

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Appeal  
of Laura L. LaVine from the  
Decision of the Governing  
Committee of the Minnesota  
Automobile Assigned Claims  
Bureau.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before  
Administrative Law  
Judge George A. Beck on Thursday, May 19, 1988 at 9:00 A.M., in  
the Large  
Hearing Room of the Minnesota Department of Commerce at 500  
Metro Square  
Building in the City of St. Paul, Minnesota. The record in this  
matter closed  
on June 17, 1988 upon receipt of the final written memorandum  
submitted by a  
party.

James A Stein, esq., of the firm of Hessian, Mckasy It  
Soderberg, 1010  
Amhoist Tower, St. Paul, Minnesota 55102, appeared on behalf of  
the Minnesota  
Automobile Assigned Claims Bureau. Michael P. Helgesen, Esq., of  
'the firm of  
Paige J. Donnelly, Ltd., 506 Minnesota Building, St.  
Paul, Minnesota  
55101-1162, appeared on behalf of Laura T. LaVine. Gregory P.  
Huwe, Assistant  
Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota  
Street, St.  
Paul, Minnesota 55101, represented the Department of Commerce  
but did not  
appear at the hearing nor file a written memorandum.

This Report is a recommendation, not a final decision.  
The Commissioner  
of Commerce will make the final decision after a review of the  
record which  
may adopt, reject or modify the Findings of Fact,  
Conclusions, and  
Recommendations contained herein. Pursuant to Minn. Stat. S  
14.61, the final  
decision of the Commissioner shall not be made until this Report  
has been made  
available to the parties to the proceeding for at least ten days.

An

opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Michael A. Hatch, Commissioner, Minnesota Department of Commerce, 500 Metro Square Building, St. Paul, Minnesota 55101 to ascertain the procedure for filing exceptions or presenting argument.

#### STATEMENT OF ISSUES

(1) Whether the Commissioner of Commerce has jurisdiction in this matter under Minn. Stat. S 65B.63, subd. 1 (Supp. 1987).

(2) Which party has the burden of proof in this proceeding.

(3) Whether -a recorded statement taken from Laura Lavine on October 7, 1987 is admissible in this proceeding.

(4) Whether Laura LaVine was the owner of a private passenger motor vehicle for which security is required by Minn. Stat. S 658.48, which requires that a plan of reparation security be maintained "during the period in which operation or use is contemplated".

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. On April 7, 1987 at 12:30 P.M., Laura L. LaVine was walking across Franklin Avenue at its intersection with Nicollet Avenue in Minneapolis on a green light, when she was struck by a truck which was making a left turn. The truck was driven by Tauno Joseph Stone. Ms. LaVine was thrown into the air and suffered a cut on her chin as well as chipped and broken teeth. (Ex. D).

2. The day following the accident Ms. LaVine contacted Minneapolis attorney James M. Dunn and he agreed to represent her in regard to the accident. Mr. Dunn determined that the driver of the truck had no insurance for the vehicle and that his economic situation was such that it was unlikely that Ms. LaVine would make a recovery from him.

3. On April 22, 1987 Ms. LaVine applied to the Minnesota Automobile Assigned Claims Bureau for benefits. (Ex. D). The Bureau assigned the claim to Aetna Casualty and Surety Company for investigation. The claim was handled by Aetna Claims Representative Jodi Lee Stanoch. Mr. Dunn advised the Bureau that he represented Ms. LaVine in connection with this claim.

4. On June 3, 1987 Mr. Dunn wrote to Ms. Stanoch and advised her that at the time of the accident Ms. LaVine owned a 1977 Plymouth Fury automobile, license plate number MHR 097. He also advised her that Ms. LaVine did not have any insurance on the vehicle since she did not have a driver's license at the time of the accident and was not driving the vehicle. (Ex. 10).

5. On June 11, 1987 Ms. LaVine wrote a letter to the Assigned Claims

Bureau in which she stated that she had lost her driver's license in October of 1986 and had stopped driving at that time. When her automobile insurance came due on February 26, 1987, she did not pay the premium since she was not driving. (Ex. 8). Ms. LaVine lost her license for a period of one year.

