



Navigator

Fall 2012

Charting a Course in UI Appeals



"Followed Lynda and the Tennessee TDLWD gang to Nashville" and what a time we had!!!

The 2012 Nashville conference was a smashing success! From the 156 attendees (65 NEW members) representing 36 states and 1 province and outstanding speakers to the 5 vendors: one thing is clear.....NAUIAP is supported by intelligent, dedicated professionals. The conference provided top notch in depth training on all key aspects of the unemployment insurance appeals process. The training topics included NEW UI information, best practices from award winning states as well as "Epic Failures" to avoid. Whatever questions the participants did not get answered from the presentations during the day were enthusiastically answered during the evening networking opportunities.

Then, throw in a "country western bar" of fun and you have a conference that should not have been missed! Thank you, Tennessee!! And, thanks to all who attended, all presenters, all Department of Labor attendees and everyone who signed up for on-going committee work!! The NAUIAP Board of Governors thanks "y'all" and welcomes any suggestions to make the next conference experience more beneficial!



Save the Date!

Hooray for HOLLYWOOD! May 12-16, 2013



California will proudly host the NAUIAP TRAINING CONFERENCE

Live like a movie star for the week! Loews Hollywood Hotel, cornerstone of the luxurious Hollywood and Highland entertainment complex, will be your "home away from home" for this event. Slip on your shades, stroll out of your sleek quarters onto the renowned Walk of Fame, enjoy views of the Hollywood sign and tour the many unique attractions of this glamorous destination. Prepare to be equally dazzled by an impressive educational agenda populated with engaging speakers on topics of national interest and import to unemployment insurance appeals professionals.

Go to www.nauiap.org for more information as we prepare to roll out the red carpet for you!

President's Column



By Craig Gustafson, President

Thanks for reading the fall issue of the Navigator! This is our first electronic edition, so I hope everyone is able to adjust to the new format with ease. Thanks to Kathryn Todd from Ohio and the newsletter committee for their work on this edition. Thanks also to our outgoing President, John Garrett from Mississippi, for all of his efforts over the past year. John has been instrumental in implementing many positive changes that will benefit all of us for years to come.

The activities of NAUIAP are only possible through the volunteer efforts of our members. I encourage all of you to get involved in your organization in any number of ways, from simply reading this newsletter, to writing an article, checking out our website(nauiap.org), or volunteering for a committee. Even if you cannot attend our training conference, there are many ways to take advantage of your membership. From my experience, the rewards of membership have been numerous. When I face a difficult issue that I haven't faced before, I often pick up the phone and call Steve Bier from Indiana, who I met at the Arizona conference back in 2008.

With the adoption of state memberships, NAUIAP now has over 800 members nationwide. 156 members representing 36 states and Canada attended the 2012 training conference that was held in Nashville, Tennessee. Due to the hard work of Lynda McDaniel and the staff in Tennessee, the conference was a resounding success. Thanks to the presenters from the states and USDOL. You were informative and enlightening. The plentiful music venues of Nashville were a welcome respite from long days in sessions. Several attendees were even lucky enough to catch Vince Gill sitting in with a Western swing band at a small venue on the edge of downtown Nashville.

Now we look forward to our conference in Los Angeles, California in May of 2013. Angela Bullard and several other California staff members are working hard to prepare for what will be our largest training conference to date. The Tuesday evening outing will be a dinner and tour of the Madame Tussauds wax museum where you can have your picture taken with stars ranging from John Wayne to Lady Gaga. The 2013 training conference will be a great opportunity for NAUIAP members from around the country to get to know many of the ALJs from our most populous state. Plus, I will be there from Minnesota, our most popular state, so we have all our bases covered! All kidding aside, the 2013 training conference is one that you will not want to miss.

In addition to planning for the 2013 conference, the NAUIAP board of governors is preparing for its fall meeting in Washington, D.C. We will be meeting with several USDOL officials to discuss various ways that we can enhance communications and collaborative efforts between the states and the federal government. Because USDOL is the funding source for all administrative costs for our state UI programs, including appeals, it is vital that we have a continuing dialogue regarding the importance of fully funding appeals operations. We will also be meeting with Brian Langley, the NASWA UI director, to discuss ways that NASWA and NAUIAP can effectively work together in addressing issues of common concern to both organizations.

