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The 2017 NAUIAP Conference will be held at the Mayflower Park Hotel (http://www.mayflowerpark.com/). This Hotel is centrally located in downtown Seattle, with easy access to the Pike Place Market and beautiful Puget Sound; the world-famous Space Needle and nearby Chihuly Garden and Glass museum; lots of great shopping and restaurants; and Seattle Mariners baseball (tickets available online).

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President's Column

By Tim Dangerfield, South Carolina

Greetings!

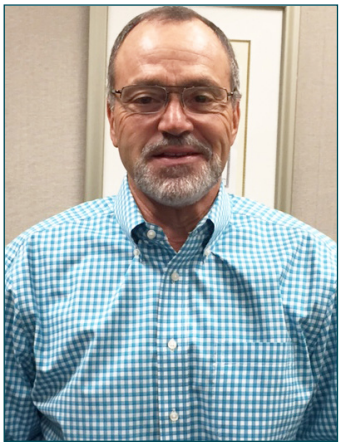
Hope everyone had a great Christmas and that 2017 will be a happy and productive New Year! Welcome to our newest board members, Reba Blackwell from New Mexico and Paul Fitzgerald from Massachusetts.

Our board met in Seattle, Washington, this past October to discuss the previous convention and make plans for the upcoming one. We discussed our finances, membership, website, and the 2017 convention agenda. This productive meeting showed that we are on the right track.

One of our goals for 2016-2017 was to grow our state membership. We currently have enrolled six states: California, Colorado, Florida, Maryland, Ohio, and South Carolina. With your help, we can continue to grow. Please talk with the management in your state to help them understand the importance of joining NAUIAP. Help them see that even if their employees cannot attend the annual convention, they can still receive the materials and connect with others throughout the United States.

Seattle is a beautiful city. The weather is great, and there is plenty to do. Make plans to attend the 2017 NAUIAP Annual Convention, June 18-22.

We are looking for volunteers to serve on numerous committees. Please email me if you are interested.



Looking forward to our time together in Seattle.

