National Association of Unemployment Insurance Appeals Professionals

Navigator

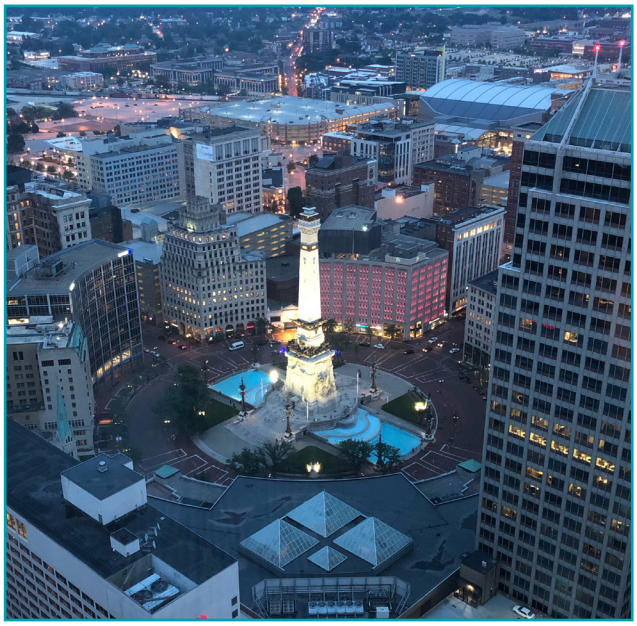
Fall 2019

2019 NAUIAP CONFERENCE REFLECTIONS

Stefanie Price, Director of Appeals
Indiana Department of Workforce Development

Ladies and Gentlemen, Start Your Engines! Here are some highlights of 2019's NAUIAP conference in Indianapolis, Indiana.

I've attended the past three NAUIAP conferences and I've enjoyed the unique experiences each conference provided. When I participated as an attendee, I walked away from the conference refreshed and full of new ideas to implement within my State's division. By taking part in the planning of this year's conference, I was able to experience and learn even more.



The agenda was impressive as always. The sessions had interesting and qualified speakers that presented on a variety of topics that served all aspects of UI appeals. The agenda provided great concepts and ideas for both higher and lower authority. Interesting subjects such as, UI Fraud, judicial demeanor, hearsay, and de-escalation tips in administrative hearings were just a sample of the wealth of knowledge shared during the conference. DOL updates, informative NASWA presentations, and recession planning also provided useful information for those in the administrative areas.

This year's conference expanded my professional networks both within my state agency and with other NAUIAP members. I welcomed new UI professionals from around the country I had not had a chance to meet and reconnected with returning members.

The 2019 conference gave Indiana a chance to showcase Indiana Supreme Court Justice Stephen David who shared his experiences with the law on and off the bench and his Administrative Law Judge's Creed. His opening remarks made everyone laugh but at the same time appreciate his immense professionalism and dedication to public service.

Having the conference in Indianapolis also provided the opportunity to showcase NAUIAP and Indiana's Appeal Division to other professionals within the Indiana Department of Workforce Development. It exposed other UI professionals to the benefits being a state member of NAUIAP and the valuable connections it provides for that membership. It provided an opportunity for Indiana's DWD commissioner, Fred Payne, to attend some presentations and give a welcome speech to all the attendees.

Lastly, I was proud to show off my city – Indianapolis – to all of the NAUIAP attendees. Indianapolis has many wonderful attractions and planning the logistics, from the hotels to the evening events, was a fun opportunity for me to canvass my own hometown to determine the best. This involved visiting the attractions and, best of all, tasting the food! I know that everyone enjoyed the full breakfast every morning – one cannot have too much bacon or biscuits and gravy. The Crowne Plaza, being part of the first Union Station, provided a historical experience during their stay. I enjoyed watching visitors from all around experience this city I call home. One night, I was able to share my favorite downtown Italian restaurants – Iozzo's – with a small group of attendees where we mingled on a social level and enjoyed the summer nights of Indianapolis while enjoying a delicious dinner. The Tuesday night event at the Indianapolis Motor Speedway gave people the opportunity to learn more about the automobile racing circuit located in Indianapolis. Guests had the opportunity to use a racing simulator and walked away with a picture of themselves sitting in an actual race car from the track.

After the 2019 NAUIAP conference, I hope the audience walked away feeling more enlightened having expanded their knowledge and skills. This conference was an amazing success and allowed members to come together on both a professional and personal level. Indianapolis is known as the "Crossroads of America" and it was great that so many states, including many west of the Mississippi, were able to make it.

FROM THE PRESIDENT'S DESK

Edward S. Steinmetz, Assistant Chief Administrative Law Judge
Washington State Office of Administrative Hearings

"You are the face of justice!"

Honorable Justice Steven H. David, Indiana Supreme Court

Hello fellow NAUIAP members! As the weather starts to cool here in the Pacific Northwest, I find myself still basking in the warmth that I feel every time I think about our June 2019 conference in the beautiful city of Indianapolis. There are many positives that initially drew me to my first NAUIAP conference as an attendee, and later motivated me to accept an opportunity to serve as a member of the NAUIAP Board of Governors. I am humbled and honored to serve as your current President of this wonderful Association.

I decided to begin this Column with a powerful quote from our keynote speaker at the 2019 conference, Justice Steven David, because when he spoke the words quoted above, my inner voice cried out "He gets it!" Here was a gifted legal professional, serving at the top tier of Indiana's judicial system, who clearly understands the great importance of the work that you and I perform on a daily basis. Justice David understands that we do much more than adjudicate Unemployment Insurance claims. If done right, our work provides workers and employers that essential opportunity to have their grievances and concerns heard in a neutral and respectful forum. And sometimes, that feeling of "finally" being heard by someone in a position of authority is more important to the parties than the ultimate outcome of the case.

