fees on December 16, 2016, its Findings of Fact and Conclusions of Law on May 17, 2017, and its Findings of Fact, Conclusions of Law, and Order on Attorney Fees and Costs on August 3, 2017, and for other good cause, the Court hereby ENTERS JUDGMENT against Petitioner, and in favor of Respondents Energy Enterprises, Inc., and

Drive Line, L.L.C. in the total amount of $16,285.00, plus statutory post-judgment interest in the amount of 2.87% per annum pursuant to Utah Code § 15-1-4.

***** The Court's seal and signature is found on the top of the first page *****

Approved as to Form:

_____

Bruce Harper
jeneannehulce@yahoo.com
Petitioner, Pro Se

/s/ David M. Wilkins
(Signed by D. Scott Crook with permission of David M. Wilkins)
David M. Wilkins
dwilkins@utah.gov
Attorneys for Respondent Utah Labor Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2017, I caused a true and correct copy of the (proposed) **JUDGMENT** to be served by email and mail to Bruce Harper at the address below and by email to David M. Wilkins, and again served this document after filing on the 1st day of September, 2017, as follows:

By filing with the Court's Electronic filing system as follows:

David M. Wilkins
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Sean Reyes
OFFICE OF THE ATTORNEY GENERAL
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160 East 300 South, 5th Floor
Salt Lake City, Utah 84114-0857

By United States Mail, Postage Prepaid, and email to the following:

Bruce Harper
jeneannehulce@yahoo.com
5308 Cygnus Hill Cove
West Jordan, Utah 84081

/s/ D. Scott Crook
D. Scott Crook
scott@crooktaylorlaw.com
CROOK & TAYLOR LAW PLLC
Attorneys for Respondents Energy Enterprises, Inc., and Drive Line, LLC

Return of Electronic Notification

Recipients	
D SCOTT CROOK	- Notification received on 2017-09-01 16:46:41.727.
DAVID M WILKINS	- Notification received on 2017-09-01 16:46:41.643.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 160901238

Judge:

JAMES GARDNER

Official File Stamp:	09-01-2017:16:46:06
Court:	3RD DISTRICT COURT - SALT LAKE District Salt Lake
Case Title:	HARPER, BRUCE vs. UTAH LABOR COMISSION, et al.
Document(s) Submitted:	Judgment
Filed by or in behalf of:	JAMES GARDNER

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

D SCOTT CROOK for ENERGY ENTERPRISES, DRIVE LINE

DAVID M WILKINS for UTAH LABOR COMISSION, ENERGY ENTERPRISES, DRIVE LINE, BRUCE HARPER

The following people have not been served electronically by the Court. Therefore, if service is required, they must be served by traditional means:

Tab C

EXHIBIT C

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

BRUCE HARPER, Petitioner, vs. UTAH LABOR COMMISSION, DRIVE LINE LLC, ENERGY ENTERPRISES, INC., Respondents.	**ORDER** Case No. 160901238 Judge James D. Gardner

THIS MATTER is before the Court on Petitioner Bruce Harper's Motion for a New Trial (New Trial Motion) and Respondents Energy Enterprises, Inc. and Drive Line, LLC's Motion for Vexatious Litigant Order (Rule 83 Motion). The parties briefed the issues and the Court determines that a hearing would not substantially assist the Court in resolving the pending motions. Having carefully reviewed the record and considered the arguments of Mr. Harper and counsel for Respondents, the Court now issues the following Order.

The New Trial Motion is DENIED. Mr. Harper argues that several of the Court's findings in its Findings of Fact, Conclusions of Law, and Order entered on May 17, 2017 are not supported by sufficient evidence. But Mr. Harper only selectively quotes from portions of the bench trial and ignores evidence that supports the Court's findings. Respondents have provided a detailed recitation of the evidence in support of the challenged findings in their opposition memorandum. The Court sees no reason to include it here, especially where Mr. Harper failed to

discuss any of the supporting evidence in his New Trial Motion. The Court concludes that Mr. Harper has failed to demonstrate that he is entitled to relief under Rule 52 or Rule 59 of the Utah Rules of Civil Procedure.

