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5 GENERAL

A. General

Evidence is the material from which the proof of the truth or falsity of the facts in an issue may be drawn. The determination to allow or deny unemployment benefits is a result of the gathering of evidence and the application of the law and principles described in the Alaska Statutes, the Administrative Code, Court and Commissioner decisions, and the Benefit Policy Manual, to the facts of the situation involved.

In gathering information we consider all evidence that seems relevant and useful -- evidence of the kind that responsible persons are accustomed to rely upon in serious affairs.

B. Definitions

1. Burden of proof

For a complete discussion see EV 10 BURDEN OF PROOF.

The burden of proof is the necessity for convincing an adjudicator at any level.

Example: In a case where a claimant quits a job, the **claimant** must convince the adjudicator that there was good cause for the quit. If the claimant does not convince the adjudicator, the claimant has not met the burden of proof, and good cause is not shown.

Example: On the other hand, in cases of misconduct, the **employer** must show that the reason for the discharged was misconduct in connection with the work. The employer has the burden of proof. In this case the claimant does not have to show that there was no misconduct; the whole weight of convincing the adjudicator falls on the employer.

2. Circumstantial evidence

Indirect or circumstantial evidence is secondary facts by which a principal fact may be inferred.

Example: Walking down the street you see confetti and streamers along the sidewalks. This is circumstantial evidence that there was a recent parade or celebration of some sort.

3. Consistent

Evidence is **internally** consistent when all statements by the same party lead to the same conclusion.

Evidence is **externally** consistent when statements or other evidence from different parties lead to the same conclusion.

4. Contested statements

A contested statement is one that a party to the dispute disagrees with.

5. Credibility

Credibility is the capacity for being believed.

6. Cumulative evidence

Cumulative evidence is a combination of factors that taken together substantially support a holding.

> Example: In 78H-59, the claimant had refused a job because of the salary and the distance of the employment from his home. Although these facts did not necessarily indicate unavailability, it was further noted that the claimant had been unemployed for a lengthy period at the time of the refusal, that the prospective job paid the prevailing rate (showing that the claimant was unwilling to accept the prevailing rate of pay), and that the claimant lived a considerable distance from the nearest labor market. Although none of the factors taken separately would necessarily have resulted in the claimant's disqualification, the Commissioner held that all of the factors taken together resulted in the conclusion that the claimant was not meeting the availability requirements of the law.

7. Direct evidence

Direct evidence is a statement containing information supplied by a person who actually experienced the event.

> Example: A worker's statement that she quit because she was pregnant is direct evidence.

8. Hearsay

Hearsay is information about a past event reported by a person who did not witness the events described.

> Example: Another worker's statement that the employer threatened to fire the claimant is hearsay. The claimant did not hear the employer make the threat.

9. Inconsistent

Evidence is inconsistent if it:

- contradicts known facts, or
- contradicts previous statements, either written or oral, made by the same person, or
- contradicts behavior of the same person.

Example: A claimant (98 0927, June 23, 1998) gave as her reason for incorrectly filling out her claim forms the fact that English is her second language and she did not understand the questions. In finding that the claimant had filed fraudulently, the Tribunal held, " It is illogical to conclude that she was reasonably successful in offering relevant responses to questions posed on her initial claim application, yet incapable of reading or understanding similar questions on her continued claim certifications. The explanation that she sought assistance from strangers, but not her brother or the Literacy Council (a professional organization) is simply not plausible."

10. Indirect evidence

See 2 "Circumstantial Evidence."

11. Interested party

For a complete discussion see "Interested party under each issue in EV 190, Types of Employment.

An interested party is one who has a direct interest in the outcome of a decision. Therefore the claimant is always an interested party. The Agency is always an interested party.

12. Preponderance of evidence

"Preponderance of evidence" has been defined as "that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." (Adelman, 86H-UI-041, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.25, 5/10/86, citing S. Yamamoto v. Puget Sound Lumber Co., 146 P.861, 863 (WA))

Example: The employer discharged a worker due to an altercation between him and another employee. The employer had felt the incident was simply a verbal altercation that could be worked out until the employer received an anonymous letter complaining about the worker's aggressiveness. Based on the letter, he was

discharged. The Tribunal held that there was not a preponderance of evidence supporting a finding of misconduct. (99 0055, February 25, 1999)

If two parties make conflicting statements, give the greater weight to the one supported by the preponderance of the evidence.

13. Presumption

A presumption is an inference of a fact not known, arising from its logical connection with facts that are sufficiently known. This logical connection is given legal operation as a natural outgrowth of a common human experience.

Example: Presumption of unavailability for work arises when a person travels; a person who is ill is presumed unable to work, and the like.

14. Probative

"Probative" means that the evidence proves, or at least tends to show, the truth of the alleged facts.

15. Relevant

Relevant evidence is evidence that tends to establish some fact at issue in the case.

16. Reliable

"Reliable" means that the evidence is the type of information that sensible people use to decide everyday matters of importance.

17. Self-serving

See also EV 30 WEIGHT, B.3, Interest

A statement is self-serving if it benefits the maker of the statement. The fact that a statement is self-serving does not automatically make it untrue, but it does mean that its weight is less than one by a neutral party.

Example: A claimant says that the reason for voluntary leaving was unsafe working conditions. The employer denies that the conditions were unsafe. Both statements are self-serving. If the claimant's reason is accepted, the claimant has compelling reasons for leaving work. If the employer's statement is not accepted, the employer will have various agencies requiring safe working conditions to contend with.

18. Stereotypes

Stereotypes are standardized mental pictures held in common by members of a group and represent an oversimplified opinion, affective attitude, or uncritical judgment about someone or something.

19. Weight

The weight of evidence is the value to the adjudicator in determining the facts of a case.