In every civilized governmental structure, there must be a fair, neutral and non-violent process for resolving disputes and disagreements. As Justice David clearly understands, you and I are the "boots on the ground" in this effort to ensure that people are treated fairly and respectfully in our corner of the world. In performing our daily work, we should always try to remember that we do in fact represent the face of justice and the legitimate authority of state government to the people who come before us. It is that special opportunity to serve which has kept me interested and engaged in the adjudication of UI claims for 25 years. And it is because NAUIAP embodies those critical values, that I can't imagine any other place in the UI world that I would want to be right now.

One aspect of our annual training conferences that I so greatly enjoy is the learning and professional growth that I experience at every conference. At our conference in Indianapolis, I specifically set a goal to try to learn something new and valuable at every presentation, whether plenary or workshop. I am pleased to say that I was successful! The learning takes place in many forms. Certainly, the great presenters that we are able to attract to our conference provide much of the valuable education we receive. The opportunity to hear from Jim Garner, Corey Pitts and the Regional Representatives from the U.S. Department of Labor provides extremely valuable insight into hot topics on DOL's radar, as well as previews of future issues or trends that may become important for our work. Also, the work we perform as adjudicators requires a team effort with our state agencies or departments who are responsible for the claim intake and initial determination of eligibility. Accordingly, it is always helpful to hear from Julie Squire and Randy Gillespie from NASWA at our conferences as they provide an important perspective that helps us see the full UI picture. And finally, I will never underestimate the value of the learning I receive when I speak with many of you. To hear from others who perform the same work that I do gives me confidence in many areas of my work, and helps me to see new possibilities or ways to improve in others. The comments and discussions occurring in the Workshops this year were amazing and I learned so much from you!

As I conclude this President's Column, I want to tell you just a bit about your current Board of Governors. When Past President Amanda Hunter handed me the keys to the NAUIAP Indy race car, I knew that I was getting a finely tuned machine. Everyone on the Board of Governors has assigned responsibilities, and they work tirelessly throughout the year to make our annual conference a success. Their NAUIAP work is in addition to their day jobs, and somehow they find a way to get everything accomplished. Everyone on the Board is passionate about NAUIAP's mission and believes in the value of what we do. The commitment and dedication of your Board members is clearly demonstrated by the fact that we currently have four Past Presidents who have chosen to continue serving on the NAUIAP Board – Kathryn Todd from Ohio; Tim Dangerfield from South Carolina; Jayson Myers from New York; and Amanda Hunter from Florida. Board members with significant experience on the Board are Dan Doherty from Maryland; Paul Fitzgerald from Massachusetts; Melissa Butler from Texas; and John Lohuis from Oregon. And to make the Indianapolis conference even more rewarding, conference attendees Stefanie Price from Indiana and Shawn Yancy from Kansas have recently joined the Board. I feel very fortunate to be able to work with such a talented, experienced and motivated group of professionals who care deeply for NAUIAP. Thank you all for putting your trust in us!

PROCEDURAL FAIRNESS IN UNEMPLOYMENT INSURANCE DECISIONS:
The Losing Party's Perspective

By J. S. Cromwell, Chair
Oregon Employment Appeals Board

"There are only two kinds of people: 1. Those who can extrapolate from incomplete data." [1]

The other day I was reading a lower authority appeals order in which the claimant lost his case. It seemed like a well-drafted order, but I thought that there must have been an error because the procedural history indicated that the claimant had appeared at the hearing, but the rest of the order suggested he didn't. As it turned out, the claimant had in fact appeared and offered extensive testimony about why he thought he should receive unemployment benefits despite being discharged from work. Why, then, was the claimant missing from the order?

Unemployment insurance orders have a variety of audiences, some expert, but also including unrepresented laypersons who will be directly affected by the outcome of the order. Those individuals likely participated in the events at issue, or were directly affected by them. They know what happened from their own perspectives, and they know how they feel about what they know. What they need to know, and learn from our orders, is why they didn't win their cases even if they feel like they should have. They need to understand why their explanations and arguments about what happened did not lead to the outcomes they wanted. And if they don't receive that information from reading the order, they will continue to have those questions long after the hearing, and long after the last review has ended, inevitably resulting in parties feeling unheard and dissatisfied with the process. They might even feel that the officials who decided their case were biased, and question whether the processes that led to the outcome were legitimate.

People who win their cases rarely think the underlying proceedings were unfair. People who lose their cases, though, frequently do. One cause might be that losing parties regularly go unrecognized in the decisions deciding their cases; we are expecting too much from unrepresented lay parties if we are expecting them to extrapolate the reason why they lost the case from a decision from which their point of view is missing.

"The link between courts and the public is the written word * * * It is therefore not enough that a decision be correct, it must also be fair and reasonable and readily understood." [2] Our decisions should provide parties with a fair and accurate statement of what was before the court for decision, what the court decided, and what the reasons for the decision were. [3] And when "the losing side has raised substantial contentions," doing so will sometimes necessitate "explaining why contrary arguments were rejected." [4]

Incorporating procedural fairness techniques into our decision writing processes might help parties to our orders feel heard and accept the orders and the processes that led to them as legitimate.[5] Techniques include allowing voice to each party by summarizing the basic points each side made, "emphasizing that you did, in fact, listen to the parties." [6] Orders might fully explain what the legal points are that control the outcome. They might also "[s] how respect" by addressing the losing party's arguments, since "a person whose important matter is handled in court without anyone ever directly addressing him or her might well perceive a lack of respect . . ." [7] The person might well also perceive a lack of impartiality.