The Rule 83 Motion is GRANTED. The Court finds by clear and convincing evidence that Mr. Harper is a vexatious litigant and there is no reasonable probability that Mr. Harper will prevail on his claim or any potential post-trial motion.[1] Specifically, the Court finds that Mr. Harper has filed the following unmeritorious pleadings or papers in this action: (1) Petition for Judicial Review of Final Agency Action filed on February 19, 2016; (2) Motion to Disqualify Defendant's Council [sic] (UALD) and Petitioner's Request for Utah States Council [sic] and Representation filed on March 14, 2016; (3) Motion to Compel filed on August 23, 2016; (4) Motion to Amend Petition filed on September 16, 2016; (5) Motion to Compel Disclosure filed on October 25, 2016; and (6) Motion for a New Trial filed on August 28, 2017. Each of these papers was filed without a reasonable basis in law or fact. Moreover, as the Court has previously found, this action was brought by Mr. Harper with the intent to hinder, delay and defraud the Respondents. The Court further finds that Mr. Harper has conducted a pattern of unnecessary and frivolous discovery practices throughout this litigation that the Court has routinely denied. Mr. Harper's discovery tactics advanced his objective of harassing the Respondents.

Based on finding Mr. Harper a vexatious litigant, the Court hereby orders that before filing any additional motions, or requesting from this Court any relief related to his initial claim

[1] Mr. Harper, of course, has already lost his claim. But the Court shares Respondents' concern that Mr. Harper will continue to file post-trial motions in an effort to harass and drive up costs for Respondents. The Court finds that any post-trial motion brought by Mr. Harper has no reasonable chance for success.

or the supplemental proceedings, Mr. Harper must obtain legal counsel.[2] *See* Utah R. Civ. P. 83(b)(3). The Court directs its clerks to not enter any motions submitted for filing in this action by Mr. Harper without legal counsel. The Court declines to impose any additional sanctions or attorney's fees against Mr. Harper at this time.

DATED this 18th day of October, 2017.

BY THE COURT:

James D. Gardner
DISTRICT JUDGE

[2] This requirement does not prevent Mr. Harper from responding to any motions filed by Respondents or from pursuing his appellate rights.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160901238 by the method and on the date specified.

MAIL: BRUCE HARPER 5308 CYGNUS HILL COVE WEST JORDAN, UT 84081
MAIL: D SCOTT CROOK 2150 S 1300 E STE 500 SALT LAKE CITY UT 84106
MAIL: DAVID M WILKINS 160 E 300 S 5TH FLOOR STE 201 PO BOX 140857 SALT LAKE CITY UT 84114

Date: 10/18/2017 /s/ BRENDA L KLEINLEIN

Deputy Court Clerk

Tab D

EXHIBIT D

IN THE UTAH COURT OF APPEALS

---oo0oo---

BRUCE HARPER, Petitioner, *v.* LABOR COMMISSION, Respondent.	)	ORDER Appellate Case No. 20150474-CA

This matter is before the court on its own motion to transfer the petition for review pursuant to rule 44 of the Utah Rules of Appellate Procedure.

Rule 44 states; in part:

> If . . . a petition for review is filed in a timely manner but is pursued in an appellate court that does not have jurisdiction in the case, the appellate court, either on its own motion or on motion of any party, shall transfer the case, including the record on appeal, all motions and other orders, and a copy of the docket entries, to the court with appellate jurisdiction in the case.

Id. Transfer is appropriate in this case, because the petition for review was timely filed, but it is within the appellate jurisdiction of the district court. *See* Utah Code Ann. § 78A-5-102(7)(a)(2012). Accordingly, IT IS HEREBY ORDERED that the petition for review is transferred to the Third District Court, Salt Lake Department.

Dated this 26th day of June, 2015.