20. Written documents

Written documents include any forms or questionnaires completed by a party to the decision, and documents presented by the parties, such as contracts, business records, signed confessions and letters of resignation.

Example: A claimant (99 0174, April 8, 1999) submitted documents to show that he was hired by the employer. The documents included:

- A letter to him from the employer apologizing for not reimbursing him for his airplane ticket;
- A fax to him from the employer stating, "You've been promoted to District Director;"
- An e-mail to him from the employer establishing his salary, vehicle allowance, and travel expenses;
- A statement signed by the employer saying, "Frank Weaver is the designated district supervisor for our Anchorage office . . .;"
- A copy of a prospectus detailing the specifics of the company and listing him as the Anchorage Regional Director and Branch Manager.

The Tribunal, based on the documentary evidence, found him to be an employee.

10 BURDEN OF PROOF

To meet the burden of proof, the claimant, the employer, or the agency relies upon evidence. The amount of evidence necessary to meet the burden of proof is the minimum quantity and quality that would cause the adjudicator to believe the facts alleged. If the agency alleges that the claimant is unavailable for work, the agency must produce sufficient evidence that would cause a reasonable person -- the adjudicator -- to believe that the claimant is not available for work.

The evidence used must be reliable, probative, and, in light of all the circumstances, the alleged fact must still appear true.

> Example: The business records of an employer used in the normal course of the employer's business are probative (97 1837, September 30, 1997.)

However, other evidence can contradict the evidence shown and so disprove it. A claimant's statement that a quit was due to unsafe working conditions can be disproved by an employer's safety inspection certification. If rebuttal is not offered, the evidence is accepted as fact (97 2536, December 18, 1997.)

In any issue, the burden of proof never shifts; an allegation necessary to prove a claim or a disqualification must be shown to be true by the party relying upon it. The burden of going forward with evidence, however, may shift. As facts are brought forward, the duty to produce evidence in rebuttal shifts the burden of producing evidence to the opposing party.

15 PRESUMPTION

A. General

Common human experience tells us that some events are almost always connected. When we infer a fact not known, from its logical connection with facts that are known, we have made a **presumption**.

Presumptions establish the meaning of certain events. When sufficient proof gives rise to a presumption, the presumption must be followed unless there is convincing evidence to the contrary.

B. Commonly Used Presumptions

1. Knowledge of laws

A claimant who has received the claimant's handbook, or any other information on the laws and procedures to be followed, is aware of these procedures. This presumption may be rebutted by a showing of some disability on the part of the claimant that would show the claimant unable to read or to understand the material presented.

2. Normal operation of mails

A letter, job offer, or call-in duly mailed was received by the claimant. This presumption may be rebutted only by evidence that establishes that the "normal order of events has been displaced." (80H-86) Such rebuttals would include evidence showing the claimant had difficulty in receiving mail in the past, return of the item to the post office, improper address, or the like. Mere testimony that the item was not received is not sufficient to overcome the presumption.

> Example: A claimant (98 1251, June 5, 1998) claimed that he did not receive his notice of determination. He had had his mail mixed with other persons' who share the same post office cite, and had other documents that he had not received. He had all documents with him that he had received. The Tribunal held that his history of difficulty in receiving mail was sufficient to overcome the presumption that mail is correctly delivered.

3. Expert testimony

A person who is an expert in a particular field is presumed to know that field, and testimony from such a person has, **in that area**, greater weight than from a non-expert.

> Example: A claimant (99 0562, April 14, 1999) held an asbestos abatement worker certificate of fitness. The Tribunal held, " Lacking evidence to the contrary,(his) certificate of fitness creates

a presumption that he is competent to describe primary government mandated job safety requirements."

Physicians' statements in particular must be weighed carefully. A physician's statement is valuable in determining the existence and extent of a claimant's disability. In fact, it is usually conclusive as to the claimant's health, since it is the evidence of a presumably competent expert. But it is not conclusive of a claimant's availability for work, since the physician is unlikely to be an expert concerning the claimant's labor market or the extent to which a particular job would be detrimental to a claimant's health.

Example: A claimant (98 1570, August 4, 1998) had a doctor's statement that said she had been unable to work since May 7. However, she had worked until June 19, thereby, according to the Tribunal, negating the doctor's statement.

4. Schedules

A schedule of a means of transportation establishes when the conveyor traveled or was expected to travel.

Example: In 87H-UI-261, September 29, 1987, the Commissioner took note of two ferry schedules that would have allowed the claimant to be in Seattle on June 20.

5. Cause and effect

If one action ordinarily causes another, the presence of the first tends to prove the existence of the second. However, the presence of the effect does not show the existence of the cause.

Example: A worker (98 1528, July 30, 1998) quit his job in order to go whale hunting. The Tribunal held that, since he had quit, he was clearly unavailable for work in the first week of the hunt.

6. Department personnel give correct information

The presumption is made that Department personnel give correct information. This is not correct with respect to other persons, such as employers, union officials, and other claimants. Even this presumption is rebuttable.

Example: A claimant (98 0103, February 26, 1998) began work on a commission basis and called his local office to inquire how to file while working. He was told to continue filing as he had been doing. He took that to mean without reporting work or earnings. The

Tribunal held that he had been given incomplete instructions by the local office.

C. Information Filters

Statements may be "colored" by interpretations that go beyond the facts. Information in a separation case must travel through at least three "filters": the claimant, the employer and the adjudicator.

1. Hidden Assumptions

Assumptions are taken for granted without proof and often go unexamined and untested. When analyzed, assumptions may prove to be misinformation. They may cause fuzzy thinking and inaccurate determinations. Although it would be counterproductive to delay action until every assumption is tested or proved, an adjudicator needs to be aware of faulty assumptions and to use caution when using assumptions in the decision-making process.