Furthermore, thoughtfully drafted orders can explain things plainly, using language a layperson can understand, and pay particular attention to how the losing party will view the case. [8] One technique is to write the order or decision as a "letter to the loser," "designed to explain why he or she lost but also to help the acceptance of the reality." [9] Not only might that approach make it easier for the losing party to understand the decision and accept it as correct, but providing an easily understandable and empathetic explanation for a denial of benefits might also help improve the wellbeing of the parties to the case.[10]

In law school we were taught that "fair" is just a place you can go to get some cotton candy, and that an outcome doesn't have to seem fair to be right. But fairness is not really determined by whether or not the parties like a case's outcome. "Fair" can simply mean that the process that led to the outcome was "marked by impartiality and honesty : free from self-interest, prejudice, or favoritism." [11] We can and do provide fair proceedings, including hearings held by impartial judges who have no relation to the parties, no personal interest in the outcome of the case, and show no favoritism to the agency or any other party to the proceedings. Why, then, do we sometimes show favoritism in our orders by privileging the winning party's point of view over that of the losing party? We can address this by trying to see the whole order from the losing party's perspective, incorporating explanations targeted toward the losing party, and ensuring that all parties to the case feel heard. We can improve parties' understanding of and satisfaction with our proceedings if parties perceive they have been heard and treated fairly throughout our proceedings, including in our orders.[12]

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[1] Popular internet meme, origin unknown.
[2] William W. Schwarzer, Director Emeritus, Federal Judicial Center, Judicial Writing Manual: A Pocket Guide for Judges, Second Edition, Forward to the First Edition (2013).
[3] See William W. Schwarzer, Director Emeritus, Federal Judicial Center, Judicial Writing Manual: A Pocket Guide for Judges, Second Edition at 5 (2013).
[4] Federal Judicial Center, *Judicial Writing Manual, 2nd ed.* at 19 (2013).
[5] See Steve Leben, Judge, Kansas Court of Appeals, *Some Thoughts on the Judges' Written Work* at 2-3 (2014).
[6] *Id.*
[7] *Id.*
[8] *Id.* at 5, 14.
[9] *Id.* at 14, *citing* Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 Court Rev. 54, 56 (Spring 2000).
[10] *Id.* at 17; *see also* International Society for Therapeutic Jurisprudence, Therapeutic Jurisprudence in the Mainstream Blog, *Judicial Decision Writing Can Improve Wellbeing*, August 8, 2017.
[11] https://www.merriam-webster.com/dictionary/fair
[12] In a study undertaken by the Minnesota Judicial Branch Fourth Judicial District, results showed that perceptions of fairness were approximately twice as important as dispositions when measuring litigant satisfaction. See Minnesota Judicial Branch Fourth judicial District Research Division, *Serious Traffic Court Fairness Study* at 3, 6 (October 2005). The study also suggested that litigant satisfaction can lead to parties viewing court authority as legitimate.

Spotlight

SPOTLIGHT ON UTAH

By Kyle Preston, Assistant Director
Utah Division of Adjudication and Appeals

Greetings from the Beehive State! Utah's nickname is a tribute to the industry, stability, and cooperative spirit of our beautiful state, and those same qualities are what make the Division of Adjudication in the Department of Workforce Services (DWS) successful.

The Division of Adjudication handles appeals for unemployment insurance (UI), WIOA training services and public assistance programs such as SNAP, TANF, Medicaid, and Child Care. However, UI accounts for the majority of hearings we hold. We have one chief ALJ, and six administrative law judges (ALJs), who all telecommute full-time. We have allowed telecommuting for over 10 years, and it has been a great success. In our opinion, the ALJ position is well suited for telecommuting, and it has worked to keep staff happy and retained. We have five legal secretaries/support staff and a support-staff supervisor. Our support staff assists both lower and higher authority.

Higher authority appeals are handled by the Workforce Appeals Board, which is made up of individuals appointed by the governor to sit in three-person panels to review the ALJs' decisions. The Board is advised by a DWS attorney. If a party is dissatisfied with the Board's decision, the matter can be appealed to the Utah Court of Appeals. Individuals denied public assistance or training services can appeal an ALJ's decision to the Division Director for an administrative review, or file for a de novo hearing in district court.

In 2018, lower authority resolved approximately 6,900 UI appeal requests. Nearly all hearings are conducted by telephone. In-person hearings are allowed if a person needs an accommodation or the ALJ determines it is necessary to ensure due process. Our requirement for parties to confirm participation in advance of the hearing and our use of what we call an "appeal hold" calendar helps immensely with scheduling. The appeal hold calendar allows us to schedule single party cases to a four-hour time block (either 8 AM to noon or noon to 4 PM) and assign to an ALJ to hold as they have time between other hearings. This works to benefits claimants, as their less complex issues are resolved more quickly.

We are currently in the midst of a major project to enhance the online appeals filing process. The current system, in place for many years, has allowed both claimants and employers to file online appeals, but it is really nothing more than us receiving a written request from the website. Further, while the majority of claimants file their appeal online, few employers utilize the system. We attribute this to the fact that our online system requires the employer to know the same login information as the person who files the quarterly tax reports. Since many employers use an accountant or PEO to handle their taxes, it is problematic when an owner or HR manager wants to file an appeal but does not know the password. With our new process an employer will be able file an online appeal through a standalone system, using secure credentials, without needing to have access to the other system.

Our current online system requires claimants and employers to describe in writing the decision(s) they wish to appeal. This can be especially difficult for claimants, who sometimes misunderstand the reason or time frame for a denial, or have a hard time explaining what they are disputing. It also creates difficulties for the support staff, who struggle at times to decipher what a claimant is intending to appeal. Rather than depending on a party to explain the specific decision(s) they are appealing, the new system will allow claimants and employers to choose which decision(s) they wish to appeal from a list of existing decisions that adversely affect them. A brief but clear explanation of the initial decision will be provided to the appealing party. After a party selects a decision to appeal, they will then be asked to provide a brief statement about why they disagree. After the appellant clicks "Submit," the system will then automatically create the docket and send it to be reviewed before the hearing packet is sent out. The parties will easily be able to appeal multiple decisions at once if applicable. The party can also provide witness and representative contact information and request an interpreter. The party will be given an opportunity to review all information, and select if they want a text or email reminder for the hearing. Our new system will also allow parties to confirm participation for the hearing online, access all documents related to the hearing, and upload new documents for the hearing.