Tim Dangerfield
tdangerfield@dew.sc.gov

- **Small - $500 to enroll on (1) to twenty-five (25) members**
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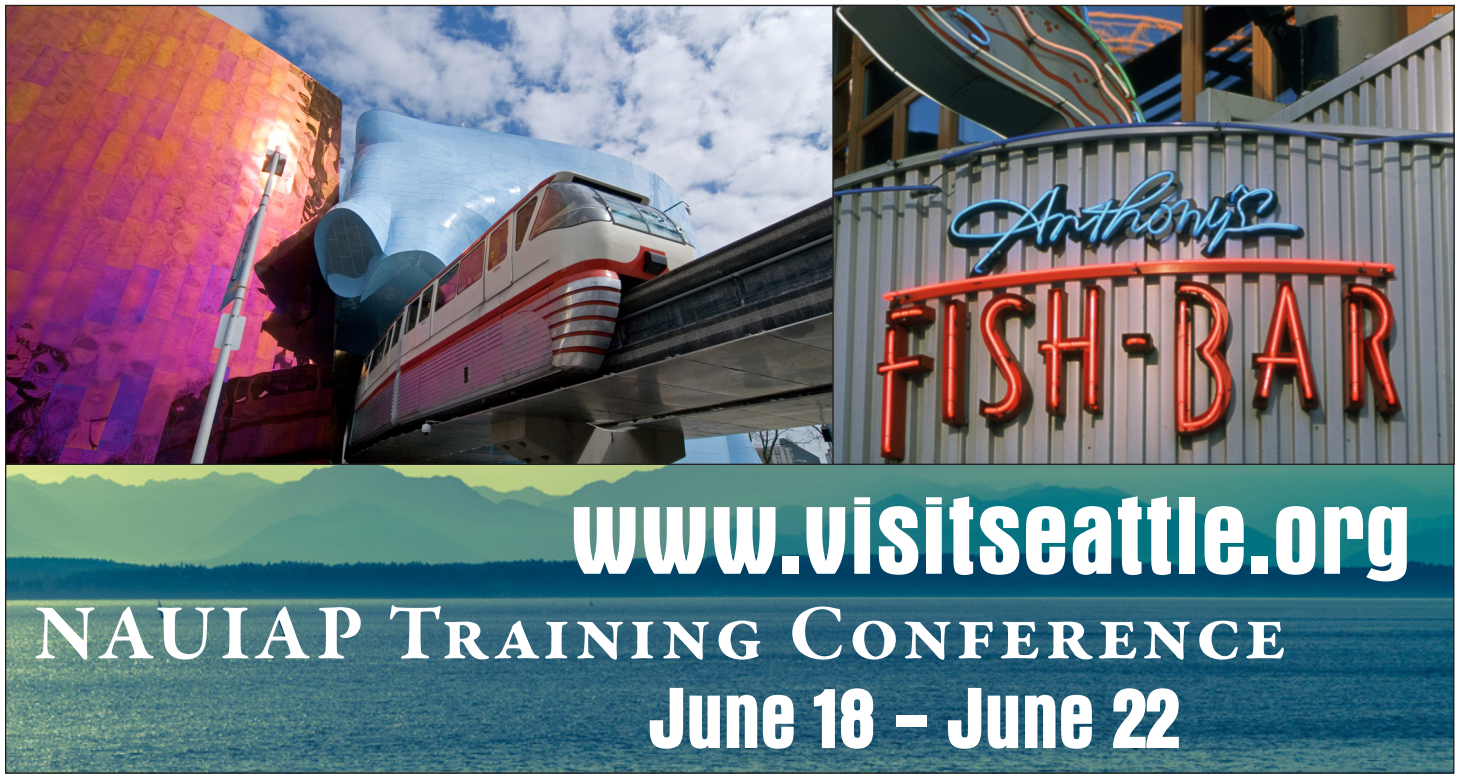


Complementing Higher Authority Workload *with* Other Program Responsibilities

By Tracey L. Schwalbe, Deputy General Counsel
Wisconsin Labor & Industry Review Commission

The higher authority in Wisconsin, known as the Labor & Industry Review Commission (LIRC), reviews appeals in worker's compensation, fair employment, and public accommodation cases, as well as unemployment insurance cases.

The numbers of appeals that come to the commission are reflected by the number of decisions issued by the lower authority ALJs. On average, approximately 12% of UI ALJ decisions, 35% of equal rights ALJ decisions, and 40% of worker's compensation ALJ decisions are appealed to LIRC.

Appeals to the commission may go up or down depending on how experienced the ALJs are. New ALJs take longer to issue decisions but tend to be appealed more frequently. Appeals also may go up or down if the department changes any of its procedures in how it handles cases. For instance, appeals tend to go up whenever the legislature makes substantial changes to the laws as parties test to see how the commission will decide the issues. And an increased focus on mediation in equal rights cases may reduce the number of ALJ decisions and, in turn, reduce the number of appeals to LIRC.

UI appeals go up in recessionary times when the unemployment rate rises. When the unemployment rate is high and more people are out of work, the worker's compensation appeals go down because fewer people are working and those who are working are reluctant to file injury claims. When the unemployment rate goes down and people return to work, the number of worker's compensation claims and corresponding appeals again rise.

The commission has always shifted its staff around to work on the different program areas in Wisconsin as the workload demanded. At times, LIRC staff can be focused almost entirely on processing UI cases; at other times, the focus shifts to working the backlog in other program areas. When the unemployment rate is high, and staff work is directed to UI cases, the decisions in the worker's compensation and equal rights program areas take longer to issue.

Most LIRC staff attorneys develop expertise in at least two program areas so they can shift around their workload as necessary. LIRC also defends its UI cases in court and several of its staff attorneys have developed expertise in handling court appeals. The staff attorneys enjoy the opportunity and challenge to work on different issues, and the commission benefits from this cross-training because it is responsive to shifting workloads and there is not a complete loss of expertise in the event of absences or retirements.