In conclusion, I hope that you find your membership in NAUIAP to be as useful professionally and personally as I have. For many members, lifelong friendships are formed through attending conferences and participating in committees and the board of governors. These are challenging times for those of us who work in UI appeals. NAUIAP exists to help us meet these challenges. If you have suggestions on how NAUIAP can better serve you or your state, feel free to contact me or any member of the board to have your voice heard. As Garrison Keillor says, "Be well, do good work, and keep in touch."

Committees

Conference Agenda , Elise Rose (CA) Marketing and Membership, Karl Jahnke (OK) Newsletter, Kathryn Todd (OH) Planning and Projects, Craig Gustafson (MN) Website and Technology, David Scrimm (MT)

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State Spotlight

Beginning with this edition, the State Spotlight will highlight information from state appellate agencies, boards and commissions. The information including contact information, organization and best practices will be added to the "State Spotlight" on the website for future research purposes. Let the editorial staff know what other state information would be helpful to you!!!

Minnesota

Minnesota's unemployment insurance appeals office is part of the UI program and the Minnesota Department of Employment and Economic Development. There are currently 36 full-time and 3 part-time Unemployment Law Judges (ULJ's) who conduct lower authority hearings and issue decisions on requests for reconsideration. Minnesota issues approximately 30,000 lower authority decisions a year. Decisions of the ULJ are directly appealable to the Minnesota Court of Appeals. Minnesota has not had a higher authority since 2005. The office also includes a Chief Unemployment Law Judge, three supervising attorneys, two appellate attorneys, and a compromise/tax attorney. The administrative functions are performed by 31 administrative support staff.

The Minnesota UI program developed and implemented the first fully integrated online system for UI benefits and tax in the nation. Appeals scheduling and processing of decisions is done in this UI system.

Minnesota has also implemented a new training program for the Unemployment Law judges. The training program is unique in that it includes training and experience in issuing first level determinations. ULJ's who have completed this training program have found it to be extremely valuable in preparing them for their work as hearing officers, especially when issues arise relating to a customer's use of the online system.

Agency leadership includes Mark Phillips, Commissioner, Rick Caligiuri, UI Director, and Craig Gustafson, Chief Unemployment Law Judge. Information courtesy of Craig Gustafson.

Indiana

Indiana is comprised of both lower and higher authority appeals. Lower authority appeals consists of approximately fifty-five (55) staff members, which includes twenty-eight (28) Administrative Law Judges (ALJs). The management staff consists of one (1) Director, three (3) Team Managers, who are also Administrative Law Judges (ALJs), and one (1) Support Staff Supervisor. Previously, one (1) director supervised all ALJs. This Team Manager structure has been in place for the past couple years and has been beneficial in our ability to monitor the case age and quality of each ALJ. Indiana issues approximately 32,000 lower authority decisions a year. These decisions are appealable to the Review Board, and then appealable to the Indiana Court of Appeal.

There are a few things that have really helped the Lower Authority Appeals department in recent years. First, a Redetermination Group was created to review appeals prior to intake. This group reviews certain issue types to determine

whether the issue can be corrected or whether the appeal should be entered and a hearing conducted. Second, ALJs are to issue their decision the same week in which the case is heard. This has greatly improved our timeliness and is monitored weekly through an Active Case List that is reviewed at the beginning of each week by the Director and Team Managers. Lastly, the Team Managers have two (2) cases for each ALJ randomly pulled each quarter for internal evaluations. This helps us monitor quality and address any concerns that may arise in the one-on-one meetings that follow.

Agency leadership includes Deputy Commissioner, Unemployment Operations: Joshua Richardson and Sabrina Rahn, Appeals Director/Chief ALJ. Information courtesy of Sabrina Rahn.

Michigan

Michigan is a central panel state, conducting hearings for 28 different Agencies. One of the divisions within the Michigan Administrative Hearing System is Benefit Services, which includes Unemployment Appeals (both higher and lower authority) and Worker's Compensation (both higher and lower). There are currently 40 lower authority ALJ's conducting unemployment hearings full time, with another 6 who conduct them on a part time basis. Lower Authority has approximately 35 Administrative Support staff. In 2011, they disposed of over 50,000 unemployment appeals.