We anticipate the new system will allow us to better communicate expectations with the parties, and in particular help claimants be more informed about the status of issues on their claim. We anticipate this will greatly increase our percentage of online appeals, and reduce our processing time. And we are truly hopeful that text and email reminders will decrease the No Show rate, and the amount of re-work – fingers crossed.

If you have any questions about the Division of Adjudication in Utah or our appeals processes, please feel free to contact us.

COMMITTEE SPOTLIGHT: THE NEWSLETTER COMMITTEE

Leanne Colton, Senior UC Administrative Hearing Officer
State of Ohio Unemployment Compensation Review Commission

STRUCTURE: The Newsletter Committee is currently made up of a chairperson, a co-chairperson, and six members. The chairperson serves on the Board of Governors and was appointed by the President.

DUTIES: The Newsletter Committee is responsible for creating the NAUIAP Navigator, which is published three times a year. Committee members meet via a telephone conference shortly after the annual conference to discuss how the committee has done things in the past, what worked well, and what can be improved upon. Members brainstorm ideas for articles, discuss which edition each idea is best-suited for, and assign specific topics to individual members. Committee members then reach out to find people to write the articles or write the articles themselves. Once the articles are written, they are sent to the chair and co-chair for final editing. The finalized articles are then compiled and sent to the layout designer. Once the layout is complete, a draft of the newsletter is sent by the chairperson to the Board of Governors for final approval. After it is approved, the newsletter is sent to the chairperson of the Website Committee for publication and the chairperson of the Membership Committee e-mails all NAUIAP members about the publication of the NAUIAP Navigator.

TIME COMMITMENT: The Newsletter Committee meets via telephone conference or email several times each year. Individual members periodically email each other to discuss specific articles or issues. Members also spend time finding authors for the articles they are assigned or writing those articles themselves.

GET INVOLVED:
We are always happy to welcome additional committee members. If you are interested in serving on the Newsletter Committee, please send an email to chairperson Jayson Myers at Jayson.Myers@uiab.ny.gov. There will also be a sign-up sheet at the annual conference in Denver, Colorado next June.

The Newsletter Committee is always looking for article ideas for upcoming issues. If you have ideas or suggestions, please email Jayson Myers at Jayson.Myers@uiab.ny.gov.

Announcing the Annual NAUIAP Conference in Denver, Colorado June 15-19, 2020

www.visitdenver.com

Recession Planning Considerations

Marilyn White, Administrator of Appellate Services, Arizona
Sara Cromwell, Employment Appeals Board Chair, Oregon
Judy Smylie, Chief Hearing Examiner, Maryland

Unemployment Insurance appeals are cyclical with the economy. Historically, an economic downtown occurs every 8 to 10 years and causes an inversely proportional increase in UI appeals. The last, great recession was in 2008 and 2009. No one has the ability to accurately predict when the next one will occur, but we can all agree that it will…someday. Below are some things you can consider and do to better position yourself and prepare your staff.

Pay close attention to the Federal Leading Economic Indicators, primarily the weekly USDOL report of new claims filed. When that number exceeds 400,000, an economic downturn is indicated. USDOL issues other periodic information, some of which is helpful in identifying the need for increasing staff. Your state's UI Claims unit should have similar data on its initial claims, continuing claims and adjudications. Try to obtain this information and monitor it for trends over time.

Keep position descriptions current and accurate. Prepare hiring justifications in advance. Write and obtain pre-approval for interview questions. Discuss these things with your HR colleagues so they are prepared to react quickly for you. Hold budget discussions with higher management and your budget and finance division with respect to above-base funding so that all understand the USDOL methodology to pay for unanticipated increases in appeals and claims workload. If you don't have a firm grasp on USDOL budgeting, work with someone in your Regional office who does.

Prepare and maintain lists of needed equipment, furniture, space, supplies and IT access needs for each function or position in your unit. Consult with your Facilities and IT colleagues so they will understand the sudden nature of your need to request these things.

Ensure current training documents and plans are in place. Existing staff who could mentor new hires should be identified and, if needed, receive additional training for that role. Identify who, on your existing staff, is best positioned to train new staff at all levels of the organization. Analyze what positions, if any, may be filled by temporary or contract workers and put a plan in place to bring them on-board quickly.

Training and cross-training can lead to otherwise unknown efficiencies as fresh eyes are reviewing and learning other duties. This also creates more potential trainers and mentors as new staff are added to the roles. Cross-trained staff will be of great value for flexibility and for when it comes time, once again, to downsize. Explore whether some functions may be performed by less experienced staff, i.e., can paralegals handle postponement requests, issues dismissals, process subpoena requests, etc.?

Utilize existing resources (staff) to analyze duties and tasks and identify some "low-hanging fruit" process improvements or the elimination of unnecessary steps and do them. Where possible, prepare detailed process flow documents for functions. These will serve as roadmaps for new staff, both to perform duties and to understand how it all fits together. Each function should be dissected and analyzed with a resulting average time to perform each step or duty. Knowing how many minutes are needed for each function is critical to determining how many people are needed to perform those functions based on incoming or anticipated workload.

Analyze whether the right work is being done in the right place at the right time. Review your current workload in light of existing staff and optimal conditions and timeframes. Determine whether tasks are being performed in an efficient manner. Look for redun-

dancies and steps which have become habit, but add no value to the process. Time should be spent now identifying best practices, using internal and external resources. Train staff performing these functions on the newly identified process. Going through all these steps will allow for an accurate calculation of the time needed for perform all functions. When you know that, you will be in an ideal position to demonstrate the need for additional resources.

With your management, strategize some long-term system improvements and plan for them. Look at your computer systems, applications and programs. Should you explore new or replacement systems or can the extant ones be improved? Keep in mind that any new system will have a long lead time from initial plan to production. Scheduling and Noticing innovations are available either as part of a system upgrade or as a stand-alone. Using an automatic scheduling process can significantly reduce the number of staff needed. Utilizing a process by which Notices of Hearing are automatically created when a case is scheduled also requires fewer staff.