Evolution *of the* Temporary Help Firm Industry

Winston Wheaton, Michigan Administrative Hearing System,
Administrative Law Manager

In the ash-light of an early summer morning, grey figures wander aimlessly back and forth between the curbs on the median. Glowing coals of cigarettes identify others waiting restlessly, wondering perhaps with Buddy Guy, "Where is the next one comin' from?" A stake-rack truck squeals to a stop, the figures jump in the back, and the truck roars off to deliver its cargo of day-laborers. A vignette from the '50s.

The job-posting proclaims the availability of good-paying manufacturing positions immediately available at Widget Manufacturing (WM). No experience required. Joe answers the ad at WM's employment office and is told, "Yes, we are hiring, but you must submit your application through Astounding Staffing (AS). AS is a temporary help firm/staffing agency. Joe may or may not be told that he is an employee of AS, but he is told he will be working a temp to hire job. Joe may be told that the job will become permanent once he successfully completes the probationary period. A vignette from now.

There are multiple reasons why workers pursue employment through a temp agency. In some instances, it offers the opportunity for stop-gap work until something better can be found—often following an economic reduction in work-force by their former employer. Some positions may offer schedule flexibility that will allow one to work while pursuing other goals. For some, it is the entry point into work following completion of their studies. From my perspective as an unemployment appeals administrative law judge, the motive I most commonly see is fueled by the perception that the temp job is a foot-in-the-door opportunity to obtain full time, permanent employment with benefits. Sometimes it works out that way. Often it does not.

It is the "often it does not" result that causes difficulties in adjudicating unemployment claims. In Michigan, an unemployment applicant is disqualified for benefits if he/she voluntarily quits a job without good cause attributable to that employer. A voluntary quit is excused if the employee leaves the job in order to accept permanent, full-time employment with another employer, and does perform services for the "accepting" employer. If a separation from the accepting employer occurs, and a claim for unemployment benefits is granted, the accepting employer will be charged for benefits based on its own payment of wages together with the applicant's earnings from the former employer.

Enter the temporary help firm. Joe reads the job-posting ad for WM. Joe goes to WM's employment office and is redirected to AS, where he meets a recruiter, Susie Enthusy, who paints a rosy picture of future employment with WM. The job he is about to leave at Cookie Crumbles (CC) pays $9.00 per hour, with no benefits. The job at WM will start at $10.50 an hour, and when he completes the probationary period, it will increase to $12.00 with health insurance. What reasonable person would not jump at the chance? He accepts the offer, to start the following Monday.

Joe returns to CC and tells his supervisor that Friday will be his last day of work. He finishes the week, and begins working at WM the following Monday. But, alas, WM has an unexpected down-turn in business seven weeks into his assignment. Joe is laid off. He seeks another assignment from AS, but nothing is available at that time. He is told to keep AS apprised of his availability. Joe reluctantly files a claim for unemployment benefits to tide him over until business picks up. CC protests his claim, because it is going to be assessed its proportionate share of his benefits. It proclaims that it is not liable, because Joe quit without good cause attributable to CC. Disqualification for one is disqualification for all.

Joe responds, "But I quit to take another job that paid more." AS says, "It ain't me babe. We're a temp agency. You can't pass that cup of hemlock (CC's liability) on to us under the leaving-to-accept provisions, because we never offer permanent jobs." Under traditional thinking, the hearing officer accepts that assertion, and Joe is left disqualified.*

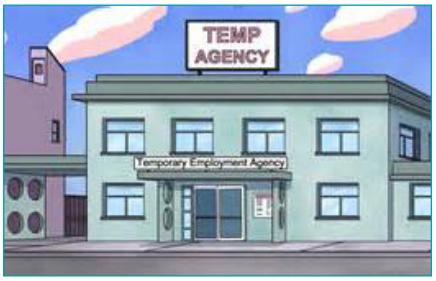
A few thoughts.