In August of 2011, unemployment's higher authority was merged with the worker's compensation higher authority, forming the Michigan Compensation Appellate Commission, a nine member panel of appointed Commissioners. Cases are assigned to one of three panels of 3 Commissioners. The Commissioners are trained in both unemployment and worker's compensation, allowing for flexibility in assignment type, to address fluctuating caseloads between the two case types.

In 2009 Michigan received an SBR grant to develop and implement an automated case management system. The unemployment lower authority expects to convert to that system in mid-2012. Higher authority will follow in 2013. The system will allow us to schedule cases and manage dockets in a more automated fashion, concentrating on achieving the Federal timeliness standards.

Agency leadership includes Executive Director, Michael Zimmer and Director of Unemployment and Workers Compensation, Chris Seppanen. Information courtesy of Paula Henige.

Recent Developments in Evaluating the Reliability of Eyewitness Testimony

by Tim McArdle, California and Allan Toubman, Maine

He said. She said. Too many of our cases come down this. As we analyze facts rather than rely upon intuition or gut response, we need objective tools.

Two recent decisions by the U.S. and New Jersey Supreme Courts give us apparently contradictory direction on valuing eyewitness testimony. As those of us familiar with the Daniel Simons famous "Gorilla" video, eyewitnesses are easily distracted and remember what they believe to be important at the time of the observation.

The two recent decisions are criminal cases. Of course, there are vast differences between criminal law and administrative adjudication. Nonetheless, these cases provide clarity to the discussion and guidance to the way we view and evaluate the eyewitness evidence that is presented to us.

The landmark eyewitness case in federal criminal law is *Manson v. Brathwaite*, 432 U.S. 98 (1977). The issue involved the suggestibility of police procedures in witness identification of alleged perpetrators in lineups, photo arrays, or show up identifications. Declaring that "reliability is the lynchpin in determining the admissibility of identification testimony" (432 U.S. at 114) the *Manson* court set forth a two part test in determining what process is due to criminal defendants in these situations. (1) Whether the police procedure was, in fact, impermissively suggestive; and if so, (2) whether the objectionable procedure resulted in a very substantial likelihood of irreparable misidentification--the competence of the witness who made the identification. If it is determined to be nonetheless reliable, the identification may be admitted into evidence.

This rule was challenged in *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716 (2012). In that case the defense argued that whenever the reliability of eyewitness testimony is questioned, the defendant is entitled to a pre-trial hearing to determine whether the evidence is admissible. In an eight to one opinion, the court rejected this approach and affirmed the rule of *Manson*. The court noted that criminal defendants have a vast array of procedural protections available to them, including the right of confrontation and cross-examination, mitigating jury instructions, and a high quantum of proof.

Perry does not provide much insight. If we carry anything away from the case, it is that we are responsible for properly evaluating the evidence and explaining our evidentiary conclusions to the parties, the agency and appellate tribunals. Just five months earlier, the New Jersey Supreme Court took a substantially different approach to the identical issue. In *New Jersey v. Henderson*, 30 A.3d. 318 (2011), the court took note of the approximately 2000 studies over the past 35 years which have examined the reliability of eyewitness testimony in wide variety of circumstances adjusted for numerous variables.

The court began with the well known studies on the malleability of memory by Dr. Elizabeth Loftus, first published in 1974. In one study, with which many of us are familiar, subjects were shown film clips of auto accidents. The subjects then were asked how fast the cars were going at the time of the accident, but different participants were asked the question in different ways. Some were asked how fast the cars were going when they "smashed" into the other car, while others were asked how fast they were going when they "bumped" "hit", "collided", or "contacted" the other car. Perhaps not surprisingly, the group asked the "smashed" question estimated the speed at 40.5 mph while the "contacted" group answered 31.8 mph.