Consider going paperless for your hearings and your Board reviews. This can save both time and other resources. Consider sending Notices and Decisions electronically; you may need to change your agency policies, administrative rules or even statutes.

Gather and keep statistics. Usable data concerning current workload; front-line and professional staff time necessary to perform functions/duties; and limits of productivity expectations to avoid or mitigate burnout are necessary to support requests for hiring, for equipment, and for budget.

A written plan is critical to manage the increased workload demand of a recession. It will quantify and simplify your requests and will establish to those who may "back seat drive" that you did, in fact, prepare and plan for how to respond to a downturn in the economy and an upturn in your appeals workload.

Annual Conference 2019 in Indianapolis

REASONABLE INFERENCES: An Oregon Experience

By J. S. Cromwell, Chair
Oregon Employment Appeals Board

"The EAB may be entitled to draw reasonable inferences from facts in evidence, but it is not entitled to conjure findings from thin air." [13]

When is an inference reasonable? Oregon's Employment Appeals Board (EAB) has, as suggested by the quoted sentence, some experience struggling with that question. In Oregon, the Court of Appeals has stated that an inference is reasonable if "there is a basis in reason connecting the inference to the facts from which it is derived." [14] The court explained, "[a]n inference has two parts: a primary fact plus a deduction. The evidence directly establishes only the truth of the primary fact or facts from which an inference may be derived therefrom." [15]

In some cases, "a rational nexus between an evidenced fact and an inference drawn from it is obvious from common experience (e.g., we may infer from the fact of a wet street that it recently rained)." [16] Where the reasoning is not obvious, or where it requires expertise, however, the courts generally do not assume the existence of a rationale. "Rather, we look to the order to state the rational basis of the agency's inference." [17] For an order subject to a substantial evidence and reasoning review, the danger lies in the latter type of case.

In Hanshew v. Employment Department, EAB found that claimant was unwilling to take public transportation to a city within her labor market.[18] The court reversed and remanded the case to EAB, explaining "'In the abstract, it is possible that EAB drew an inference from claimant's testimony that she was unwilling to work [], but EAB does not explain in its opinion why its findings of underlying fact support that inference." [19] Absent from EAB's decision was an explanation of what facts gave rise to EAB's inference that claimant was "unwilling" to work, or why EAB considered such an inference reasonable under the circumstances.

Likewise, in Kay v, Employment Department, EAB inferred that the employer's owner, who did not provide evidence for the hearing, had acted out of frustration when he made certain remarks to the claimant. [20] EAB did not, however, identify what evidence gave rise to the inference, acknowledge the limitations of the evidence relied upon to make that inference, or explain why EAB considered the inference reasonable in spite of any limitations. The Court of Appeals again reversed, finding that the inference was "not supported by substantial evidence, but rather appears to be mere speculation." [21]

Whether based on "speculation" or, as the court in Nickerson wrote, "conjur[ing] findings from thin air," the question becomes, what has been lacking from EAB's analyses over the years such that EAB decisions involving inferences have been subject to a higher-than-normal reversal rate? Analyzing inference-based decisions affirmed by the court suggests that what is missing is an explanation that ties the conclusions drawn from the indirect facts found.

In Dawson v. Employment Department, for example, EAB inferred from claimant's decision to drink and drive, thereby risking incarceration, that he was indifferent to the employer's expectation that he remain available to report to work as scheduled. [22] The court found that EAB's inference was explained and supported by the facts, and upheld EAB's decision that claimant's discharge was for misconduct. [23]

In Henley v. Employment Department, the claimant alleged that he had to quit his job because he feared for his safety. [24] Drawing inferences from claimant's actions and inactions around the time he left work, EAB illustrated through reference to specific facts in the record that claimant's safety concerns were after-the-fact rationalizations of his decision to quit work and that claimant did not genuinely fear for his safety at the time he quit. [25] The Court upheld EAB's decision, finding that EAB's inferences were based upon specific evidence in the record, and were reasonably drawn therefrom. [26]

The lessons learned from comparison and analysis of appellate court opinions issued over the years thus include the following:

- Recognize when a decision is based upon inferences rather than direct evidence.
- Ensure that all inferences are supported by record evidence.
- Specifically identify which evidence supports the inference, or identify why a lack of evidence compels a negative inference.
- Remember that whether an inference is considered reasonable is based in large part upon the reviewer's experience, and that everyone's experiences differ; in other words, while some may indeed reasonably infer from the fact of a wet street that it had recently rained, others might question whether that was why the street was wet and view the inference as unreasonable. Explaining the foundations of an inference might help whoever reviews the decision understand the basis for the inference and why it should be considered reasonable.
- Be prepared to explain the basis of each inference and why it is reasonable, especially if the reasonableness of an inference depends upon any amount of specific experience or expertise.

In sum, plainly identifying inferences, explaining which facts gave rise to them, and stating why the inference should therefore be considered reasonable might go a long way toward avoiding reversal.

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[13] Verbatim from an Oregon Court of Appeals decision reversing and remanding a case to EAB for reconsideration. *See Nickerson v. Employment Department*, 250 Or. App. 352, 280 P.3d 1014 (2012).
[14] *See Laing v. Employment Division*, 119 Or. App. 256, 850 P.2s 1136 (1992), *citing City of Roseburg v. Roseburg City Firefighters*, 292 Or. 266, 639 P.2d 90 (1981).
[15] *City of Roseburg*, 292 Or. 266, 271, 639 P.2d 90 (1981); *cf. Springfield Education Assn. v. School Dist.*, 290 Or. 217, 228, 621 P.2d 547 (1980), and *McCann v. OLCC*, 27 Or. App. 487, 495, 556 P.2d 973 (1976), *rev. den*. 277 Or. 99 (1977).
[16] City of Roseburg, 292 Or. at 271.
[17] *Id.* at 272; *cf. Home Plate, Inc. v. OLCC*, 20 Or. App. 188, 530 P.2d 862 (1975).
[18] *Hanshew v. Employment Dep't.*, 230 Or. App. 286, 214 P.3d 833 (2009).
[19] *Hanshew*, 230 Or. App. at 290-291.
[20] *Kay v. Employment Department*, 292 Or. App. 700, 425 P.3d 502 (2018).
[21] *Kay,* 292 Or. App. at 705.
[22] *Dawson v. Employment Department,* 251 Or. App. 379, 283 P.3d 434 (2012); see also *Freeman v. Employment Department,* 195 Or. App. 417, 98 P.3d 402 (2004).
[23] *Dawson,* 251 Or. App. at 385.
[24] *Henley v. Employment Department,* 284 Or. App. 781, 395 P.3d 55 (2017).
[25] *Henley,* 284 Or. App. at 785.
[26] *Id.*