The Michigan statute does not define "permanent." Nothing in life is permanent. When Joe accepted employment with AS for placement at WM, he was not accepting a limited term position, e.g., filling in for Bobby Sue while she is on vacation or a 6-week maternity leave. It was expected, at his time of hire that he would be employed indefinitely. Typically the prospective employee is told that he/she must call in to the temp agency on a regular schedule to maintain his/her eligibility for placement in another assignment (and there are statutory disqualification penalties if you do not do so timely) if the assignment ends. Obviously the temp agency wants to maintain contact so it can reassign its employees, both for its own profit and to end its unemployment liability. If employees are not considered permanent hires, why are they required to maintain contact between assignments?

The temp agency's clients are subject to the same vagaries of the economy as any other employer. If the temp agency chooses to be the employer on the client's behalf, how is the job any less permanent than any other employment that is subject to economic fluctuations and seasonal factors? The fact that there may be gaps between assignments or during an assignment does not diminish the character of the employment as permanent. If one accepts the notion that temporary help firm employment of indefinite duration, as opposed to limited term employment, satisfies the condition of permanency, then Joe is not disqualified for leaving CC. The charges attributable to Joe's CC employment would then be passed to AS in the same fashion it would if it were considered a permanent employer in the traditional sense. None of this reasoning applies, of course, if the temp job accepted is known from the outset to be a limited term engagement.

How significant is this issue? Employers have increasingly turned to staffing agencies to perform the probationary role in identifying good and competent workers. The American Staffing Association (ASA) reports (2014 statistics) that more than 3 million workers are engaged in work for staffing companies weekly; more than 16 million annually, nationwide. Seventy-six per cent of those so employed are working full-time jobs. There are 20,000 companies operating 39,000 offices. ASA provides the following statistical breakdown in employment categories:

Of the overall "temporary" workforce, 37% are employed in industrial occupations; 28% in office/clerical/administrative positions; 13% professional-managerial; 13% engineering, IT, and scientific; 9% in health care. Thirty five per cent of these workers are offered permanent employment by the client companies. Sixty-six per cent accept



that offer of work from the client. It is not clear what percentage may have accepted work with another "permanent" employer based on the skills and work record established while working for the client.

From a policy perspective, it seems preferable to remove obstacles to entering or re-entering the work-force. That has to include the negative consequence of being barred from unemployment benefits if, through no fault of the employee, the "temp to hire" fails. Let us not hit the gas before the man in the median has a chance to jump on.

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*Since this article was originally written, an "evolution" of sorts has occurred in Michigan. In Booker v. HCS Resource, LLC, 15-050756-246776 (April 12, 2016), the Michigan Compensation Appellate Commission (MCAC) panel reached the traditional result. A claimant was employed by HSC, a temporary help firm that lost its contract with the client company. The claimant decided to stay on at the client company as an employee of Applewood, the successor temporary help firm. When claimant's assignment was ended by the Applewood, and he filed for benefits, his claim was opposed by HSC. It asserted that he lefts its employ to accept work with a temporary help firm, and thus, he did not leave to accept permanent employment within the meaning of the Michigan Employment Security Act. Claimant's leaving was held to be disqualifying, and disqualification for one employer is disqualification for all in the base period.

More recently, an MCAC panel has arrived at a conclusion more consistent with the main thesis presented above. In Thomas v. Wal-Mart Associates, Inc., 16-004600-248849W (October 31, 2016), "…claimant left work [Wal-Mart] for a staffing agency, Aeroteck, and did so with the understanding that she would be assigned a long-term open-ended position with Quicken with the possibility of eventually being hired by Quicken. If claimant left to accept a long-term open-ended assignment, the claimant left to accept permanent employment. In that case the claimant would not be disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a)."

CAP IT!