These studies demonstrate how easily memory is manipulated. This malleability of our memory has been studied extensively. Based on these empirical studies, *Henderson* rejects the *Manson* standard and adopted a more rigorous analysis. The court distinguished "systematic" variables, such as the nature of the police procedures, from "estimator" variables, for which the criminal justice system has no control. It is these estimator variables which are most useful for our purposes as they address issues of witness competency.

In previous training programs, we have emphasized the difficulty of detecting with any degree of accuracy witness deceptive behavior, that is, the lying witness. Instead, we have focused on the competency of the witness to testify



as to the subject matter of the inquiry. The Henderson court identified and discussed nine such estimator variables that deal directly with witness competence.

Stress: While it might be thought that stress would cause a witness to focus ever more strongly on the event taking place, the studies have demonstrated that the element of stress actually impairs a witnesses' ability to perceive and remember the event accurately. This is particularly true where the witness fears physical harm.

Gun focus: In Henderson, for example, the alleged perpetrator was holding a gun pointed at the witnesses' chest. The witness was focused more on the gun than the perp. Fortunately, we do not encounter these situations often in our work.

Duration: While there is no minimum time for a witness to observe and recall an event accurately, the longer the witness observes the event, the more likely the witness will recall it accurately. A significant factor in an event of very brief duration is the presence or absence of accompanying distractions.

Distance and lighting: For example, in Perry, the witness identified the alleged perpetrator at 3:00 a.m. in a lighted parking lot from her fourth floor apartment window. A hearing officer should establish where the witness was relative to the observed individual or event, and the conditions surrounding that observation.

Witness characteristics: These include age, visual acuity, background noise, and intoxication which can affect the reliability of testimony. In Henderson, for example, the witness and his girlfriend had smoked two bags of crack cocaine and drank two bottles of wine just prior to witnessing the event. There also is the factor of own age bias where witnesses are better at identifying people of their own age than people of other ages.

Perpetrator characteristics: Changes in dress and facial characteristics.

Elapsed Time: Memory decay is irreversible. Memories cannot improve with time. This is why contemporaneous statements and memory refreshed through past recollections recorded may be helpful.

Race bias: One meta analysis cited by the court involved 39 studies and 5000 identifications. The analysis confirmed that witnesses are less able to identify an individual who is a member of a race other than that of the witness. In that regard this factor is similar to that of own age bias.

After acquired information: This may be the most significant of all of these variables. This occurs when the witness is exposed to opinions, descriptions, and identifications by other witnesses, photographs, media accounts, or any information that might affect the independence of the witnesses' testimony. In particular, perceptions can be altered when co-eyewitnesses, especially those with whom the witness was acquainted previously, share information about what they observed. Co-witness feedback, as one study observed, may cause a witness to form a false memory of details that the witness never actually observed. Perhaps most damaging of all, post observation confirming feedback can imbue the witness with a confidence in his or her observations not warranted by the circumstances. This may occur when a manager or supervisor or other authority figure offers words of encouragement or even congratulations after the witness has recounted his or her observations.

Confidence: Studies demonstrate that this the single most influential credibility factor for juries. Indeed, the Henderson court declared that the Manson court overstated a jury's innate ability to evaluate eyewitness testimony. There are many influences affecting witness confidence that have no relation to reliability. This includes after acquired information and post observation confirming feedback, societal pressure to appear confident when testifying, a well prepared witness, and, of course, the lying witness who has powerful motivation to appear confident.

These cases remind us that we are involved in an uncertain enterprise when we judge credibility of the witnesses. Henderson is the stronger case because it attempts to uncover the layers of the onion. Unlike Perry, it comes to grips with the reality of testimony and avoids platitudes.

As hearing officers we need to be rigorous in our questioning of witnesses. We must explore whether witnesses have been influenced by their discussions before the hearing. We need to ask the right questions of eyewitnesses and explore the circumstances surrounding the witness observation. A sound foundation for eyewitness testimony is essential. It likely is necessary from a due process standpoint in order to reduce the risk of an erroneous deprivation of benefits (*Mathews v. Eldridge*, 424 U.S. 319, 1976). Despite our high volume of cases, we need to use all the tools available to uncover the facts and produce a just result.