6. At the time of the accident Ms. LaVine owned a 1977 Plymouth Fury which she kept in a locked garage which she rented in south Minneapolis. She had not driven the car since the end of 1986 when she lost her license as a result of a DWI conviction and she did not drive the automobile during 1987.

7. In late 1986 Ms. LaVine asked her boyfriend, Eddie Collins, to work on the car because it was not operating properly. ON. LaVine gave him the keys to the car so that he could work on it. She intended to sell the car once it was repaired. The car's performance had been deteriorating since Ms. LaVine bought the car in 1986. By the end of 1986 the vehicle would only start occasionally. Mr. Collins worked on the car on and off as he had time during 1987 but was unable to get it to operate properly.

B. From January to April of 1987, Ms. LaVine did not check on the car

very much. On a couple of occasions during 1987 she discovered that the garage was unlocked when she checked on the car.

9. By a letter dated July 8, 1987, Jodi Stanoch advised attorney James Dunn that Pis, LaVine would not be eligible for benefits from the Minnesota Assigned Claims Plan because she was the owner of an uninsured motor vehicle at the time of the accident. (Ex. 11).

10. By a letter dated July 13, 1987 Mr. Dunn encouraged Ms. LaVine to consult with another attorney if she wished to pursue heir, claim. (Ex. 12). Mr. Dunn did not send a copy of this letter to either the Assigned Claims Bureau or Ms. Stanoch.

11. On July 17, 1987 the Claims Bureau advised Ms. LaVine that her appeal of Ms. Stanoch's denial would be presented to the governing committee of the Bureau. (Ex. 13). The Governing Committee considered the claim in early August of 1987 and decided that more information was needed. They requested that Aetna get a statement from Ms. LaVine.

12. In August of 1987 Ms. LaVine received new license plate tabs for the 1977 Plymouth and indicated that she was insured.

13. On August 20, 1987 Ms. Stanoch called attorney Dunn and advised him that she needed more information from Ms. LaVine. He suggested that Ms. Stanoch contact Ms. LaVine directly. Mr. Dunn did not advise Ms. Stanoch that he no longer represented Ms. LaVine.

14. On October 7, 1987 Ms. Stanoch -took a recorded statement from Ms LaVine with her permission. Prior to taking the statements Ms. Stanoch asked Ms. LaVine if she were represented by an attorney and Ms. LaVine replied that she was. Ms. Stanoch believed that Ms. LaVine was still represented by James Dunn.

15. After the statement was taken Ms. LaVine called Ms. Stanoch later in the day and said that she had talked to her attorney and that he had advised her that she should not have had the statement taken. Ms. LaVine asked Ms.

Stanoch not to use the statement. Ms. Stanoch then called James Dunn because she thought she had his permission for the statement. Mr. Dunn advised Ms. Stanoch that he no longer represented Ms. LaVine. Ms. Stanoch then called Ms. LaVine back and Ms. LaVine advised her that Paige Donnelly was now representing her.

16. In the statement Ms. LaVine stated that she suspected Eddie Collins of using the car, (Ex. 5, p. 7) but also said that she really didn't know if he did. (Ex. 5, p. 4). She stated that she had been able to start the car when showing it to a prospective buyer at one point, (Ex. 5, p. 7) but also described the car as inoperable (Ex. 5, P. 11) and stated that it was hard to sell a car when it wouldn't run. (Ex. 5, p. 7).

17. Some time in July of 1987 Ms. LaVine had contacted the Paige Donnelly law firm which had orally agreed to represent her. On August 31, 1987, Ms. LaVine signed a retainer agreement with the Paige Donnelly law firm. This agreement was not signed by Paige Donnelly until May 19, 1988, the date of the hearing of this matter. (Ex. C).

18. On October 12, 1987 James Dunn wrote to Ms. LaVine confirming that he no longer represented her in regard to the accident of April 7, 1987. A copy of this letter was sent to Ms. Stanoch and to the Assigned Claims Plan. (Ex 14) . Mr. Dunn had received documents relative to Ms. Lavine's claim at his office between July and October of 1987.