Decision-writing in Plain English

Munazza Humayun, Unemployment Law Judge
Minnesota Department of Employment and Economic Development

A strange thing happens when lawyers sit down to write. Stiff, pompous words displace their humbler brethren. Sentences creak under the weight of qualifying clauses. Suddenly, it becomes imperative to direct the reader to the "foregoing reasons" or the "aforementioned dates."

Much of the misery we inflict on our readers is unnecessary: it is possible to explain legal concepts and complex arguments in a way that does not require the non-lawyer to read a sentence several times before she begins to half-understand it. And in the specific work we have chosen—as unemployment insurance hearing officers—the need to write simply and clearly has a moral urgency.

A seven-state study of people who received unemployment benefits showed that 60 percent had a high-school education; another 12 percent did not graduate high school.[49] With the pain of losing a job and all the anguish it brings, the last thing a newly unemployed person wants is to read a long, dense decision to figure out why she is not getting unemployment benefits.

Notice, we're not writing for ourselves. If we accept the premise that the process is for the parties and must be accessible to them, any residual insistence on writing "like a judge" is misguided. The whole point of the written decision is to explain. If our erudition is getting in the way of that, then we're not doing our job as public servants.

Here are some ways to make our decisions easier to read and understand:

USE THE PARTIES' NAMES.

The convention we have adopted in the Minnesota unemployment appeals office is to use parties' and witnesses' last names in decisions. We do not refer to a party as "the applicant" or "the claimant" except at the beginning of the decision to identify who the applicant is. We do the same with the employer's name.

When referring to employers (or to anything or anyone else, really), avoid unnecessary acronyms. Acronyms that are unfamiliar to the reader usually make a decision harder to read. If the employer is called Dave Flannery Innovative Custom Design Corporation, and the owner-witness's name is Dave Flannery, you need not reach for an acronym like "DFICDC" to avoid confusion in the decision text, nor do you have to keep using the long company name every time you refer to it in the decision. You can use a shortened name for the company ("Innovative Custom Design"). (There are exceptions. "UPS" instead of "United Parcel Service" is one example. Both parties are likely used to referring to the company as "UPS," and the acronym "UPS" is enough of a household name that it doesn't slow the reader down when encountered in a decision.)

FINISH WRITING YOUR DECISION FIRST. THEN EDIT.

Even with the best of intentions, many of my first drafts will have a "subsequent" here, a "not inconsistent with" there. Sometimes I will have written independent clauses with em dashes, making a nesting doll of a sentence. It is usually in the editing stage that I notice them.

How should you edit? The best writers all give pretty much the same advice:

"Never use a long word where a short one will do. If it is possible to cut a word out, always cut it out. Never use the passive where you can use the active." (George Orwell)

Cherish "brevity, clarity, simplicity, humanity." (William Zinsser)

Did you start a sentence with, "We conclude" or "I conclude"? Just state the conclusion instead. If a semicolon is holding two independent clauses together, split the sentence into two. If your sentence has several commas, that's also a sign that breaking the sentence up will make for easier reading. Is there any good reason to write, "Refusing to abide by the employer's reasonable policies constitutes misconduct," rather than, "Refusing to abide by the employer's reasonable policies is misconduct"? Or to write "numerous" instead of "many," "attempted" instead of "tried"?

Avoid double negatives. If you're addressing only one aspect of eligibility, you may be tempted to write something like:

Smith is not ineligible for unemployment benefits because of his discharge from employment with Cafe Meow.

Or,

Smith is not ineligible for unemployment benefits under Minnesota Statutes, section 268.095, subdivision 4.

One alternative that avoids the double negative and will likely make more sense to the reader is:

Cafe Meow discharged Smith for reasons that do not amount to employment misconduct, under Minnesota Statutes, section 268.095, subdivision 5. Smith is eligible for unemployment benefits, if he meets all other eligibility conditions under Minnesota Statutes, section 268.085.

WRITE AS YOU TALK.

By this I mean, don't let officialese creep into your decision: don't sound needlessly "chilly" in your decision, as Zinsser would say. If you were telling your friend a story about an encounter you had with someone in a parking lot, would you say, "He parked so he was blocking me, and then he exited the vehicle and started yelling"? Or would you say, "He parked so he was blocking me, and then he got out of the car and started yelling"? When telling your spouse or partner how your day went, are you likely to say, "Guess what, I'm getting ready to head out the door in the morning, and the car is not functioning"? Or would you say the car "wouldn't start"? Follow the advice of late Justice Antonin Scalia and legal-writing teacher Bryan Garner: write normal English.

NO THROAT-CLEARING

A sentence like the one below gives no useful information:

Anderson had repeated attendance occurrences during the course of her employment.

What is an "attendance occurrence"? Does it mean she was absent a lot? Does it mean she was often late? Left early too many times? The sentence is a vague summary, at best, and makes the decision longer than it needs to be. For the findings of fact to have any meaning, this sentence must be followed by information the reader needs to make a decision: what the "attendance occurrences" were, when they happened, and why.

Make every word and every sentence convey clear meaning; make it count. And if a word or sentence isn't pulling its weight, be ruthless and cut it.

FULLY UNDERSTAND WHAT YOU WISH TO SAY.

