



Navigator

Spring 2013

Come to California An Amazing Training Opportunity May 12 to May 16

For much of the country, this winter has been unusually long, cold, snowy, and seemingly endless. However, there is a light at the end of the tunnel. The NAUIAP training conference is right around the corner! The conference this year will be held at the Loews Hollywood Hotel in sunny Los Angeles, California. California staff have lined up an agenda with top notch speakers and timely and relevant topics. Highlights will include a primer on the ADA, analytic interviewing techniques and credibility assessments, and security in UI appeals hearings. In addition to the training sessions, there will be opportunities for more informal networking at our Sunday night welcome reception, the Tuesday night dinner outing to Madame Tussauds Hollywood, and the Wednesday night bowling event at the famous Lucky Strikes Lanes. Review the agenda, book your hotel room and register for the conference at www.nauiap.com. We hope to see all of you there!!!



NAUIAP Spring Newsletter - President's Column

By Craig Gustafson

Welcome to the SPRING issue of the Navigator!

Spring is an active time for most state legislatures. In 1866, Judge Gideon Tucker famously stated, "[n]o man's life, liberty or property are safe while the Legislature is in session." While we may not always agree with the final product of a legislative session, the session presents great opportunities for improving our UI programs through the enactment of laws and statutes. Each state's UI law should be updated frequently. The laws need to be revised to reflect binding court precedents and federal conformity requirements. The laws should also be modernized to reflect current technologies and streamline any outdated processes.

We should strive to make our laws clear and understandable to the average reader. Most UI claimants and employers are unrepresented by counsel, so having an easy-to-read UI statute makes things easier for everyone involved, including UI staff. Claimants and employers generally do not have access to online legal research tools such as Westlaw or Lexis. As a result, if much of a state's UI law is contained in caselaw and has not been codified into state statute, the current state of the law is difficult to discern for the typical party.

One of the tools that many states have used effectively in updating their UI laws is an active advisory council. UI advisory councils typically include members of the state legislature, including members of both parties and both chambers, representatives of

various stakeholder groups, including unions, employer groups, staffing agencies, and legal aid societies, and UI officials, including a representative from appeals. An advisory council generally will have more time to discuss UI law changes in depth than would a standing committee of a state legislature. In time, council members develop expertise in UI and can serve as valuable resources for your UI program or appeals office when pursuing legislative changes.



President's Column continued

No matter how your agency pursues its legislative agenda, appeals staff should play a vital role. Hearing officers and higher and lower authority managers should suggest law changes as needed and become familiar with the legislative process. An appeals professional who has practical experience in applying the UI law to actual cases and is comfortable in the legislative arena can become a key asset for any state UI program.

I hope you find the contents of the Newsletter to be informative and useful in your work. We will continue to feature three states in each issue in the "State Spotlight" (the State Spotlight has been bumped from this issue in order to allow the Board

of Governors to post the proposed slate of BOG members... stay tuned it will return in the next edition). If your state has not been featured yet, feel free to draft a summary of your UI appeals office and email it to Kathryn Todd, our newsletter chair, at Kathryn.todd@jfs.ohio.gov. Also, we are always looking for substantive articles addressing topics of interest to UI appeals professionals for publication in the Navigator and on our website.

Thanks for reading and I look forward to seeing you on May 12th in Los Angeles. Keep in touch.

Best Ways to Avoid a Remand

By Christopher Tyler, Chief Hearing Officer, Oklahoma

No one likes to have issues remanded to them. Do you? If not, then you are in the same situation as many across the nation when you ask yourself, "What can I do to avoid having issues remanded?"

A few years ago at the NAUIAP conference in Mystic, Conn., Donna Watts-Lamont, the Board of Appeals Chairperson, presented "The Top Ten Ways to Avoid Remands." I did not personally attend that conference, but when the material was brought back by those that did, it was conveyed to the others in our state. We frequently try to remind our hearing officers of the "Best Ways to Avoid a Remand."