19. Subsequent to the taking of the statement from Ms. LaVine on October 7, 1987, Aetna Casualty and Surety Company advised the Governing Committee of the Claims Bureau that it still recommended denial of the claim. The Governing Committee then formally denied Ms. LaVine's claim and she was advised of the denial in a letter dated November 25, 1987 (Ex. 3) The letter advised Ms. LaVine that the "decision of the committee may be appealed to the Minnesota Commissioner of Commerce within 30 days. If you wish to do so you may direct the appeal to the Minnesota Department of Commerce, 500 Metro Square Building, St. Paul, Minnesota 55101.. A copy of this letter was sent to James M. Dunn. (Ex. 3).

20. On December 16, 1987 an Assistant Commissioner of the Department of Commerce wrote to the Assigned Claims Plan and stated that after reviewing the matter he was ordering that the claim be paid. (Ex. 1). The Bureau did not follow this directive and the Department did not pursue it.

21. On December 24, 1987, the Assigned Claims Plan received a letter from Paige J. Donnelly dated December 23, 1987. (Ex. 2). Enclosed with the letter was a "Notice of Appeal and Appeal' which was venued in Hennepin County District Court. (Ex. 4). The Notice also stated, however, that the Appellant, Laura LaVine was appealing the November 25 1987 decision of the Governing Committee of the Minnesota Automobile Assigned Claims Bureau pursuant to Minn. Stat. S 65B.63, subd. 1 The Notice of Appeal had been placed in the mail on December 23, 1987. (Ex. E). The manager of the Assigned Claims Bureau had been expecting an appeal because he had talked to a lawyer from Paige J. Donnelly's office prior to December 24, 1987.

22. The manager of the Assigned Claims Bureau wrote to Mr. Donnelly on December 24, 1987 acknowledging receipt of his December 23, 1987 letter. The letter stated that since there was no evidence that an appeal had been made to the Minnesota Department of Commerce within 30 days of the Bureau's November 25th letter, the Bureau's claim file for Laura LaVine would remain closed. (Ex. A).

23. During March of 1988, someone broke into Ms. Lavine's automobile and removed a tape player. She decided to give the car to Eddie Collins and told him that he could have it. She was able to get the car started in the garage and proceeded to drive it a few blocks to her house where Mr. Collins was to have it: picked up and towed away. The title was actually transferred to Mr. Collins on March 21, 1988. (Ex. 9).

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. That the Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. SS 65B.63, subd. 1 (Supp. 1987) and 14.50 (1986).

2 . 'That the Department of Commerce has fulfilled all relevant substantive and procedural requirements of law or rule.

3. That the Department of Commerce has given proper notice of the hearing in this matter.

4. 'That the Appellant, Laura L. LaVine, perfected her appeal as required by Minn. Stat. S 65B.63, subd. 1 (Supp. 1987) and that therefore the Commissioner of Commerce has jurisdiction in this matter.

5. That the burden of proof in this proceeding is upon the Appellant, but that the Respondent must prove its affirmative defense, namely that the Appellant owned an uninsured motor vehicle which she contemplated using.

6. That the statement taken from Laura L. LaVine on October 7, 1987 is admissible as evidence in this contested case proceeding.

7. Minn. Stat. S 658.64, subd. 3 (1986) provides, in part, as follows:

A person shall not be entitled to basic economic loss benefits through the assigned claims plan with respect to injury which was sustained if at the time of such injury the injured person was the owner of a private passenger motor vehicle for which security is required under sections 65B.41 to 658.71 and that person failed to have such security in effect. . . .

8. That Laura L. LaVine was the owner of an uninsured private passenger motor vehicle on the date of the accident.

9. Minn. Stat. S 658.48, subd. 1 (Supp. 1987) provides, in part, that:

Every owner of a motor vehicle of a type which is required to be registered or licensed or is principally garaged in this state shall maintain during the period in which operation or use is contemplated a plan of reparation security under provisions approved by the commissioner, insuring against loss resulting from liability imposed by law for injury and property damage sustained by any person arising out of the ownership, maintenance, operation or use of the vehicle. . . .

10. That the Bureau has failed to prove by a preponderance of the

evidence that Laura L. LaVine contemplated operation or use of her 1977 Plymouth automobile at the time of her accident or within a reasonable period thereafter.

11. That therefore, Laura L. LaVine is entitled to economic loss benefits through the Assigned Claims Plan with respect to her injuries incurred on April 7, 1987 under Minn. Stat. S 65B.64.