Writing clearly requires uncluttered, unfuzzy thinking. Once you start replacing big words with simpler ones, you might find that the big words were imprecise to begin with: simplicity forces you to be clearer about what you mean. In hearings, ask witnesses who can't seem to stop using jargon to help you understand the meanings of unfamiliar terms. A judge at the Minnesota unemployment appeals office once asked an employer witness to explain what would happen to a piece of equipment if the claimant did not pay attention to certain alarms (i.e., if the claimant did not do his job). The explanation that followed had much industry arcana and included phrases like, "some very violent physical issues," and "a very high chance that you can have something more serious where the compressor fails mechanically." When the witness finished, the judge asked, "Is that another way of saying it could explode?" "Yes, sir," replied the witness, no doubt wondering why it hadn't occurred to him to put it that clearly in the first place.

NO LATIN!

Enough said.

LOOKING FOR MORE?

Ditching writing habits formed over years or decades is not easy. If you're looking for inspiration or tools, here are some I have often turned to:

- Bryan A. Garner, Legal Writing in Plain English (2d ed. 2013).
- Eugene Volokh & J. Alexander Tanford, "How to Write Good Legal Stuff," https://www.law.indiana.edu/instruction/tanford/web/reference/how2writegood.pdf (2009).
- William Zinsser, On Writing Well: The Classic Guide to Writing Nonfiction (7th ed. 2006).
- George Orwell, Politics and the English Language, in The Collected Essays, Journalism and Letters of George Orwell (1968).
- Bryan A. Garner & Antonin Scalia, Making Your Case: The Art of Persuading Judges (2008).

[49] Marios Michaelides, "Repeat use in the U.S. unemployment insurance system," Monthly Labor Review, U.S. Bureau of Labor Statistics, September 2014, https://doi.org/10.21916/mlr.2014.30.

IS THE GIG UP FOR GIG WORKERS SEEKING UNEMPLOYMENT INSURANCE BENEFITS?

Ana Maria Price, ALJ
Mississippi Department of Employment Security

Leanne Colton, Senior UC Administrative Hearings Office
State of Ohio Unemployment Compensation Review Commission

When is a gig worker an employee or an independent contractor? Geography seems to determine all on this issue. Two states have allowed the decision to percolate through the court system while others have intervened through direct legislative or regulatory action. Most states have not specifically addressed this issue.

This article reviews the actions of the eleven states that have addressed this issue to date. These states employ two competing tests to address the status of gig workers and qualification for unemployment benefits: the "marketplace contractor model" test and the "ABC" test. The "marketplace contractor" model uses a multi-part test to favor classifying the worker as an independent contractor. The "ABC" test provides a three-part test to favor classifying the worker as an employee. It will be interesting to watch as the remaining states face mounting market and political pressure to adopt one of the two competing independent contractor tests.

ARIZONA

Passing the first legislation in this area in 2016, Arizona treats digital platform gig workers as independent contractors for all purposes, including employment security laws, if a three-part test is met [27] exempting government and delivery sector workers. The statute is retroactive one year from the 7/01/2016 effective date. Arizona's "qualified marketplace contractor" [28] test requires that payment for the services be related to the performance of the services or output; the marketplace contractor and the marketplace platform must execute a contract; and the written contract for the performance of services must comply with six (6) requirements.[29]

CALIFORNIA

Bucking the trend of the "marketplace contractor" test among the states, in April, 2018, the Supreme Court of California in *Dynmex v. Superior Court of LA County*,[30] selected a three-part test (ABC test [31]) to determine the classification of gig

workers. The court found a presumption that the gig worker is an employee by placing the burden on the hiring firm to show through the three-factor test that the worker is an independent contractor. On September 11, 2019, the state legislature passed Assembly Bill 5 which codifies the overall concepts of the Dynamex decision to extend minimum wage, overtime pay, and other benefits – including employment security benefits – to large numbers of California workers. The law takes effect on January 1, 2020. The exemption of numerous industries [32] from coverage under the law leaves its focus upon just few areas, e.g., ridesharing, independent truck driving[33] , web-based delivery services, and technology. Criminal penalties result for violation of the law's provisions. The law contains exceptions to the exceptions. [34] Lobbying efforts to add to the list of exempted industries are expected to continue in 2020.[35]

FLORIDA
The statute covers household services workers and workers engaging with transportation network companies using digital networks to facilitate the engagement of services as independent contractors if using a digital network to facilitate such services (namely ride-sharing drivers), and imposes a few restrictions on time, the method of work, and the worker's schedule.

INDIANA
Enacted the "marketplace contractor" model as a five-part test to allow the worker to qualify as an independent contractor.[39] A written contract is required which must include specific provisions related to payments, hours, freedom to work for others, and the worker's responsibility to pay expenses to perform the work.

ILLINOIS
Uses the "ABC" test, as in California, to evaluate independent contractor status of workers, but limits coverage to just the construction industry.[40]

IOWA
Also enacted the "marketplace contractor" test but as a four-part test to define digital platform workers as independent contractors. This statute, as with Arizona's, is retroactive one year from the July 1, 2018, effective date. The statute exempts from coverage governmental entities, Indian tribes, and religious, charitable, and educational organizations, [41] as well as real estate brokers and licensed real estate agents.

KENTUCKY
Following the trend, Kentucky enacted the "marketplace contractor" test as a five-part test to define digital platform workers as independent contractors. The additional test prohibits the marketplace platform firm from supplying the tools for the work. This statute, as with others, is retroactive for one year from the effective date of July 14, 2018. The statute exempts from coverage governmental entities, Indian tribes, religious, charitable, and educational organizations, [42] as well as freight and package delivery entities.

NEW YORK
In July 2018 and in April 2019, the Unemployment Insurance Appeal Board found that Uber Technologies Inc. (Uber) drivers were employees of the company. Uber promptly appealed both decisions but later withdrew its first appeal relating to New York City-area drivers. The second appeal, relating to an Albany-area driver, is pending at the Appellate Division. In a subsequent case the Appellate Division found that a web-based odd-job clearinghouse platform company did not exert enough direction and control over the workers to create and employer-employee relationship.[43] That case is currently pending before the Court of Appeals.