FOR THE COURT:

Lisa A. Collins
Clerk of the Court

CERTIFICATE OF SERVICE

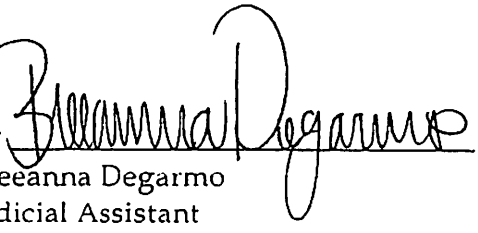
I hereby certify that on June 26, 2015, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

D. SCOTT CROOK
ARNOLD & CROOK PLLC
2150 S 1300 E STE 500
SALT LAKE CITY UT 84106

BRUCE HARPER
5308 CYGNUS HILL COVE
W JORDAN UT 84081

JACESON R MAUGHAN
LABOR COMMISSION
jacesonmaughan@utah.gov

LABOR COMMISSION
ATTN: SARA DANIELSON
sdanielson@utah.gov

By 
Breeanna Degarmo
Judicial Assistant

Case No. 20150474
LABOR COMMISSION, 15-00862

Tab E

EXHIBIT E

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

BRUCE HARPER, Petitioner, vs. UTAH LABOR COMMISSION, ENERGY ENTERPRISES, INC., and DRIVE LINE, LLC, Respondents.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON ATTORNEYS' FEES AND COSTS** Case No. 160901238 Judge James D. Gardner

On May 17, 2017, the Court entered its Findings of Fact and Conclusions of Law (May 2017 Findings) in this matter. In its May 2017 Findings, the Court ruled "that pursuant to Utah Code § 78B-5-825(1), the Court determines that Mr. Harper filed his wage claim in bad faith and that Respondents are entitled to their reasonable attorney's fees in defense of this action." The Court also ruled that "[a]s the prevailing party, Respondents are also entitled to an award of costs." (May 2017 Findings.) Respondents subsequently filed separate motions seeking attorneys' fees and costs. Mr. Harper filed oppositions to the motions and after the motions were fully briefed, a Request to Submit was filed with the Court on June 27, 2017. No party requested oral argument on the pending motions and the Court determines that oral argument would not substantially assist the Court in resolving the motions. The Court, having considered the arguments of the parties, and for good cause appearing in the record, hereby makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On February 19, 2017, Petitioner Bruce Harper filed a Petition for Judicial Review of Agency Action (Petition).

2. On March 22, 2017, a bench trial was held in this matter.

3. In its May 2017 Findings, the Court ruled in favor of the Respondents and against the Petitioner and held "that pursuant to Utah Code § 78B-5-825(1), the Court determines that Mr. Harper filed his wage claim in bad faith and that Respondents are entitled to their reasonable attorney's fees in defense of this action." The Court also ruled that "[a]s the prevailing party, Respondents are also entitled to an award of costs."

Enterprises, Inc. and Drive Line, LLC's Fees and Costs

4. On May 23, 2017, Respondents Energy Enterprises, Inc. and Drive Line, LLC (collectively, Energy Enterprises) filed their Motion for Attorney Fees seeking $21,920.00 in attorney's fees since March 17, 2015.[1] Energy Enterprises' motion was supported by the Declaration of D. Scott Crook in Support of Attorney Fees (First Crook Declaration). The First Crook Declaration included a detailed breakdown and description of time spent and work performed for each person who performed the work. Energy Enterprises did not seek any costs as part of its motion.

5. In his opposition to Energy Enterprises' motion, Mr. Harper argued that (1) Energy Enterprises was only awarded fees in this action, and not in the underlying administrative

[1] This amount includes $1,375 in attorney's fees that had previously been awarded to Respondents pursuant to the Court's December 16, 2016 Order on Request for Attorney Fees. Although this order was certified as final, it does not appear that a judgment was ever entered on this previous award of fees.

proceeding; (2) Energy Enterprises did not seek fees in the underlying administrative proceeding; and (3) Energy Enterprises did not need counsel in the underlying administrative proceeding.

6. In its reply memorandum, Energy Enterprises argues that it is entitled to fees in the underlying administrative proceeding. In the alternative, Energy Enterprises submitted a Supplemental Declaration of D. Scott Crook in Support of Attorney Fees (Second Crook Declaration) that "separates out the attorney fees incurred for representation that occurred prior to this appeal of the administrative proceeding." The Second Crook Declaration seeks "$14,910.00 for unawarded fees spent in defense of this claim" since the filing of Mr. Harper's Petition before this Court.

7. The Court finds that Energy Enterprises is entitled to $14,910.00 in attorney's fees for the work performed in this action.