A few things that many of us take for granted quickly come to mind. Things like remembering to administer "The Oath" to everyone who testifies, to mark documents clearly and to make sure your findings of fact and conclusions of law and evaluation of the evidence do not conflict. These are isolated and unintentional mistakes that might just slip your mind when you hold six to ten hearings a day or when you get the random question that has nothing to do with the hearing that completely blows your train of thought. This is nothing that cannot be fixed by keeping a small checklist handy for when you receive those random questions and others at inopportune times causing you to have a minor memory lapse.

I posed the above question to the Higher-Authority in Oklahoma. The response was one that I had not thought of but which should have been obvious. That is, if your state allows, thoroughly reviewing the file prior to the hearing. Failure to do so could cause you to overlook something, in turn causing a remand. For instance, a party mentions a document that you might not have in front of you, so it is not considered. However, when the

Higher-Authority receives the file, the document the party mentioned is there. Other times it may not have been there but due to a processing error it was not included. A thorough review of the file might prevent certain types of these issues.

There are other helpful ways to avoid remands like making clear and specific findings of fact, not stating necessary findings of fact in your evaluation of the evidence instead of in your findings of fact and making sufficient findings to support your conclusions of law. If you have done this before then you are well aware that not only can these be fatal due process issues which could cause you to fail an ETA-382 review, but these errors also lead to those dreadful remands.

Got those covered? Then just focus on making a clear record. For some of us, recordings begin automatically. For others, you have to manually record hearings yourself. First make sure you have started the recording. It sounds dumb, but I know even the best of us have done it. Also, be sure that each person can clearly be heard. Once you have done that, do your best to avoid interruptions and maintain proper order and procedures during the hearing.

Lastly, don't rush yourself and don't rush the parties. Rushing yourself though a hearing only increases the chances you will have something remanded to you for committing one of the above errors. If you rush the parties, they could feel like you are not giving them an opportunity to let them present their case.

With the recent recession and increased case load, some of these errors are unavoidable. However, with a reminder and a conscientious effort, we can all do our best to avoid remands.



Burdens of Proof: Are they a good idea in UI?

By Amy Lawler, Appellate Attorney, Minnesota

Anyone who has ever watched an episode of Law & Order, been required to show picture identification when purchasing alcohol, or heard arguments from a teenager about why he didn't actually break curfew, is familiar with one seemingly unshakeable tenet: in a dispute, one side must have to prove that it's right. Black's Law Dictionary defines "burden of proof" as "A party's duty to prove a disputed assertion or charge." But you don't need a law degree to know that in these scenarios the prosecutor must prove guilt beyond a reasonable doubt, the baby-faced customer must prove that she is of age, and the teenager must come up with something sufficiently plausible to prevent him from being grounded.

There is widespread belief that this burden of proof scheme has a place in unemployment insurance proceedings as well. When the federal government created the unemployment insurance program nearly 80 years ago, it gave no direction to states on the burden of proof issue. The federal scheme allowed flexibility on the hearing process, on hearsay and testimony generally, and on admission of evidence. But while states have not clung to the trappings of civil procedure on most aspects of the determination and hearing process, most have hung tight to the notion of burdens of proof. A quick Google search finds hundreds of entries from the majority of state UI websites, all discussing which parties have burdens in various cases. ADP's unemployment compensation website declares, without qualifier, that "The burden of proof always falls on the party who initiated the separation (moving party)." Somehow, most states have drifted toward this burden scheme. Some of this may be ascribed to inertia and comfort, and some to the notion that a burden scheme encourages the parties to prepare for, attend, and fully participate in the determination and hearing process.