TENNESSEE
Also follows the "marketplace contractor" test to define a worker as an independent contract meeting a ten-factor test. The additional factors address written agreements; termination by either party (marketplace contractor (MC) or marketplace platform (MP)); the lack of insurance benefits provided to the MC; and payment to the MC based upon performance of services engaged through the MP. [44] Those workers exempted under FUTA are exempted from coverage under this statute.

TEXAS
Texas employed the rule-making authority of the Texas Workforce Commission to implement a nine-factor "marketplace contractor" test for independent contractor for unemployment insurance purposes only.[45] The factors of note involve allowing the marketplace contractor freedom from: control in performance of the work; to use the digital platform of any other market platform; from following specified instructions for the work; and from attending mandatory meetings or training. The statute exempts governmental entities, Indian tribes, religious, charitable, and educational organizations, and marketplace platforms "regulated as Professional Employer Organizations and professional employer services," and temporary employees and temporary help firms.[46]

UTAH
This statute addresses only "building service contractors" using a service marketplace platform to connect with and receive requests from customers seeking a building service (janitorial, furniture delivery or moving, landscaping, home repair, or similar services). [47] The statute creates a presumption that a building service contractor is an independent contractor "unless there is clear and convincing evidence that the parties intended the building service contractor to be an employee."[48]

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[27] Ariz. Rev. Stat. 23-1603(A)(1) – (3)(g) (2019).

[28] Ariz. Rev. Stat. 23-1603E (2019) defines this term to include individuals and business entities and excludes delivery contractors of freight and packages.

[29] Ariz. Rev. Stat. 23-1603(A)(3)(a)-(g) (2019) (requiring services be performed as an independent contractor; the qualified marketplace contractor (QMC) must have flexibility to set hours or schedule or selected hours/schedules; the QMC shall have the ability to work for others; payment shall be based upon performance of services; the QMC shall bear its own expenses incurred to perform services; the QMC shall be responsible for taxes; the contract may be terminated without cause by either party upon reasonable notice).

[30] *Dynamex Operations West, Inc.* v. Sup. Ct. of Los Angeles Co., Unpublished Op. (Ca. Sup. Ct. April 30, 2018).

[31] Under *Dynamex*, a person providing labor or services for remuneration is considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C)The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

See Dynamex Operations West, Inc. v. Sup. Ct. of Los Angeles Co., Unpublished Op. at 66-67 (Ca. Sup. Ct. April 30, 2018).

[32] CA. Lab. §2750.3 (b)(1) – (6) (2019). Exemptions include licensed insurance agents, real estate licensees, certain licensed health care professionals, registered securities broker-dealers, direct sales salespersons, commercial fishermen, licensed barbers and cosmetologists, and others performing work under a contract for professional services with another business entity or under a subcontract in the construction industry. Most interesting about the law is the fact that the list of exemptions is nearly four times longer than the rule enacted.

[33] Owner-operator truck drivers who are hired by the job by trucking companies may be forced to become employees of those trucking companies.

[34] CA. Lab. §2750.3 (a)(2)(B)(2019) (for example, the statute does not cover "professional services" defined, in part, as freelance still photographers, writers, editors, or newspaper cartoonists who do not license content or content submissions more than 35 times per year).

[35] Uber, Lyft, and Door Dash pledge $30 million each to fund a 2020 ballot initiative for exemptions for their industries. Techcrunch.com/2019/09/10/gig-worker-bill-ab-5-passes-in-califorina/

[36] Fla. Stat. Ch. 451.02 (2019) exempting government workers, as well as those working for Indian tribes, and religious and charitable organizations, from coverage.

[37] Fla. Stat. Ch. 627.748 (2019) exempting limousines, taxicab associations (see section 320.01(15)), medical transportation for Medicaid/Medicare-eligible individuals, common carriers, motor carriers. The statute outlines specific auto liability insurance, fare transparency, receipt, and driver background check requirements.

[38] Id. At 627.748 (g)(4)-(13) (outlining fare transparency, electronic receipt requirements, TNC insurance requirements, TNC required insurance disclosures to TNC drivers, TNC driver requirements including drug & alcohol use as well as a code of conduct, and non-discrimination policy requirements)

[39] Ind. Code 22-1-6-3 (2019).

[40] 820 Ill. Comp. Stat. 185 (2019) primarily focused on the misclassification of employees in the construction industry as independent contractors.

[41] If the worker is excluded by the Federal Unemployment Tax Act, 26 U.S.C. §§3301-3311, solely by reason of §3306(c)(8)of that Act.

[42] Ky. Rev. Stat. 336.137. Not at Ky. Rev. Stat 336.137(4) As long as the worker is excluded by the Federal Unemployment Tax Act, 26 U.S.C. §§3301-3311.

[43] *TaskRabbit Inc. v. Commissioner of Labor,* 168 A.D.3d 1323 (N.Y. App. Div. Jan. 2019); see Vega v. Postmates Inc., 162 A.D.3d 1337 (N.Y. App. Div. Jun. 2018) (finding that a web-based on-demand pickup and delivery service who conducted a background check, orientation on the platform software, set rates, tracked deliveries, and handled complaints did not exert sufficient control over the workers to qualify as an employer). The Postmates decision is on appeal to the New York Court of Appeals. On April 19, 2019, the NY UI Appeals Board held that Uber Tech. Inc. was an employer. Uber is currently appealing this decision in the Appellate Division, Third Division.

[44] Tenn. Code 50-8-102 (2019).

[45] 40 Tex. Admin. Code §815.134 (2019).

[46] 40 Tex. Admin. Code §815.134 (1) – (4) (as defined under Texas law) (2019).

[47] Utah Code 34-53-102 (2019).

[48] Utah Code 34-53-201 (2019).