8. The Court finds that Energy Enterprises is not entitled to recover any attorney's fees from this Court related to the underlying administrative proceeding. More specifically, the Court finds that the award of fees as ordered in its May 2017 Findings only related to the proceedings before this Court, and did not include fees that may have been expended before the Petition was filed.[2] Furthermore, as set forth below, the Court finds $14,910.00 to be a reasonable fee award.

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[2] Moreover, it is unclear to the Court whether section 78B-5-825 would even authorize an award of fees for work performed in the administrative proceeding. Section 78B-5-825 authorizes attorney fees only in "civil actions" where "the court determines that the *action* ... was without merit and not brought or asserted in good faith." (Emphasis added.) And a civil action is typically understood as a proceeding brought in court. *See* Utah R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.'"); *see also State v. Moore*, 2015 UT App 112, ¶ 12 (distinguishing between an "administrative action" and a "civil action"). The Court, of course, need not answer this particular question because the Court's May

9. Rule 73(c) of the Utah Rules of Civil Procedure provides that a motion for attorney fees "must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work."

10. Here, the Court finds that the First and Second Crook Declarations meets all the requirements set forth in Rule 73. Specifically, the First and Second Crook Declarations include a detailed chart outlining a description of the time spent and work performed by each attorney and/or paralegal on this matter.

11. Mr. Harper did not challenge the fee request based on the difficulty of this litigation, the amount involved in the case and the expertise and experience of the attorneys involved. The Court finds that the fees charged in this case correspond with the difficulty of this litigation,[3] the amount at issue in the case and the expertise and experience of the attorneys involved.

12. Mr. Harper did not challenge the reasonableness of the hourly rates of the attorneys or the paralegal set forth in the Fee Affidavit and the Court finds their hourly rates to be reasonable and consistent with the rates customarily charged in the locality for similar services.

2017 Findings only considered and awarded fees for defending against the action brought before this Court.

[3] Although the case was not particularly complex, Mr. Harper did make the case more complex by changing his theories and by filing a number of motions. Also, the amount in controversy shifted significantly during the litigation.

13. Setting aside Mr. Harper's challenge to the fees expended in the underlying administrative proceeding, which was addressed above, Mr. Harper did not challenge the reasonableness of the hours spent by Energy Enterprises' attorney in this case. The Court finds that the amount of time spent by Energy Enterprises' attorney on the task set forth in the First and Second Crook Declarations (removing those entries that were prior to the filing of the Petition), as well as the total amount of time spent, is reasonable. The Court has reviewed the time entries set forth in the First and Second Crook Declarations and the Court finds that Energy Enterprises' attorney performed the work and that the work performed and the total hours spent after the filing of the Petition were reasonable and necessary to defend Energy Enterprises in this action.

14. For these reasons, the Court finds Energy Enterprises is entitled to recover $14,910.00 in attorney fees for the work performed in this action.[4]

Utah Labor Commission's Fees and Costs

15. On May 24, 2017, Respondent Utah Labor Commission, Antidiscrimination and Labor Division (UALD) filed its Rule 73 Motion for Attorney's Fees and Supporting Memorandum seeking $4,750.00 in attorney's fees since February 2016. UALD's motion was supported by the Declaration of David M. Wilkins in Support of Attorney Fees (Wilkins Declaration). Unlike the Crook Declarations, however, the Wilkins Declaration did not include a

[4] It is the Court's understanding that the $14,910.00 includes the $1,375.00 in attorney's fees that had previously been awarded to Energy Enterprises pursuant to the Court's December 16, 2016 Order on Request for Attorney Fees. To the extent that it does not include the $1,375.00, that amount should be added to the judgment for Energy Enterprises.

breakdown and description of time spent and work performed for each person who performed the work. UALD did not seek any costs as part of their motion.

16. In his opposition to UALD's motion, among other arguments, Mr. Harper argued that the Wilkins Declaration "is not sufficiently detailed for proper evaluation of what constitutes reasonable attorney's fees in this matter and therefore the Attorney General motion should be denied as being insufficiently supported." UALD declined to file a reply or a supplemental declaration providing the Court any more information about the work performed by UALD's attorneys.