12. Insofar -as any of the foregoing Findings of Fact are deemed to be Conclusions, they are adopted as such.

1 3. That the above Conclusions are arrived at for the reasons set out in the memorandum which follows and which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Commerce issue an Order granting the appeal in this matter and reversing the determination of the Governing Committee of the Minnesota Automobile Assigned Claims Bureau.

Bated: July 14 1988.

GEORGE A. BECK  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. S 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 6469 and 6434. No Transcript Prepared.

MEMORANDUM

This contested case proceeding is an appeal to the Commissioner of Commerce from a decision of the Minnesota Automobile Assigned Claims Bureau. Under the assigned claims plan as described in Minn. Stat. S 65B.63 and S 65B.64, insurance companies writing automobile insurance in Minnesota are required, -through the Bureau, to provide basic economic loss benefits to a person injured in an automobile accident who cannot otherwise make a recovery.

Notice of Filing of the Appeal

In this case the Bureau has argued, as a preliminary matter, that this appeal is procedurally defective because the Appellant's Notice of Appeal was filed with the Bureau rather than the Commissioner of Commerce and, additionally, the Notice stated that it was venued in Hennepin County District Court. The statute requires that the decision of the governing committee of the Bureau be appealed to the Commissioner within 30 days. It also permits judicial review of the decision in lieu of an appeal to the Commissioner. The Bureau argues that the failure to strictly comply with the statute is jurisdictional and precludes the Commissioner's consideration of this case. It cites two cases in its reply brief which stand for the proposition that a

court cannot extend the time limit for an appeal from a court decision.

The Appellant argues in tier brief that the filing requirement should not be strictly construed and points out that there was no prejudice to the Bureau since they had notice within the 30-day period set out in the statute. Additionally, counsel for the Appellant had advised the Bureau orally, prior to the written notice, that an appeal would be filed with the Department of Commerce. The Appellant also asserts in her reply brief that the Department of Commerce actually received a written Notice of Appeal within the 30-day deadline based upon a reference to that effect in a letter attached to the reply brief. There is, however, nothing in the record which would document the filing of an appeal with the Department. The attachment to the brief cannot be considered as a part of this record since it was not offered or received at the contested case hearing. Nonetheless, it is clear from Exhibit 1 and from the issuance of this Notice of Hearing that the Department did subsequently receive notice of this appeal.

The circumstances of the filing of the Notice of Appeal does not deprive the Commissioner of Commerce of jurisdiction. The case law cited by the Bureau applies to judicial rather than administrative appeals and stands for the proposition that the appeal period cannot be extended. In this case the appeal was filed within 30 days. however, it was not filed with the proper body, namely the Department of Commerce. It has been held that where an appeal is filed within a 30-day time limit but filed in the wrong court, the appeal was not barred on jurisdictional grounds. Shopper Advertiser, Inc. v. Wisconsin Department of Revenue, 117 Wis.2d 223, 244 N.W. 2d 115 (1984). In that case a decision of the Wisconsin Tax Appeals Commission was filed within 30 days but in the wrong County Circuit Court. The Wisconsin Supreme Court nonetheless found proper subject matter jurisdiction. 344 N.W.2d at 121. The Bureau can show no prejudice from the improper filing of the appeal. In fact

the procedure followed gave it better notice than it would have had had the statutory procedure been followed. Additionally, the improper heading on the appeal notice, namely, Hennepin County District Court, could not in reality have been misleading to the Bureau since it knew of the Appellant's intent to appeal to the Department of Commerce. It is generally held that notices of appeal are liberally construed as to sufficiency and will not be deemed insufficient due to clerical errors or defects which could not have been misleading. Kelly v. Kelly, 371 N.W.2d 193, 195-196 (Minn. 1985).