By C. Rene Williams, Chief, UI Appeals
Georgia Department of Labor

With the worst of the Great Recession in the rear view mirror, the Georgia Department of Labor (GDOL) launched the long awaited Centralized Appeals Processing (CAP) in June 2014. Prior to this time, appeal requests for Georgia's LAA were initially processed at 1 of 44 GDOL career centers located throughout the state. The paper files were then sent to LAA via first class mail for further processing and scheduling. As you can imagine, this process delayed the disposition of appeals and adversely affected timely release rates and case aging.

The goal of CAP was to eliminate the career centers and the pesky paper files. With CAP, all initial appeals would be processed from beginning to end at the central office by LAA staff with an electronic file (instead of a paper file) created and maintained. CAP was expected to greatly improve Georgia's timely release rates, case aging, and promote consistency and uniformity in the processing of initial appeal requests. A lot of work had to be done before the implementation of CAP. LAA management had to create a specific workflow for the electronic processing of initial appeal requests, determine the specific duties and responsibilities for the new CAP team, and assemble the right staff to do the job. This was no small task. Because the CAP team's primary responsibility was to process and docket initial appeal requests, CAP would be the "heart" of Georgia's LAA, supplying work for all others in the unit. The work can be very tedious and time consuming. The primary duty of a CAP team member is to carefully read and review incoming appeal letters, determine if the request constitutes a first level appeal, and then create the electronic file that will be sent to interested parties and eventually scheduled for a hearing before an Administrative Hearing Officer. Additionally, to meet timely release rates and ensure a full day of scheduling for each Administrative Hearing Officer, each member of the CAP team would also have to meet a daily quota.

Once the team was assembled and trained, CAP was launched as a pilot project in June 2014 with an "inaugural" CAP team of nine. During the pilot phase, appeals filed at the six largest career centers were electronically forwarded to the CAP team at the end of each business day. The pilot helped tremendously. During the pilot period, we were able to determine best and worst practices and, more importantly, recruit the best people for the CAP team.

CAP was complete in June 2016 and has been a success! The CAP team, housed among LAA staff at the central office, currently consists of fourteen members and a supervisor processing approximately 140-150 appeals each day. Only two of the current CAP team members were part of the inaugural CAP team. CAP has greatly improved Georgia's timely release rates and case aging. Since the implementation of CAP, Georgia's 30 day timely release rate has averaged 91% and case aging has never exceeded 20 days. In the same time period immediately preceding CAP, the 30 day timely release rate averaged 65% and case aging often exceeded 30 days. Parties are now able to communicate and correspond directly with LAA from the beginning of the appeal process to the end.

The next great challenge for Georgia's LAA is the implementation of the Southeast Consortium Unemployment Benefits Integration (SCUBI) next year. SCUBI is a multi-state project across North Carolina, South Carolina, and Georgia designed to build a modernized core unemployment insurance (UI) benefits system. SCUBI will revolutionize our processes and operations!

An Overview *of* Marijuana-Related Drug Testing Issues *for* NAUIAP Hearings Professionals

By Ed Steinmetz, Senior Administrative Law Judge
Washington State Office of Administrative Hearings

The number of states which have adopted some form of decriminalized marijuana continues to grow, with five states doing so in the 2016 election cycle. This trend presents hearings officers and administrative law judges with new questions regarding eligibility for Unemployment Insurance (UI) benefits. Perhaps the biggest question for us is whether an employee's off-site use of marijuana, allowed under state law, constitutes disqualifying misconduct when determining UI eligibility. The answer to that question is highly dependent on each state, territory, or district's laws. This article will focus on one question within that larger issue, namely, how do we assess the evidentiary value of drug test results when determining whether misconduct has been established? This is a rapidly developing area of law, and it is vitally important to understand what federal and state laws say regarding the adjudications conducted in your state.