17. The Court agrees with Mr. Harper and finds that the Wilkins Declaration fails to comply with Rule 73(c) of the Utah Rules of Civil Procedure because it fails to "reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work." While the Wilkins Declaration provides the total amount of hours and Mr. Wilkins' billing rate, it fails to provide any detail as what tasks Mr. Wilkins performed or the time spent on any task. Because of this failure, is the Court is unable to properly assess whether the work performed by Mr. Wilkins was unreasonable. *See, e.g.*, *Holladay Towne Center, LLC v. Brown Family Holdings, LC*, 2008 UT App 420, ¶21 ("Although the Browns' affidavit generally listed a number of services provided by their attorneys and identified each attorney's hourly rate, there was no breakdown as to which attorney performed which services, the hours spent on each service, or even the total number of hours expended on the litigation. The Browns' affidavit fails to substantially answer the questions identified in *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988) . . .").

18. While the Wilkins Declaration states that the "services performed by me on behalf of the UALD were both reasonable and necessary," in exercising its discretion the Court is "not necessarily compelled to accept such self-interested testimony whole cloth and make such an award." *Beckstrom v. Beckstrom*, 578 P.2d 520, 523-24 (Utah 1978). Specifically, the Court notes in this case that Energy Enterprises took the lead in the discovery disputes in this case and at trial and the Court is unable to determine a reasonable fee amount for the UALD absent any detail supporting the UALD's request for fees.

19. For these reasons, the Court declines to award the UALD any attorney's fees.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby enters the following Conclusions of Law:

1. "In Utah, attorney fees are awardable only if authorized by statute or by contract." *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988) (citations omitted).

2. Here, in its May 2017 Findings the held "that pursuant to Utah Code § 78B-5-825(1), the Court determines that Mr. Harper filed his wage claim in bad faith and that Respondents are entitled to their reasonable attorney's fees in defense of this action."

3. As set forth above, and based on the factors set forth by the Utah Supreme Court,[5] the Court determines that Energy Enterprises is entitled to attorney's fees in the amount of $14,910.00.

[5] *See Bracken*, 764 P.2d at 990 ("Although all of the above factors may be explicitly considered in determining a reasonable fee, as a practical matter the trial court should find answers to four questions: 1. What legal work was actually performed? 2. How much of the work performed was reasonably necessary to adequately prosecute the matter? 3. Is the attorney's billing rate consistent with the rates customarily

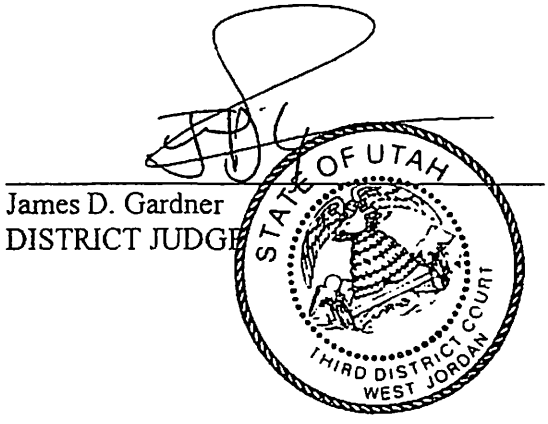
4. As set forth above, UALD failed to meet its burden to establish an amount of reasonable attorneys' fees and to comply with Rule 73 of the Utah Rules of Civil Procedure, and thus, the Court declines to award UALD any attorney's fees.

5. Energy Enterprises is directed to submit a form of a judgment consistent with these preceding Findings of Fact, Conclusions of Law and Order, pursuant to Rule 58A of the Utah Rules of Civil Procedure.

6. This is the order of the Court, and no further order is required with respect to the issues set forth herein.

DATED this 3rd day of August, 2017.

BY THE COURT:



James D. Gardner
DISTRICT JUDGE

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charged in the locality for similar services? 4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?").

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160901238 by the method and on the date specified.

MAIL: BRUCE HARPER 5308 CYGNUS HILL COVE WEST JORDAN, UT 84081
MAIL: D SCOTT CROOK 2150 S 1300 E STE 500 SALT LAKE CITY UT 84106
MAIL: DAVID M WILKINS 160 E 300 S 5TH FL STE 201 PO BOX 140857 SALT LAKE CITY UT 84111

Date: 08/03/2017

/s/ LISA MUNK

Deputy Court Clerk