2. Perceptual errors

When two or more persons witness the same event they often give very different reports. If the event is an accident or a heated argument, the variations in the reporting will be greater. Humans vary greatly in their ability to see things. Perceptions are affected by mental stress or alertness. Perception and memory of events can be selective and inventive. Perception is also affected by ability, background, motives, beliefs and emotions. Suggestive questioning may also influence reported perceptions of events. Consider perceptual errors when weighing evidence.

Witnesses to an event filter information in their reporting of events. Recall of events may be influenced by later discussions. Witnesses to an event may unconsciously try to make order out of chaos by reconstructing the event so it makes sense to the listener.

3. Demeanor

The manner in which a person speaks may influence an adjudicator's opinion of what is being said. Although the demeanor may properly be taken into account, it is important not to give it undue importance. Focus on the contents of statements.

4. Stereotypes

Parties to a separation never enter the situation as equals. Individuals in certain categories are often perceived to be more or less truthful and competent. However, the decision about credibility of the statements of

interested parties or witnesses must not be made on the basis of the individual's membership in a particular class or group.

20 RELEVANCY

Evidence must be relevant before it may be considered in the decision-making process. Such evidence may be direct or circumstantial.

25 CREDIBILITY

A. General

Evidence is also measured by its credibility, which stems from the facts asserted. Credibility deals with such things as the conviction of the testimony and certainty with which evidence is produced. The evaluation of credibility centers upon the rationality of the evidence, its internal consistency, and the manner in which it hangs together.

B. Standards for Credibility

Testimony will be considered credible **unless**:

1. The appearance and demeanor of the person testifying makes that person's credibility doubtful.

However, this fact should not be given undue importance, and allowance needs to be made for cultural differences in matters of response, nervousness in being interrogated, and the like.

2. The testimony is inherently improbable.

Testimony is inherently improbable when it is extremely unlikely that the events testified to could in fact have happened. This is not to say that the thing could not possibly have occurred. The unlikely does happen. If testimony is improbable, the adjudicator should require further proof before accepting it as factual.

Example: If a carpenter does not possess tools and states that the employer always provides them, the statement, although possibly true because of some special circumstances, would be improbable in view of the known practice of carpenters, who ordinarily provide their own tools.

3. The testimony is contradicted by other known facts.

Example: A worker (98 2380, November 16, 1998) quit her job, alleging that she was paying more in daycare costs for her three children than she was earning. The Tribunal held that it was not credible that she left for that reason as, at the time that she left, she was earning more than the costs of the daycare.

Example: A worker (98 2616, January 6, 1999) was discharged by his employer for allowing employees under his supervision to leave early. He contended that he had done this because he had changed the digital clock in his office by only 30 minutes instead of an hour when Alaska went off daylight savings time. The Tribunal, in denying benefits, held, " His contention, however, is not logical.

Daylight savings time has been a fact in Alaska for many years. Digital clocks are generally set by either the hour or the minute. Had he mistakenly reset the clock by two hours, his contention may have been understandable. It is not reasonable that (he) would have made an error of thirty minutes."

4. The testimony is inconsistent.

Testimony containing statements that contradict each other is not as credible as testimony that is consistent.

Example: A worker (98 2547, December 11, 1998) was discharged for possession of narcotics on the processing ship of her employer. She had allegedly given a drug, PCP or WET to a fellow employee, causing him to have a psychotic episode. In the course of her testimony, she "at first said that she had never used drugs in the past, but then admitted that she had been arrested for cocaine distribution. . . . She testified that she had never heard of the drug PCP or WET, and did not give the drug to Mr. Davis. However, she signed a statement prior to leaving the ship that said she was discharged for violation of the company drug policy." In denying benefits, the Tribunal held that her testimony was not credible because it was contradictory and self-serving.

Example: In 99 0871 deleted.

Failure to act where action is required creates an inconsistency.

Example: A worker (98 2042, September 30, 1998) alleged that she was concerned about possibly illegal duties that she was required to perform. She had talked with management about this concern several months before she quit. The Tribunal held that the length of time between the time that she voiced her concern and the time that she quit negated this as the primary reason for her quitting, especially when she did quit in order to attend training.

Example: A worker (98 2690, February 4, 1999) was discharged by her employer for failure to follow her employer's procedures. In the month of October against company policy, she took homework to complete, worked overtime, left early, and had confidential files that she had removed from the patient's files. However, she was continued in employment and not discharged until a November staff meeting at which the employer said that she was disruptive. The worker denied the latter allegation, and the employer had no witnesses to the behavior. As the last act was denied by the worker and not substantiated by the employer, the Tribunal held that because she was not discharged for the earlier events at the time they occurred, misconduct was not shown.

Attempts to rescind an action, such as a resignation, also tend to show that the events that caused the original action were not compelling.

> Example: A worker (98 1653, August 18, 1998) gave a two-week notice to his employer that he intended to quit because he was asked to do work that he believed was against the company's contract. He met with the human resources person, the union steward, and the union business agent who asked him several times if he intended to quit. On the next working day, following a three-day weekend, he attempted to rescind his resignation, but got the impression that all bridges had been burned. In denying benefits, the Tribunal held, "[A]n employee who opts to rescind his resignation establishes the working conditions were not so onerous as to require he leave his employment."

Signed documents taken close to the time of the event may be more credible than later unsupported statements.

> Example: A claimant (98 1376, July 1, 1998) originally signed several documents for the Agency stating that he was unable to work. He later stated that the statements were in error and he had been able to work for the time in question. There was no medical, or other, verification of his ability to work, and therefore the Tribunal held that he was unable to work.

30 WEIGHT

A. General

Determining the weight to be given to any piece of evidence depends upon two factors --- the reliability of the piece of information and its importance. The findings and conclusion the adjudicator draws must rest upon reliable and substantial evidence. In such a process, the requirements of the applicable statutes, administrative regulations, and precedent cases must be kept in mind as to the proof necessary under them. The evidence used must be of such weight and sufficiency as compared to contrary evidence as to reasonably convince the trier of facts of the correctness of the ultimate facts in issue.