First, we should be remember that although state law may decriminalize the possession and use of marijuana, the federal government's position has not wavered. Marijuana is still a Schedule 1 substance illegal under the federal Controlled Substances Act. It is still a crime under federal law to possess or ingest marijuana.

In the exercise of its' regulatory authority, the federal government has enacted the Drug Free Workplace Act. This Act applies to occupations including those employing federal contractors and grant recipients, and requires the employer to adopt a "zero tolerance" drug policy in the workplace. Affected employers are also required to certify that their workplace is drug-free to the federal government. Zero-tolerance policies are also likely to be applicable to "safety sensitive" positions such as interstate trucking and heavy-equipment operators. With regard to other driving positions requiring a Commercial Driver's License (CDL), the Omnibus Transportation Employee Safety Act of 1991 requires drug testing of all employees whose duties require a CDL.

Although there is nothing in the Drug Free Workplace Act which requires employers to drug test employees as evidence of compliance, there is also nothing prohibiting such testing. As adjudicators, it is good to remember that although the employer in an unemployment hearing may be a state business, if the separated employee was working under a federal contract or grant, or worked in a "safety sensitive" position, you could likely see a zero-tolerance policy in effect. It is recommended that you closely examine the policy, if available, to ensure that you clearly understand its' terms.

Zero-tolerance policies typically prohibit <u>any</u> use of marijuana, and are not primarily concerned with issues such as level of intoxication or impairment. Therefore, a drug test which identifies use only is likely to be sufficient to determine compliance with the policy. And that is why we typically see the standard urine test in cases involving over-the-road truck drivers who are regulated by the U.S. Dept. of Transportation.

The standard urine test is the older, and generally most accepted test for identifying marijuana usage. Unlike newer tests, it does not identify the levels of tetrahydrocannabinol (THC), which is the psychoactive ingredient in marijuana. This means that the urine test does not conclusively establish impairment, only past usage. The standard urine test looks for metabolites of THC, which are compounds resulting from the breakdown of THC in the human body. Because the rate of breakdown is fairly uniform, the urine test can estimate the time that marijuana was last used. And if the last use is determined to have occurred very near to the time of the urine test, certain inferences may be drawn regarding the possibility of impairment.

Most urine tests, including those performed under DOT oversight, establish confirmation cutoff standards for the initial test, and for any second confirmatory test. The test result is generally expressed as "ng/mL" or nanograms of marijuana metabolites per milliliter of urine. If the ratio of marijuana-related metabolites exceeds the confirmation cutoff standard, a "positive" test result is reported. For example, in most DOT required urine tests, the initial test confirmatory cutoff is 50 ng/mL. If a second confirmatory test is performed, a more exacting test procedure, known as "Gas chromatography–mass spectrometry" is generally used. The cutoff for the second test is typically15 ng/mL or 20 ng/mL.

There are also three other tests that you may see in marijuana-related discharges. The newest form of testing is the oral fluids or "saliva" test which specifically tests only for THC, and may be used when employee impairment is at issue. The saliva test is designed to detect very recent marijuana use and up to three days after use. Because this testing technology is fairly new, the validity and accuracy of the saliva test has not yet been firmly established in the medical and scientific communities. A very recent study published by the Journal of Analytical Toxicology concludes the standard urine test is significantly more accurate in identifying marijuana usage than the existing oral fluids test[3].

Another type of test you may see is the blood test. The blood test has a confirmed accuracy, and determines both THC and metabolite levels. It can identify marijuana use which occurred within the past couple of hours, and with heavy or frequent use up to seven days. A blood test may be used in situations where impairment is at issue.

The fourth test is the "hair" test. This test searches only for marijuana metabolites, and again, is therefore able to determine past use, but is not necessarily impairment. The ability of the hair test to accurately confirm past marijuana use has been disputed by some labs. The advantage of the hair test is that if the hair sample is at least one and one-half inches long, it is able to confirm marijuana use up to three months prior to the test.

[3] J. Anal. Toxicol. 2016 Sep; 40(7): 479-485.