There is nothing in either of the court decisions, and nothing in this article, to suggest that eyewitness testimony is unreliable. In fact, eyewitness testimony typically will be the strongest evidence we receive. What these cases tell us, however, is that eyewitness testimony should not simply be accepted at face value.

Thank you, NAUIAP!!

Scholarship

Kristi Smith, Oklahoma Administrative Hearing Officer

I want to extend my sincere gratitude to NAUIAP for its recent scholarship award. This award enabled me to attend a very informative class offered by The National Judicial College. During the Evidence Challenges for Administrative Judges course, I learned how to best handle objections, rule on evidence offered, examine and weigh available evidence, authenticate evidence and give fair hearings. I will certainly utilize the information from the course for many years to come. Again, thank you NAUIAP for helping me grow as a Hearing Officer and for those who will be positively affected by the knowledge I gained from such an educational opportunity.

Editor's Note: NAUIAP is currently working with the National Judicial College to secure scholarships for the 2013 year. Please stay tuned...scholarship money if available is awarded pursuant to criteria found in Chapter 13 of the NAUIAP Operations Manual and will be announced in the newsletter and featured on the website.

Do you have a favorite Website?

If it isn't www.nauiap.org we would love to hear your thoughts on improving ours!!! Looking for a few good members to assist with our website committee... no technology skills needed only appreciated! If you would like to volunteer, please go to the website, www.nauiap.org and send David a line.

How About Hosting Our Conference?

Do you live in a great state? A beautiful state? A state the rest of us should visit? Why not consider hosting the NAUIAP conference!

At its spring Board meeting in March, the NAUIAP Board of Governors will consider preliminary bids from prospective host states for the annual conference to be held in 2014. The bidding states that pre-qualify will then present their proposals to the full membership at the annual conference in Hollywood, and each state will vote its choice. An explanation of what to include in the preliminary bid and a description of pre-qualification criteria for bidding states

are included in Chapter 12 of the NAUIAP Operations Manual, which may be accessed through our website. These are some of the factors the Board considers:

Geographic Diversity – We try to hold conferences in diverse parts of the country, taking into consideration the natural beauty of the area, historical and/or cultural sites, affordable pricing, and interesting outings.

Convenience to Major or Regional Airport – The location should be reasonably accessible by air, and should offer convenient shuttle or cab service between the airport and conference hotel.

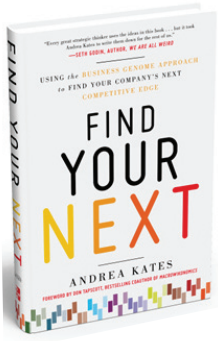
Adequate Hotel and Conference Facilities – This includes hotel amenities, guest room rates, food cost for meals and breaks, cost of ballroom and breakout rooms (and whether these will be discounted or complimentary in exchange for a guaranteed minimum number of hotel guest rooms), and complimentary rooms.

Availability of Restaurants, Shopping, Recreational Opportunities, and Cultural Attractions – The locale should offer a choice of activities in addition to those included in the conference itself, so that family members will have something interesting to do while you attend conference.

Availability of Local Talent for Speakers – The availability of conference speakers in the locale, such as university professors, attorneys, judges, and inspirational speakers.

Also important is the support of your state administration, as there are certain administrative expenses borne by the host state, as well as staffing the conference registration desk and providing computers and audio-visual equipment. If you are interested in being a conference host, please refer to the Operations Manual, prepare your preliminary bid, and send it to Craig Gustafson, electronically to <http://www.nauiap.org>. If you have other questions, you may contact Craig at (651) 259-7228.

Not this year? Start planning now to be the first to submit a bid for 2015!



An Opportunity Not to Miss!!!

The NAUIAP Training conference in May will feature as a keynote speaker...Andrea Kates. Andrea Kates is the founder of the Business Genome® project and author of the bestselling business innovation book, Find Your Next: Using the Business Genome Approach to Find Your Company's Next Competitive Edge (McGraw-Hill).

Andrea is a member of the TED (Technology, Entertainment, Design) community and featured 2012 TED speaker (short talk).

"Every great strategic thinker uses the ideas in this book...but it took Andrea Kates to write them down for the rest of us." –Seth Godin-Author, We Are All Weird

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