B. Factors in Determining the Weight of Evidence

Evidence has differing degrees of "believability." Various factors will affect the credibility of claimant, employer, and witness statements. The credibility of evidence becomes suspect as the source of the information becomes less direct or the consistency of the evidence becomes less certain.

1. Directness

Direct evidence can be expected to be more accurate than indirect evidence. Be aware that there may be conscious or unintentional distortions in the account presented.

2. Admission and bias

Be alert to the motives of the interested party and the possibility that an interested party may fabricate all or part of a story or be unable to recall selected events. A party's admission of an important detail unfavorable to the party's side can generally be accepted as true and may not require verification. Choosing not to respond when offered an opportunity for rebuttal of disqualifying information may be considered an admission of accurateness of the information.

3. Interest

See also EV 5 GENERAL, B.17 "Self-serving."

In some cases one party to the separation may have more to gain in the situation than another. There may be some basis for placing less value on statements from that individual, particularly if the other statements tend to refute them.

> Example: In the hearing of 99 0046, February 4, 1999 the claimant provided a witness who had been discharged by the employer, and the Tribunal held that, "[T]estimony from such a witness cannot carry as much weight." The employer provided two witnesses, but,

the Tribunal held, " Both are still employees of his company, and would, understandably, be concerned over their jobs. Again, this is not to say that these witnesses prevaricated because they feared losing their jobs, but, again, such testimony cannot be given as much weight."

Example: A worker (99 0856, May 12, 1999) and his employer gave conflicting accounts of the reason for his separation from employment. The Tribunal held that the employer's version of the events was more believable because the employer had nothing to gain by not describing the facts accurately. In addition other factors contributed to the believability of the employer's story.

In some cases a particular action by a claimant or an employer would have unfortunate consequences. It is generally unlikely that persons will act contrary to their interests.

Example: A nurse (99 0599, April 21, 1999) was discharged from her job for, among other things, asking the CNA to give prescription medicine, which she was not licensed to do, and for being four hours late in administering the medicine. In allowing benefits, the Tribunal held that is was not credible that she would act against her own interests by jeopardizing her nurse's license by telling an unlicensed person to dispense medication or by waiting to give medication.

4. Inherent improbability

A statement is improbable when the events described are extremely doubtful to the listener. Statements that are apparently absurd should not be rejected without further examination.

5. Consistency

Look for and examine inconsistencies in the statements, between present and past accounts, and between facts in the statement and other facts clearly established.

Example: A worker (98 0952, May 27, 1998) on her last day of work left a note on her employer's desk that she would return to complete unfinished work. On the following day she called a co-worker and said that she was not going to return because she had another job. This statement was not true. The Tribunal held that her contradictory and inconsistent statements made her testimony less credible.

A statement with no contradictory evidence in rebuttal is internally consistent.

Example: A claimant (9228018, November 18, 1992) was training for a job as an accountant or bookkeeper. There was no indication that he intended to obtain a four-year degree and no indication that his courses were transferable to a degree-granting institution. The institution from which he has taking the courses was not a public or other nonprofit institution. The Commissioner therefore held that the course was vocational.

6. Verifiability

When appropriate and necessary, seek verification of statements that are material to the case. Verification may take the form of obtaining additional witnesses or documents. Parties can be asked to supply additional evidence on the points in the case.

7. Other considerations

Transcripts, rulings, decisions of other agencies, arbitration and union grievance proceedings are not binding in the adjudication of UI claims, but these rulings and records may be considered and weighed with the other evidence in a case.

C. General Rules in Assessing the Weight of Evidence

1. Credible direct and indirect evidence carries more weight than hearsay.

Example: In the hearing of the case 97 0628, April 7, 1997, the claimant's sworn testimony carried more weight than an unsworn statement of the company service manager, unaccompanied by corroborating evidence.

2. Corroborated credible evidence carries more weight than uncorroborated evidence of equal credibility.

3. Uncontradicted evidence carries more weight than contradicted evidence.

4. Credible specific statements carry more weight than general statements of equal credibility.

5. Credible evidence of any type carries more weight than evidence lacking credibility.

Example: In 97 0499, May 19, 1997, the Commissioner stated, "The hearing officer is in the position of weighing the evidence and giving *more* weight to the witness who seems the more credible. If he were to give *equal* weight to conflicting witnesses and testimony, he could never come to a decision as to what facts are more likely to be true. As a trier of fact, the hearing officer must make the

sometimes tough decision as to which witnesses or testimony are more credible. The standard of review by which the Department reviews a Tribunal's findings has been established in previous decisions such as 85H-UI-069, April 26, 1985, and 86H-UI-048, April 10, 1986. Any question of credibility or conflict in the evidence is to be resolved by the hearing officer, and the findings are conclusive unless unsupported by substantial evidence. Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

D. Guidelines for Weighing Evidence

More Weight	Less Weight
Direct	Hearsay
Verified	
Uncontradicted	Contradicted
Corroborated	Uncorroborated
Official Documents	Unofficial Documents
Probable	Improbable
Detailed Statements or Observations	Less Detailed Statements or Observations
Statements of Disinterested Parties	Statements of Self-Serving Parties

Example: A worker (98 1310, July 13, 1998) quit her job and was unavailable for work until the time of her appeal hearing. Because at the hearing she made clear and unequivocal statements that she was seeking work at that time, the Tribunal held that she was as of that date available for work.

35 CUMULATIVE EVIDENCE

Often no single piece of evidence is probative. But, when a number of pieces of evidence all point the same direction, the cumulative weight of the evidence leads to a definite conclusion.