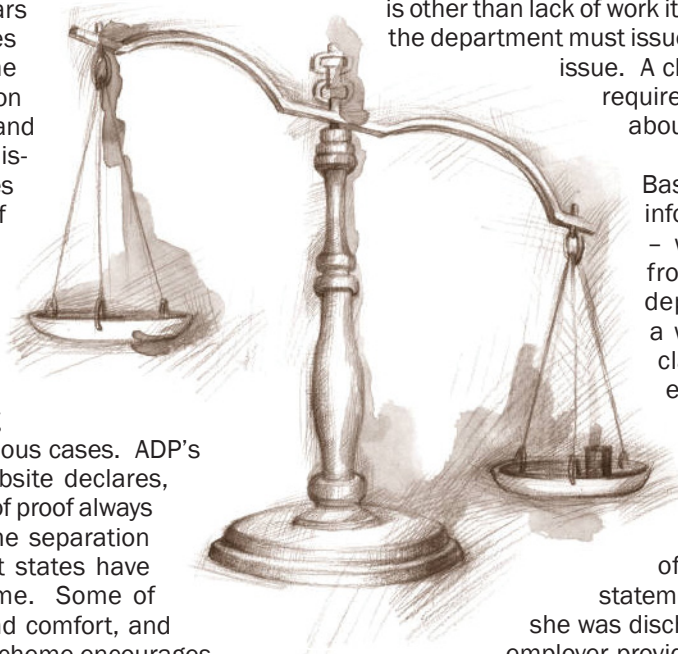
Minnesota has found, though, that having burdens of proof actually complicates the administration of the program, and undermines its fundamental principles. Minnesota currently has no burden of proof, but the pendulum of burden has swung back and forth over time. Minnesota's statute and common law initially made no mention of burdens, and state court decisions in the early 1940s acknowledged that the employer and the claimant were not adverse to one another. Shortly thereafter, though, the concept began to creep into court decisions. Courts began citing cases from other jurisdictions that had held that burdens existed. Neither the originating jurisdiction nor the Minnesota courts offered analysis about why this burden existed; the courts simply seemed to gravitate toward the notion that, if a party wanted something, it needed to prove that it was entitled to it. Minnesota's common law therefore morphed into a system where claimants were presumed to be ineligible if they quit employment. In such cases, an employer had the initial burden of proving that the claimant quit, and the claimant then had the burden of showing that she did so for a good reason

caused by her employer. Similarly, employers had the burden of proving that the claimant was terminated for misconduct, as the discharged claimant was presumed to be entitled to benefits.

But this burden scheme conflicted with our general view of how the unemployment insurance system should work. Neither our department nor our unemployment law judges (ULJs) are interested in picking a winner from two parties; our goal is to uncover relevant evidence from all available sources and make fully informed decisions. In pursuit of these goals, Minnesota UI staff worked with our state legislature to amend the laws to assign very limited burdens to claimants in the preliminary stages of the proceedings and no burden to either party after that. Under the current statute, a claimant is not presumed to be either eligible or ineligible for benefits. When a claimant applies for benefits, she must give the reason she is unemployed; if it is other than lack of work it raises an issue of eligibility, and the department must issue a written determination on the issue. A claimant who was discharged is required to give all the facts she knows about the discharge.

Based upon that information and information from any other source – whether anything is obtained from the employer or not – the department is required to issue a written determination. Thus, a claimant cannot be determined eligible (and go on to receive state funds) if she declines to provide the requested information. The converse is also true; a claimant can be determined ineligible for benefits because of misconduct based upon her statement alone, in which she admits she was discharged for wrongdoing, with the employer providing nothing. This happens frequently, and occurs before the employer is even notified that its former employee has sought benefits. Eighty percent of unemployment cases never go beyond this initial determination stage.

Thus, an argument that an employer would have some sort of burden in proving ineligibility is absolutely incompatible with a system like this, where a claimant can self-deny without any employer participation at all. It is also incompatible with the simple truth that a claimant, and not the employer, seeks public money. A burden of proof scheme often rewards silence; criminal defendants, for example, need not give testimony that would incriminate themselves and assist the prosecution in meeting its burden. In unemployment insurance, this type of admission against interest is necessary for the system to run as it should. For those 20 percent of cases that do go on to the hearing stage, neither a claimant nor an employer has a burden of proof, and there is still no presumption of eligibility or ineligibility. Because unemployment insurance proceedings are evidence-gathering inquiries, and not adversarial proceedings, ULJs act as referees in fact-finding inquiries, and will often conduct hearings even when only one party – the appealing party – appears. ULJs will also conduct hearings on a claimant's eligibility when an



Burdens of Proof continued

employer appears and argues that it has no objection to the payment of benefits. Many employers are already at the maximum tax rate and have no financial interest in participating. Some, particularly seasonal employers, would like their employees to collect benefits during the off-season even if they do not meet any eligibility requirements, so long as the employees return to them when work again becomes available. Just as an employer's objection does not summarily doom a claimant's application for benefits, an employer's silence cannot guarantee payment. Unemployment benefits are paid from state funds, not employer

funds. Even in the best of years in Minnesota, only 60% of benefits paid are able to be charged back to the account of the employer who employed the claimant who is receiving benefits. The other 40% of benefits paid are funded by all taxpaying employers in the state as a group. I believe we can best act as responsible stewards for these public funds by paying benefits to those who are eligible for them, without regard to any burden of proof. If you have any questions about burden of proof in UI cases, feel free to email me at amy.lawler@state.mn.us.

It's Spring, Thinking About Taxes.....Or Just Better UI Tax Hearings

By: Scott Michael, Legal Appeals Manager and
Eric Deluga, Legal Appeals Representative, Unemployment Insurance Tax & Wage Administration,
Washington State Employment Security Department.

Many tax branches of state unemployment insurance agencies send their auditors into administrative hearings to defend their audits by themselves, unaided by anyone trained in the law. However, as the issues get more complex and more employers bring in their own attorneys, auditors can be easily overmatched. Concerned by this trend, Washington changed that paradigm, and in 2011, began hiring legally trained staff to support auditors in unemployment tax hearings. This is a summary of what we've learned.

The obvious thing we learned is that staff with legal training are simply better at presenting evidence and arguments at hearings. They write better briefs, make better legal arguments, better present the agency's case, and poke more holes in the employer's case. The wins come easier and more consistently.

But many of the benefits were not so obvious. Perhaps the most surprising benefit was the gains in efficiency. Auditors simply are not trained in the law or in how to present evidence. They need more time to write their briefs and prepare their cases. Also, appeals can be unevenly distributed as some auditors will see appeals much more often than others. A consolidated legal unit sees appeals every day, and knows how to manage them quickly and well. We've discovered that some appeals that used to take auditors three days to prepare can take legally trained staff three hours or less to prepare.

Another discovery was the dramatic funneling effect that occurs when all appeals are handled by a small, central unit rather than a broad swath of auditors. Fewer people doing appeals means fewer variables. This makes it easier to be more consistent in how we approach appeals and present legal arguments, but it also allows for greater flexibility. For example, if a particular argument works well with ALJ Smith, but annoys ALJ Jones, a small, central unit can recognize and adjust to this variable much easier than a wide group of auditors with no legal training.

Finally, legally trained staff serve as an important screening mechanism to prevent bad audits from moving forward to hearing. If an audit has a glaring legal problem, they can spot it, and stop the audit from going to hearing. This builds the agency's credibility with the judges, and that credibility will be valuable when you have trickier legal arguments or fact patterns in the future.

Ultimately, these benefits will be enhanced if you have staff with legal training rather than counsel from an outside firm or agency. By locating legally trained staff within the agency, they will have easier access to agency information and IT systems, thereby allowing them to more quickly gather documents and evidence. Legally trained staff located within the agency will also get a better sense of the agency's culture, issues, and processes. It's also easier to build those personal relationships with auditors and managers, which are often necessary for auditors and managers to trust the advice they receive. But even if you must have attorneys from an outside agency, you can still reap many of these benefits if you can physically locate that attorney in the tax branch's main office building.

Ultimately, in order to make this work, you must give legally trained staff enough independence to give frank and candid opinions. We suggest making this unit a separate branch of the organization chart within the agency's tax branch – as far removed from an auditor's direct manager as possible. And when they make a recommendation to settle a case or reverse the auditor's action, be willing to listen. While we do not suggest complete fealty, remember that you hired these staff specifically for their legal expertise. If you are not willing to respect it, then do not proceed with this method.



NAUIAP NATIONAL JUDICIAL COLLEGE SCHOLARSHIPS

The National Association of Unemployment Insurance Appeals Professionals (NAUIAP) is now accepting applications/nominations for the scholarships donated by The National Judicial College (NJC). **Two scholarships will be awarded at the NAUIAP Training Conference in California May 12-16, 2013.** The scholarships cover half the cost of tuition to one of NJC's many outstanding onsite and online courses. See www.judges.org for complete course information, dates, tuition, fees and accommodations.

The NAUIAP Board of Governors will award the scholarships based on the following criteria:

- Duration of work in unemployment insurance appeals
- Duration of NAUIAP membership
- Relevance of preferred course to NAUIAP objectives
- Quality of the required statement
- Commitment to attend course
- Preference for first-time NJC attendees

The application/nomination deadline is April 30, 2013. Applications can be found at nauiap.org and should be submitted to admin@nauiap.org before the deadline.



Book Reviews



The Chronology of Water: A Memoir by Lidia Yuknavitch. This is a memoir by a woman who ended up teaching English in college against all odds. She starts off as a competitive swimmer in high school, gets lost in some pretty nasty situations, then found again. Her writing is extraordinary. This is an absorbing and fast read.

Rules of Civility: A Novel by Amor Towles. This is one of those books that sneaks good literature into your life, but you're so caught up in the plot that you don't notice. It begins with an older couple in New York at an art exhibition. The wife recognizes a man in one of the photos. The meat of the novel occurs in the twenties and thirties as she recollects her relationship with the man in pictures.

Half the Sky by Nickolas Kristoff and Sheryl WuDunn. This is a non-fiction about modern day slavery around the world. The title comes from the Chinese saying that women hold up half the sky. The stories are shocking. For example, rapists have custody rights in 31 states in the U.S. The book is full of appalling facts.

The Many Lives and Secret Sorrows of Josephine B. by Sandra Gulland. This is the fictionalized history of Josephine Bonaparte before she met Napoleon - the book takes the reader through the French revolution from the point of view of the heroine. It's suspenseful and very sympathetic to the main character.

Quiet: The Power of Introverts in a World that Can't Stop Talking by Susan Cain. Those of you who have met me know how outgoing I am. Well, after I read this book, I was convinced there was an introvert inside this extrovert quietly inquiring if she might be let out! This was a fascinating look at how our culture undervalues introverts and what the cost to society is. It's an easy read and everyone in my book club loved it.

for past issues of the Navigator

VISIT www.nauiap.org

State Spotlight

The State Spotlight highlights information from state appellate agencies, boards and commissions, including contact information, organization and best practices. The information collected 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!!!

NOTICE: ELECTION OF BOARD OF GOVERNORS SET FOR LOS ANGELES, CA

The NAUIAP Board of Governors held its Spring meeting in Austin, Texas in March 2013. At this meeting, the Board approved and now proposes the following slate of officers for the 2013-2014 term. The slate will be considered and voted upon by the NAUIAP membership at the general membership meeting at the Los Angeles, California Training Conference to be held from May 12 to 16, 2013. Alice Mitchell(GA) was elected to serve as President for 2013-2014 at the 2012 meeting held in Nashville, TN. Craig Gustafson(MN) will remain on the board for one year as the Past President.

Officers:

Karl Jahnke(OK) President Elect
Michael Milwee(DC) 1st Vice President
Kathryn Todd(OH) 2nd Vice President
Steve Wilson(IL) Treasurer
Brad Collins(AR) Secretary

At-Large Members:

David Scrimm(MT)
Elise Rose(CA)
Beverly Walker(AZ)

PROXY VOTING

The Constitution and Bylaws of NAUIAP are available on the website at www.nauiap.org. If you are unable to attend the annual meeting in Los Angeles, CA you may cast your vote on the proposed slate by proxy. To be eligible to vote, you must be an active member of NAUIAP and current in payment of all annual dues as of May 16, 2013. Please submit your vote via the NAUIAP website to the website administrator under the "Contact" heading.

Interested in Serving on the BOARD OF GOVERNORS?

If you are interested in serving on the NAUIAP Board of Governors in the future, please contact Craig Gustafson, President, at craig.gustafson@state.mn.us. There are currently two at-large member vacancies. Becoming a NAUIAP board member is an exciting and rewarding experience!! The Board will select the members giving preference to individuals who have been involved in one of the NAUIAP committees. The Board also values regional diversity. In addition, it is necessary that the individual's organization will allow and support the travel necessary to fulfill the obligations of the position. There are two business meetings each year in the Spring and Fall as well as the summer conference. APPLY TODAY!!!

NAUIAP Board of Governors

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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)