#### Burden of Proof

The parties are in disagreement as to who has the burden of proof in this proceeding. Minn. Rule 1400.7300, subp. 5 provides that the party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence. It also provides that a party asserting an affirmative defense shall have the burden of proof as to that defense. In this case the Bureau concedes that it has the burden of proof as to the affirmative defense of showing that Appellant owned an uninsured motor vehicle at the time of the accident which she intended or contemplated using at that time. The Minnesota Supreme Court has held that "An applicant for relief, benefits, or a privilege has the burden of proof.\* City of White Bear Lake. 311 Minn. 146, 150, 247 N.W.2d 901, 904 (1976). The Court also observed that In this state the burden of proof generally rests on the one who seeks to show he is entitled the benefits of a statutory provision." 247 N.W.2d at 904. In this case the Appellant is seeking to show that she is entitled to economic loss benefits

available under the Assigned Claims Plan and therefore, under the case law and the administrative rule, she bears the overall burden of proof. The Bureau, however, has the burden of proof as to the main issue in this case, namely whether or not the Appellant is disqualified from benefits because she owned an uninsured vehicle which she contemplated operating.

#### Admissibility of Appellant's Written Statement

Both by a prehearing Motion and through argument in the post-hearing briefs, the Appellant asserts that the October 7, 1987 statement taken by Aetna Claims Investigator Jody Stanoch should not be admissible in this contested case proceeding. The Appellant asserts that the statement was taken from her file she was represented by the Paige J. Donnelly Law Firm, but without its permission. The factual circumstances, however, make it clear that Ms. Stanoch reasonably assumed that Ms. LaVine continued to be represented by her former attorney, James Dunn. Dunn had given Stanoch permission to take a statement from Ms. LaVine. Ms. LaVine did not advise Ms. Stanoch of her change of attorneys nor did Mr. Dunn advise Ms. Stanoch or the Bureau that he was no longer representing Ms. LaVine. Accordingly, from an equitable standpoint, Ms. Stanoch's conduct was not improper.

The Appellant cites no authority for exclusion of the statement from evidence in this proceeding aside from citing the Rules of Professional Conduct for attorneys as well as an excerpt from a legal encyclopedia suggesting that wrongfully obtained evidence may sometimes be excluded in civil actions. Since Ms. Stanoch is not an attorney, the Rules of Conduct do not directly apply to her. Additionally, although some states have held that the exclusionary rule has general application to administrative cases, the Appellant has offered no case law authority for the proposition that a statement taken by an insurance investigator under these circumstances would be inadmissible in an administrative contested case proceeding. It is

therefore concluded 'that the statement should be in evidence in this case.

Its presence in the record is not a matter of great consequence since the statements made by the Appellant are more conflicting than conclusive as to the main issue in this case.

#### Whether Operation or Use was Contemplated

The main issue in 'this case is the affirmative defense presented by the Bureau which is based upon Minn. Stat. S 65B.64, subd. 3, which disqualifies an applicant for economic loss benefits if she was the owner of a private passenger motor vehicle for which insurance is required but for which none is in effect. Under Minn. Stat. S 65B.48, subd. I the owner of a motor vehicle is required to 'maintain during the period in which operation or use is contemplated' insurance on the vehicle. The question to be resolved therefore is whether or not Laura LaVine contemplated the use of or operation of her 1977 Plymouth automobile during the relevant time period.

The Bureau argues that a number of facts demonstrate Ms. LaVine's intent to operate her car in the future. The Bureau suggests that the car was driven by her boyfriend Eddie Collins, that others had access to the garage where the car was stored, that Ms. LaVine expressed an intent to allow others to test drive the vehicle if she could sell it, that she renewed the license tabs on the vehicle in August of 1987 and that she drove the vehicle on a public road in March of 1988.

The Bureau also suggests that this case is controlled by the Court of Appeals decision in *LaBrosse v. Aetna Casualty and Surety CO.*, 383 N.W.2d 736 (Minn.App. 1986). Mr. LaBrosse bought the vehicle in question in that case in March of 1983 but never obtained automobile insurance for it. On December 16, 1983, the automobile failed to start due to sub-zero temperatures. Four days later Mr. LaBrosse was a passenger in a car involved in an automobile accident. The Court denied the plaintiff's claim under the Assigned Claims Plan stating that there was no indication that he was not considering future use and noting that there was a potential for injury or damage because the automobile was parked on the street while it was inoperable. 383 N.W.2d at 738.