> Example: A produce manager (99 0469, April 12, 1999) was discharged from his job because he did his work at an unacceptable level. In allowing benefits, the Tribunal held, "Although there may have been problems, these were apparently of not great enough concern to discharge (him) immediately. There was only one written warning, and that four months before he was discharged. A new produce manager was hired and on site the day before the day (the worker) was discharged. All this supports a conclusion that (he) was not discharged for any misconduct."

> Example: A claimant (99 0522, April 13, 1999) was found by the Tribunal to be unavailable for work. The Tribunal held, "[A] person's efforts to locate work are indicative of that person's genuine desire to become employed. I can not, based on (the) two applications on the same day in two months and her testimony that she wants to take it easy, hold that she is sincerely in the labor market, and ready and willing to accept full-time employment."

40 INTENT

Many issues under the unemployment insurance laws raise questions of intent. A claimant must intend to be available or intend to be insubordinate, for example. Intent is the mental attitude of a person, shown by the person's acts. It is a subjective element usually described only in terms of the legal requirements.

> Example: A worker (99 0631, April 12, 1999) was discharged by her employer for absence. Her daughter was ill with pneumonia and she could not get child care while she was ill. She called in to tell the employer about the situation, but did not call in on the Sunday following the schedule change. She did call the following day, and was told that she would have to speak with a manager. When she did reach the manager, he told her she was fired for being a no-call no-show for two days. The Tribunal held, in allowing benefits, that her actions in calling in on Monday showed that she did not intend to quit her job.

45 TYPES OF EVIDENCE

The adjudicator is not bound by the formal rules of evidence. Any relevant evidence that is "the sort of evidence that responsible persons are accustomed to rely upon in the conduct of serious affairs" may be accepted. However, the value of various types of evidence differs.

A. Sources of Evidence

1. Sworn testimony

In a hearing before a Tribunal all witnesses are sworn. This sworn testimony is accorded more weight than unsworn testimony, as long as it is credible.

> Example: A worker (99 0304, March 17, 1999) retrieved a package from an open unguarded mail delivery area addressed to a friend, intending to take it to him. He kept the package overnight and then returned it to the mail delivery area. The friend later reported that there were personal items and $50 in cash missing from the package. The worker denied opening the package. In allowing benefits, the Tribunal held, "Although his actions were suspicious, first-hand testimony was not offered to show (he) opened the box (package) at issue or that he stole items from the box."

2. Statements

Adjudicators may take statements concerning events or circumstances from interested parties who experienced or witnessed them. Adjudicators may also take statements concerning events or circumstances from disinterested parties who witnessed them.

Where statements are contested, the greater weight will be given to a statement supported by a preponderance of evidence.

A statement carries less weight if it is improbable.

3. Written documents

Written documents are not in themselves more or less probative than oral statements. Their probative value depends upon whether or not they are direct or hearsay.

> Example: A written document from the employer's bookkeeper saying that the claimant was fired, when the bookkeeper did not directly supervise the claimant is hearsay and by itself carries little weight against the claimant's sworn statement that the separation was a layoff.

They are also of value in determining the consistency of other statements made by the author of the document.

> Example: The claimant fills out Agency forms stating on them that she quit to move with her husband. A later statement that she quit because of unsafe working conditions carries less weight, since she did not mention it at the first opportunity.

Absence of documentary evidence is also evidence. In some cases, claimants or employers fail to supply documents to support their position, and give no plausible reason for failing to do so.

4. Presumptions

Presumptions made by the adjudicator based on an inference from facts or circumstances known to exist are also evidence. However, any presumption of fact is rebuttable by sufficient evidence to the contrary.

B. Kinds of Evidence

1. Hearsay evidence

Hearsay may be considered along with other types of evidence. However, hearsay evidence by itself cannot override credible direct or indirect evidence. "Generally, hearsay evidence if relevant, is sufficient to uphold a finding in absence of an objection." (Sims, 84H-UI-007, 1/27/84 quoting Jefferson v. City of Anchorage, 374, P.2d 241 (Alaska 1962))

> Example: A worker (99 0334, March 10, 1999) was fired by her employer, a nursery school proprietor, for allegedly using inappropriate language around children. The employer was told by the assistant director, who was told by a co-worker of the worker, that she had used the words s--t and f--k in the classroom. In allowing benefits, the Tribunal held, “The employer's failure to provide direct sworn witnesses to the alleged incidents involving (her) behavior establishes (her) testimony to be more credible. While the employer was able to provide a prima fascia case to discharge (the worker) her adamant denial of the use of profanity or inappropriate language overcomes the employer's hearsay evidence."

2. Direct evidence

Direct evidence proves a fact in issue without the necessity for any presumptions or logical inference. Credible direct evidence is always more reliable than unsupported hearsay evidence.

3. Indirect (circumstantial) evidence

   Circumstantial evidence tends to prove a fact in issue indirectly. **If credible**, indirect evidence may be considered as reliable as direct evidence and will always be more reliable than unsupported hearsay evidence.

4. General vs. specific statements

   Specific testimony is preferable to general testimony. This is especially true when the testimony concerns a point on which a determination of eligibility must turn.

   > Example: If a worker quits because of childcare problems, the determination may hinge upon what efforts the worker made to secure adequate child care. Therefore, the general statement that the worker tried to secure other care would not be as satisfactory as the specifics of what the worker did to arrange child care, when it was done, with whom the worker attempted to make arrangements, and the reason the attempts were not successful.

50 REBUTTAL

Whenever an employer alleges facts that are contrary to the worker's interest, that is, facts which, standing alone or viewed in conjunction with other facts, could support a finding that would deny benefits, the worker must be given an opportunity to rebut the employer's allegations.

> Example: A worker (99 0162, February 25, 1999) was discharged by his employer because he failed a random drug test. He was informed that the sample had been adulterated. He did not know why or how the sample had been adulterated and offered to pay for the lab to test the split sample. The lab's policy was that it could not do that. The worker denied that he had used drugs. In allowing benefits, the Tribunal held, the claimant's "under oath denial of any knowledge of the adulterated urine sample was unrefuted with reliable evidence. Also, (his) testimony was supported by his willingness to pay for retesting."