While federal and state laws control when drug testing may occur, we must remember that drug tests are considered a "search" within the context of the Fourth Amendment to the U.S. Constitution. Accordingly, public employers such as state and federal government entities are subject to scrutiny under the Fourth Amendment, while private employers are not. This places a greater responsibility on public employers to ensure that the drug test is "reasonable". In most cases the employer is required to demonstrate that the drug test search is based upon "individualized suspicion of wrongdoing" (with certain exceptions). Blood tests are generally viewed as more invasive that the other types of tests, which may require even greater justification for the drug test, and may explain an employer's hesitancy to require a blood test in most employment relationships.

When we consider the impact that drug testing has on the determination of disqualifying misconduct in UI hearings, we should also be mindful of two related issues. Specifically, whether the employer has any duty to accommodate the employee's off-site use of marijuana, and the role that impairment may have in determining misconduct.

When Washington State passed the Medical Use of Marijuana Act in 1998, the legislation specifically stated that nothing in the Act "… requires any accommodation of medical marijuana use in any place of employment…". Similarly, when Colorado voters amended their State Constitution in 2000, the Amendment stated that nothing in the relevant language shall require employers to accommodate an employee's medical marijuana use in any work environment. However, as decriminalized marijuana laws were enacted in other states and relevant issues and concerns have become clearer, attitudes regarding an employer's responsibility to accommodate an employee's legal, off-site use of marijuana appear to be changing.

However, as decriminalized marijuana laws were enacted in other states and relevant issues and concerns have become clearer, attitudes regarding an employer's responsibility to accommodate an employee's legal, off-site use of marijuana appear to be changing.

In 2007, Washington State amended its' authorizing legislation to state that nothing in the Act "…requires accommodation of any on-site medical use of marijuana in any place of employment,…". RCW 69.51A.060(4). (Emphasis added). Considering the bolded language, does Washington's law now infer that employers have some duty to accommodate an employee's off-site use of medical marijuana? More recently, there have been a number of states which have passed laws which expressly address an employer's responsibility to accommodate medical marijuana use by employees. In New York, an employee who has been certified as a medical marijuana patient is considered to have a "disability" under the state's human rights law, and can avail themselves of the protections afforded by that law.

Other states including Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota and Nevada have enacted provisions establishing either anti-discrimination or reasonable accommodation requirements applicable to employers. Any requirement to accommodate an employee's legal marijuana use might still be negligible however in safety sensitive positions or those subject to federal oversight or regulation. As hearings officials evaluating the impact of drug test results in misconduct cases, it is critical for each of us to be fully aware of the law which applies in our state. This includes an awareness of any competing state laws which may limit the evidentiary value of a positive drug test result when determining misconduct in unemployment hearings.

Another issue to be touched upon in this article is the issue of impairment. As has been discussed above, there appears to be a general trend by states to require employers to extend greater accommodation to employees who engage in legal off-site use of marijuana, and particularly medical marijuana. As part of that approach, employers are justifiably concerned with the prospect of employees legally ingesting marijuana off-site, and then reporting for work impaired, which could have serious implications for workplace safety and production. This concern draws obvious comparison to workplace impairment due to alcohol consumption, except, as will be discussed below, it appears much easier for medical science to determine impairment due to alcohol than for marijuana consumption.

One of the first cases to discuss the issue of impairment from marijuana is the Michigan Court of Appeals case Braska v. Challenge Manufacturing Co., 861 N.W. 2d 289 (2014). The Michigan Medical Marihuana Act (MMMA), passed in 2008, not only grants criminal immunity to those using marijuana as allowed under state law, but also establishes a broad preemption stating that to the extent other state laws conflict with the MMMA, those conflicting laws are preempted by the MMMA.

Michigan unemployment law establishes certain types of conduct which will result in disqualification from receiving unemployment insurance benefits including: "… Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner." MCL 421.29(1)(m).