The Bureau has the burden of proof to show that Ms. LaVine intended to operate her automobile. Ms. LaVine was involved in an accident as a pedestrian in April of 1987. The record indicates that Ms. LaVine lost her driver's license in approximately January of 1987 for a period of one year and allowed her insurance to lapse in February (of 1987). There is no credible evidence that Ms. LaVine or anyone else used this vehicle which was stored in a garage off the street. Specifically, there is no evidence in the record that the automobile was used by Ms. LaVine's boyfriend. She only testified that she suspected at one point that he had used it. While the garage where the automobile was stored was found open on more than one occasion, there is no evidence that as a result someone had driven the automobile. Ms. LaVine did testify, when asked by counsel for the Bureau, that she would have allowed someone to test drive the vehicle in order to sell it, however there is no evidence that anyone did or that there was even any serious interest by anyone in buying the vehicle. Although Ms. LaVine did testify at one point that she drove the automobile in March of 1988, both this event and the renewal of the tabs for the license on the automobile in August of 1987 are remote from the occurrence of the accident in April of 1987.

This case is distinguishable from LaBrosse. In Labrosse the plaintiff had presumably driven his automobile for nine months without insurance. The vehicle was inoperable only because of sub-zero temperatures and had been inoperable for only four days when the plaintiff was involved in an accident as a passenger. In Ms. LaVine's case neither she nor anyone else had driven the automobile in question for four months prior to the accident. The record indicates that she did not drive the automobile for- the remainder of 1987 either. Although her boyfriend had been attempting to fix the car, he had not been able to do so. Even if it had been repaired, it was Ms. LaVine's intention to sell the car rather than to use it again. The LaBrosse court pointed out that LaBrosse's automobile was parked on the street and could have been involved in an accident. Ms. LaVine's automobile was stored in a locked garage.

The time periods involved here are crucial in establishing the Appellant's intent. The LaBrosse case cannot be read to mean that a claimant can never intend to use her vehicle again at any point in the future in order to recover from the Plan. The question is whether or not the vehicle owner should have had the automobile insured because she intended to use it within the reasonably immediate future. Mr. LaBrosse's automobile was only inoperable for four days due to cold weather while Ms. LaVine's vehicle had been inoperable and off the streets for four months at the time of her accident.

While Ms. LaVine did purchase tabs for the automobile license in August of 1987, this was four months subsequent to the accident and may have reflected her intent to use the automobile within the next year or to sell it.

The Bureau has failed to prove by a preponderance of the evidence that Ms. LaVine intended to use or operate her automobile at the time of her accident or in the reasonably foreseeable future so that it would have been reasonable for her, to have it insured in April of 1987. The legislative intent is to require insurance only when operation of a vehicle is contemplated. The intent does not appear to be, for example, to require insurance for all of 1987 where operation may be contemplated in 1988. In LaBrosse it seems likely that the plaintiff would have used the car again as soon as it could be started since he had been driving uninsured for several months. In this case the loss of driving privileges and the mechanical difficulties with the vehicle made it unlikely that the Appellant had the same intent.

#### Actions by Counsel

A number of actions by counsel for the Appellant after the hearing deserve mention in this Report. Minn. Stat. 14.60, subd. 2 and Minn. Rule 1400.8100, subp. I require that a decision in a contested case proceeding be based solely upon the record. Nonetheless, counsel for Appellant referred to and cited from a January 7, 1988 letter from Commissioner of Commerce Hatch which was not offered into evidence and is not a part of the record in this proceeding. Additionally, counsel for Appellant made repeated references to a May 9, 1988 deposition which was not offered into evidence in this proceeding and is not a part of the record. Appellant's counsel also referred to Ms. LaVine being under the influence of a drug called Motrin at the time her statement was taken. This fact is not a part of the record. Such references are contrary to the statute and rule cited, are potentially confusing to the decisionmaker and are unnecessary. Additionally, counsel were directed to

file simultaneous initial briefs by placing them in the mail on a certain date. The record reflects that counsel for Respondent waited to file his first brief until he had received that of the Bureau, contrary to the instructions of the Administrative Law Judge. (See, p. 7 of Appellant's Initial Brief). Such an action has at least the appearance of attempting to gain an unfair advantage. It is improper and again, unnecessary. Counsel for Appellant is cautioned that none of these actions should be repeated in any future contested case proceeding.

G.A.B.