Likewise, when a worker alleges facts that are contrary to the employer's interest, that is, facts which, standing alone or viewed in conjunction with other facts, could support a finding that would allow benefits, the employer must be given an opportunity to rebut the worker's allegations.

If one party is unable to refute successfully the allegations of the other party, and the testimony is otherwise credible, then the testimony stands as established fact.

55 PREPONDERANCE

If two parties give opposing statements, give the greater weight to a statement supported by a preponderance of evidence.

190 EVIDENCE IN ISSUES

190.1 ABLE AND AVAILABLE

A. Claimant the Only Interested Party

The fact that employers are not involved as interested parties in availability decisions gives great significance to the claimant's own testimony. (The agency is not an interested party per se prior to an appeal.) A claimant's statement, like the statement of an interested employer is frequently self-serving. Generally a claimant's statement will be given full credence and establish eligibility if:

- It is candid;
- It is neither inconsistent nor improbable; and
- It is uncontradicted.

If any of these factors are absent, the weight of the claimant's statement is substantially reduced.

The fact that the claimant is the only interested party does not mean that the claimant is the only source of information concerning availability. A claimant's statement may be corroborated or contradicted by other agencies or persons, such as physicians, licensing boards, or other agencies. In addition, documents such as physicians' statements, letters offering to provide childcare, union bylaws and contracts, and divisional records (such as work applications) are often important in determining availability.

Although an **uncontradicted** statement carries great weight, it does not always follow that a contradicted statement is not credible. Much depends on the credibility of the contrary information. Careful fact finding and close attention to the consistency and plausibility of any statements made will often resolve a conflict of evidence.

> Example: A claimant's testimony may be direct evidence, whereas the conflicting testimony may be indirect or hearsay. Or the claimant's testimony may be weakened by inconsistent statements made in the past.

While unresolved conflicts of evidence are usually the result of incomplete fact finding, occasionally there do arise conflicts that cannot be resolved. In such cases, it is correct to resolve the conflict in favor of the claimant.

B. Burden of Proof and Presumptions

The claimant has the initial burden of establishing availability for work by registering for work as required and providing information on claim forms as to ability to work, job prospects, customary occupation, restrictions, and so on.

A claimant is presumed to be available for work if, at the time of filing the claim:

- The claimant is physically able to work;
- The claimant is registered for work as required;
- The claimant is ready to accept any offer of suitable work that the claimant does not have good cause to refuse;
- A labor market exists for the claimant's services; and
- The claimant did not leave the last immediate employment for a reason that would indicate inability or unavailability for work.

  Example: A worker (99 0722, May 7, 1999) changed the hours of her last job, from full-time to part-time, because she could not afford to work full-time because of child care costs. The Tribunal held that, since nothing in that regard had changed, she was still unavailable for work.

Once the claimant has established availability, the burden of proving unavailability rests upon the agency.

On the other hand, a presumption of unavailability can be established by any fact that shows that the claimant is unable to work, not properly registered for work, unwilling or unable to accept suitable work immediately, or inaccessible to a reasonable labor market.

> Example: A claimant who is hospitalized raises the immediate presumption of unavailability for work, since the claimant cannot immediately accept an offer of employment. Someone engaged in self-employment during normal working hours is presumed not available for work, and someone who voluntarily retires may be presumed to have withdrawn from the labor force.
>
> Example: On the other hand, a seasonally unemployed worker is not presumed unavailable for work during the off-season, even though the worker may have shown a consistent history of total unemployment during the off season. It may very well be that such a claimant is uninterested in employment and unavailable for work, but this must be shown by the claimant's efforts to find work, training and experience in other occupations, and the availability of other work during the off season, rather than on the simple fact that the claimant is seasonally unemployed.
>
> Example: The Tribunal held that a claimant (98 1927, September 24, 1998) was not attached to the labor market because, "She has not sought work, registered for work, nor made any effort to become reemployed that we can discern. She raised the presumption of unavailability through her refusal to continue her bus-driving job past her normal season. She reinforced the presumption when she answered "no" to the question as to whether she could accept immediate employment. She still has done

nothing to overcome that presumption and has shown only a passive willingness to accept any employment."

NOTE: An exception is found in AS 23.20.378(c). A claimant who is attending academic instruction of ten or more credit hours per week is presumed unavailable for work and therefore ineligible, unless the evidence allowing for a waiver is present. This presumption is dictated by the statute and is not the same as a presumption of fact.

C. Weight and Sufficiency

Availability issues involve special problems of evidence that differ from those in other issues.

1. Availability determinations subjective

One problem typical of availability issues is the fact that they involve an element of subjective, but not unsupported or uninformed, judgment by the adjudicator. Although a determination of availability must necessarily be subjective in the sense that it is a conclusion based upon someone's judgment, it is not subjective in the sense of being an arbitrary or whimsical conclusion. It must be based upon objective facts as shown by evidence. Because availability determinations often turn on more than one issue or fact, and because the facts are often less precise and determinable, it is extremely important that the adjudicator obtain and record all necessary evidence. It is also important that the claimant's statements be recorded at the time they are made.

2. Intent

For a complete discussion of intent, see EV 40 INTENT.

The claimant's intent is indicated by actions. The primary question is whether the claimant's conduct and actions are consistent with a desire to remain in the labor market.

> Example: A claimant (98 1234, July 7, 1998) quit her job in order to attend school. In finding her unavailable for work, the Tribunal held, the claimant " is making no efforts to locate work, and the fact that she quit suitable work to further her studies establishes that she is more interested in furthering her studies than in obtaining or retaining employment. She is held not available for work."

3. Cumulative Evidence

Unlike other types of determinations where only the cause of the act must be considered, availability determinations are quite often based upon cumulative evidence or the preponderance of the evidence. In this sense,

cumulative evidence means a combination of factors that taken together substantially support a holding of either availability or unavailability.

Although it is necessary for the adjudicator to have a complete picture of the claimant's availability, it is not necessary to exhaustively document all aspects. What is required is that the documentation includes all necessary evidence bearing on the particular aspect of availability that is being considered. In some cases, a few simple facts will suffice. In other cases, a variety of factors must be considered and recorded.

190.2 MISCONDUCT

A. Interested Parties

There are two interested parties in any misconduct issue -- the employer and the worker -- and it is necessary to obtain accurate information from both. This is sometimes difficult in the case of employers. The notice of employment is often returned by an agent or personnel officer who has no personal knowledge of the act or acts for which the worker was discharged. Where the facts are in dispute, it is important for the interviewer to get information from the person who has firsthand knowledge of the worker's alleged acts of misconduct. If the worker's statement is not rebutted by someone with personal knowledge of the pertinent facts, the worker's statement assumes additional weight.

Additional sources should be contacted when necessary to verify either the worker's or the employer's statement in case of a dispute.

B. Burden of Proof

"When a worker has been discharged, the burden of persuasion rests upon the employer to establish that the worker was discharged for misconduct in connection with the work. In order to bear out that burden, it is necessary that the employer bring forth evidence of a sufficient quantity and quality to establish that misconduct was involved." (86H-UI-213, August 25, 1986)

The employer always has the initial burden of producing evidence sufficient to establish that the worker was discharged for misconduct. If the worker denies having done the act that could be considered misconduct, and the employer fails to present sufficient facts to establish the allegation of misconduct, then the worker is presumed to have been discharged for reasons other than misconduct.

> Example: A claimant (97 0450, March 24, 1997) was discharged from her job as a bartender for the Fraternal Order of Eagles for a number of actions, including poor attitude to customers, selling alcohol to a non-member who was not a guest of a member, and asking others to buy pull-tabs for her. The employer offered no proof of these actions, and the claimant denied under oath that any had taken place after an initial warning about selling alcohol to non-members. The employer did not meet his burden of proof in the face of her denials, and the Tribunal allowed benefits.
>
> Example: A worker (98 2211, January 27, 1999) was discharged by his employer because he was arrested at work because on his unpaid break time he assaulted his wife. The employer relied on the summons and complaint as reliable evidence of the reason for the arrest. The worker denied the charges on the complaint, and the complaint was later dropped because his wife would not testify. The Commissioner, in allowing benefits, held, “Without reliable evidence or testimony that the charges

were true, there is no reason to disbelieve the claimant's version of the event."

Regardless of who has the burden of proof, the adjudicator always has the responsibility to gather and weigh the facts necessary to determine eligibility.

C. Credibility of Testimony

For a complete discussion of credibility, see EV 25 CREDIBILITY.

In cases of alleged misconduct, if the employer is willing to rehire the employee, this fact casts doubt upon a finding of misconduct.

Example: In 98 2352, (November 27, 1998), the Tribunal held that the fact the employer was willing to maintain the worker in his same position but on another shift undermined the employer's position that he was guilty of willful misconduct.

D. Sufficiency of Evidence

Evidence is sufficient to establish misconduct in connection with the work if it clearly shows that the worker's conduct displayed "a willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from an employee or in carelessness to such a degree and recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer."

Sufficiency of evidence is dependent both on **type of evidence** and the **weight** to be accorded that evidence. For a discussion of types of evidence, see EV 45 TYPES OF EVIDENCE. For a discussion of the weight of evidence, see EV 30 WEIGHT.

190.3 SUITABLE WORK

A. Claimant the Only Interested Party

Suitable work determinations do not include the employer as an interested party. Nevertheless, relevant evidence must be obtained, where required, from the potential employer.

B. Burden of Proof

Since the claimant and the division are the only parties in suitable work cases, the burden of proving disqualification or eligibility may not be shifted to any other entity or individual. The rules regarding who has the burden of proof in these cases must conform with the general rule that the responsibility for proving an allegation must be borne by the party relying on it. Thus, if the division seeks to disqualify an otherwise eligible claimant for refusing work, it must show by a preponderance of the evidence that the work was suitable and was refused without good cause, and this burden never shifts. However, once a prima facie case has been made to support a disqualification, the division has discharged its burden, and it is the burden of the claimant to rebut this evidence in order to avoid disqualification.

The division has the ultimate burden of proving a disqualification, and each party has the duty to produce the evidence necessary to decide the facts of the case. The claimant's obligation in this respect is generally limited to truthfully answering questions put by the interviewer, since the claimant is not expected to know the relevance of much of the evidence in the case.

C. Presumptions

1. Suitability of work

Suitability of work may **not** be presumed, but is a question of fact that must be established on the basis of the evidence in each case. In other words, there is no automatic presumption that a job offer made, or referral given, is to suitable work. However, it would be unnecessarily burdensome to inquire in every case whether the wages, hours, and all other relevant conditions of the offered work are suitable. "The division may be reasonably assured that work is suitable unless and until question arises." (81H-59).

A determination of the suitability of the work must be made, however, when:

- the claimant raises the issue by inquiring as to the suitability of the work,
- the claimant objects on any ground to the suitability of the work, or

- facts appear at any stage that put the adjudicator on notice that the work may be unsuitable, either on the basis of the prevailing wages, hours or other conditions, or on the basis of the claimant's personal circumstances.

Once the question of suitability is raised, it must be resolved before benefits may be denied.

2. Position vacant due to a labor dispute

A position offered behind a picket line, other than an informational picket, established during the course of a labor dispute is presumed to be vacant due to the dispute, and therefore unsuitable under AS 23.20.385(a). This presumption may be overcome by specific, credible evidence obtained from the employer. Division policy is that a referral will not be made to a position behind a picket line unless the employment office has established that the particular position is not vacant due to the dispute.

D. Weight and Sufficiency

In suitable work cases, as in other issues, the rules regarding **admissibility** of evidence are flexible. However, the **weight** accorded any piece of evidence is dependent on whether it would tend to convince and impartial and reasonable individual as to the correctness of the facts to which it attests.

The usual sources of evidence in suitable work cases are the claimant, the employment service interviewer, and the prospective employer. In some cases, testimony from other sources, including physicians, is necessary. In taking information from any of these sources, it is important to minimize the use of hearsay evidence whenever possible. Thus, for example, the adjudicator should make every reasonable attempt to obtain direct information from the employer regarding an alleged job refusal, rather than relying on an account of a conversation with the employer given by an ES interviewer.

It is not possible or desirable to give anything resembling a complete ranking of the various kinds and sources of evidence applicable to suitable work determinations. The few examples given below are intended only to illustrate the general principles that competent first-hand evidence is to be accorded greater weight than evidence that is indirect, hearsay, or inexpert.

1. Generally a physician's statement concerning a claimant's health or ability to work should be given greater weight than the claimant's own testimony, and in most cases a claimant who refuses otherwise suitable work for medical reasons must provide competent medical evidence of disability or incapacity. This rule is not absolute however. See SW 235.05, "Health or Physical Condition."

2. A signed and properly identified document completed by an ES interviewer will be given considerable weight if it attests to facts or circumstances of which the interviewer has direct knowledge. For example, a document describing a claimant's refusal of a referral offered by the interviewer constitutes an eye-witness account of the refusal. Much less reliable would be an ES interviewer's account of a claimant's remarks, as reported to the interviewer by an employer who witnessed them. In this case, the evidence is essentially hearsay. Of course, in some instances hearsay is the best, or only, evidence obtainable. The point is to minimize its use and obtain direct evidence from the parties whenever possible.

190.4 VOLUNTARY LEAVING

A. Interested Parties

There are two interested parties in any voluntary leaving issue -- the employer and the worker -- and it is necessary to obtain accurate information from both. This is sometimes difficult in the case of employers. The notice of employment is often returned by an agent or personnel officer who has no personal knowledge of the reason that the worker quit. If the worker quit for a job-related reason, it is important for the interviewer to obtain information from the person who has firsthand knowledge of the situation. If the worker's statement is not rebutted by someone with personal knowledge of the pertinent facts, the worker's statement assumes additional weight.

Additional sources should be contacted when necessary to verify either the worker's or the employer's statement in case of a dispute. Facts from any source can be gathered to establish a worker's eligibility. However, the weight given to different kinds of evidence varies.

B. Burden of Proof

The burden of proof is initially on the worker (the moving party) in voluntary leaving cases. A worker who voluntarily leaves last work has the responsibility of showing either that the work was not suitable or that the worker had good cause for leaving it.

The initial burden of proof is never on the employer in voluntary leaving cases to show that the claimant is subject to disqualification. It is up to workers to show that they are not subject to disqualification. However, once workers have established that the work was unsuitable or that they had a compelling reason to leave, it is then the employer's burden to show that the worker is ineligible. "The Department's position is that all accidents are unacceptable and can be traced in most cases to a failure to observe safety precautions." (9027671, November 6, 1991.)

> Example: A worker (99 0562, April 14, 1999) quit his job when he received a third degree burn in the course of his work. In allowing benefits, the Tribunal held, “When employees are accidentally getting third degree burns, the burden of persuasion shifts to the employer to establish safety concerns do not provide good cause to quit. Third degree accidental burns have not been shown to constitute an acceptable part of the job. The hearing record creates a presumption, not rebutted by the employer, that unacceptable burn accidents alone gave (the worker) good cause to quit."

Regardless of which party has the burden of proof, the responsibility of obtaining the necessary facts to make the determination rests upon the adjudicator. The parties to the determination are often unschooled in the requirements of law and

policy. For that reason, the adjudicator cannot passively wait to be persuaded by one part or the other. The question of which party has the burden of proof is of secondary importance, since in any case the adjudicator must elicit the proper facts from both parties to make a correct determination.

C. Reason for Leaving

The reason for leaving may be job-connected or it may be a personal cause unconnected with the employment. The adjudicator must establish the primary reason for the quit, the exact effect upon the claimant of remaining employed, and the relationship of the alleged cause to the leaving. Careful fact-finding is necessary to avoid a "laundry list" of reasons for leaving. The claimant may have several objections to the work, not all of which were sufficiently strong to cause the claimant to quit. It is important to establish the reason the claimant quit at the time the claimant did.

In some cases, the worker may contend that the final reason for quitting was the "last straw" in a series of events. It may be that these reasons taken together would constitute good cause for leaving, although none of the reasons by itself would constitute good cause. If it is clear that the worker would not have quit except for the prior circumstances leading up to the "last straw," it is correct to consider all of the reasons taken together as the cause of the quit.

D. Attempts to Adjust

Examination of this factor is almost always necessary. The worker's attempts to adjust indicate whether the worker has acted as would a reasonably prudent person who wanted to remain employed. It includes not only the worker's response to unsatisfactory circumstances or situations, but also includes any part the claimant may have played in contributing to the circumstances causing to the separation.

E. Conditions of Work

If the worker's reasons for leaving are personal and unconnected with the work, the investigation is complete when the reasons for the quit and attempts to adjust have been examined. If the worker's reason for leaving is related to working conditions, a further examination of those conditions is often necessary. This may include employment rules or agreements, including union agreements, standard industry or job practices that the worker contends were violated by the employer, or conditions of work which the worker may contend are in violation of health and safety standards.