Mr. Braska held a valid medical marijuana card at the time he was injured at work, and used marijuana under the terms of that card. According to the employer's policy, Mr. Braska was directed to submit to a post-accident drug test. The test returned positive for the presence of marijuana metabolites. Mr. Braska was then discharged and unemployment benefits were initially denied.

In its' decision, the Michigan Court of Appeals noted that there was no evidence that Mr. Braska ingested or inhaled marijuana on the employer's premises, and that Mr. Braska did not refuse to take the drug test. The Court also noted that there was no showing that Mr. Braska was impaired or under the influence of marijuana at the time of the work-related ankle injury. (Emphasis added). The Court ultimately reversed the denial of unemployment benefits to Mr. Braska.

The decision of the Michigan Court of Appeals was clearly based upon the specific provisions of Michigan's laws, and this case clearly emphasizes the responsibility that we have as hearings professionals to ensure that we are fully aware of the specific provisions of our state's laws relating to decriminalized marijuana use.

Another interesting case which will not be discussed here, but is nevertheless informative on the issue of impairment and unemployment benefits is a case from Illinois, Eastham III v. The Housing Authority of Jefferson County et al., 2014 IL App (5th) 13209.

If marijuana related impairment is presented as an issue in one of your unemployment cases, how do you evaluate the scientific or medical evidence presented? My research reveals that states are struggling mightily to identify and adopt a valid "per se" standard for marijuana impairment or intoxication as has been done for alcohol. As you might expect, the issue of marijuana impairment is being most actively pursued in relation to state motor vehicle and driving laws. The states of Arizona, Delaware, Georgia, Illinois, Indiana, Iowa, Michigan, Oklahoma, Rhode Island, South Dakota, Utah and Wisconsin have adopted "zero tolerance" laws under which any detectable level of marijuana metabolites will result in a per se inference of impairment while driving. Colorado, Montana and Washington have adopted a per se level for impairment at 5 ng/mL. (Colorado also adopted a "reasonable inference" of impairment for test results between 0 and 5 ng/mL). Nevada and Ohio have adopted a per se standard of 2 ng/mL, and Pennsylvania has adopted a per se standard of 1 ng/mL.

Despite state efforts to establish and adopt a valid per se standard of marijuana impairment, there is still on-going criticism of the validity of such standards. A recent detailed study completed by the American Automobile Association (AAA) in May 2016, entitled "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis" concluded:

"There is no evidence from the data collected, particularly from the subjects assessed through the DRE (Drug Recognition Expert) exam, that any objective threshold exists that established impairment, based on THC concentrations measured in specimens collected from cannabis-positive subjects placed under arrest for impaired driving. An association between the presence and degree of indicators of impairment or effect from cannabis use were evident when comparing data from cannabis-positive and cannabis-negative subjects. However, when examining differences in performance in these parameters between subjects with high (>5ng/mL) and low (<5 ng/mL) THC concentrations, minimal differences were found. There was no correlation between blood THC concentration and scores on the individual indicators, and performance on the indicators could not reliably assign a subject to the high or low blood THC categories."

Just as states are grappling with the establishment of a valid per se standard of impairment for motor vehicle laws, it is likely that administrative hearings officers will be confronting similar challenges when asked to consider the existence of impairment based upon existing drug testing technology and standards.

And finally, the issues of drug testing and drug test results may also require us to consider chain of custody issues related to the test sample. Specifically, verifying the chain of custody allows the hearings officer or administrative law judge to be reasonably certain that the drug test result offered by the employer is based upon the specific test sample provided by the claimant of benefits. When questions arise regarding the accuracy or validity of the reported test result, the party carrying the burden of proof, or the presiding officer, may wish to call as a witness the drug testing facility's medical review officer, typically a physician, to explain testing procedures and to verify the test result.

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21 U.S.C. sec.812 (2015).
41 U.S.C. Sec. 81 (1988).
J. Anal. Toxicol. 2016 Sep; 40(7): 479-485.
https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf