

IN THE SUPREME COURT OF PENNSYLVANIA

LANI G. HARKNESS,
Appellee

v.

UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW,
Appellant,

MACY'S EAST INC., Intervenor-Appellant.

No. 112 MAP 2005, 113 MAP 2005

Appeal from the Order of the Commonwealth Court of Pennsylvania, Dated February 3, 2005,
No. 150 C.D. 2004, Vacating and Remanding
the Order of the Unemployment Compensation Board of Review.

**BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, THE
PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, THE NATIONAL
FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, THE
ASSOCIATION OF UNEMPLOYMENT TAX ORGANIZATIONS, UWC-STRATEGIC
SERVICES ON UNEMPLOYMENT & WORKERS' COMPENSATION AND THE
PENNSYLVANIA ASSOCIATION OF RESOURCES FOR PEOPLE WITH MENTAL
RETARDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
STATEMENT OF JURISDICTION.....	4
STATEMENT OF THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW	4
ORDER IN QUESTION.....	4
STATEMENT OF THE QUESTIONS PRESENTED	5
STATEMENT OF THE CASE.....	6
SUMMARY OF ARGUMENT	7
ARGUMENT.....	8
I. THE DECISION OF THE COMMONWEALTH COURT SHOULD BE REVERSED BECAUSE IT MISCONSTRUED THE NATURE OF UNEMPLOYMENT COMPENSATION PROCEEDINGS, IGNORED PRECEDENT AND MISAPPLIED THE LAW IN CONCLUDING THAT NON-ATTORNEYS MAY NO LONGER REPRESENT EITHER PARTY BEFORE THE UNEMPLOYMENT COMPENSATION BOARD.....	8
A. The Commonwealth Court misconstrued the nature of unemployment compensation proceedings, which are unique by design and do not require legal representation.....	8
B. The Commonwealth Court erred in its analysis of the unauthorized practice of law because it confused the purpose and nature of an unemployment compensation proceeding with that of a workers’ compensation hearing	10
II. REPRESENTATION OF BOTH PARTIES BY NON-ATTORNEYS IN UNEMPLOYMENT COMPENSATION HEARINGS FULFILLS THE PURPOSE OF THE UNEMPLOYMENT COMPENSATION PROCESS AND PROMOTES SOUND PUBLIC POLICY	15
A. Prohibiting the use of non-attorneys to represent parties in UC proceedings will unnecessarily increase costs to the UC system as well as to businesses and taxpayers	16

B. Prohibiting the use of non-attorneys for respondents in UC proceedings implicates the role of non-attorneys performing identical functions for the claimant.....18

C. The Unemployment Compensation Board should have the ability to interpret its own rules.....19

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

California Department of Human Resources v. Java, 402 U.S. 121 (1971)9

Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Board, 99 Cal. App. 4th
1094 (Cal. 2002)13

Cleveland Bar Association v. Compmanagement, Inc., 818 N.E.2d 1181 (Ohio 2004)13

Cleveland Bar Association v. Perlman, 832 N.E.2d 1193 (Ohio 2005)13

Eckles v. Atlanta Technology Group, Inc., 485 S.E.2d 22 (Ga. 1997).....16

Edwards v. Valdez, 602 F.Supp. 361 (D. Colo. 1985).....15

Ewing v. Ewing, 843 A.2d 1282 (Pa. Super. 2004)10

Frederick v. Action Tire Co., 744 A.2d 762 (Pa. Super. 1999)12

Harkness v. Unemployment Compensation Board of Review, No. 150 CD 2004, 2005
WL 245622 (Pa. Commw. Ct. Feb. 3, 2005)6, 8, 10,
17, 18, 19, 20

Harkness v. Unemployment Compensation Board of Review, No.150 CD 2004, 2005
WL 2382681 (Pa. Sept. 28, 2005).....6

Heinze v. Giles, 490 N.E.2d 585 (Ohio 1986)15, 18

McNeill v. Unemployment Compensation Board of Review, 511 A.2d 167 (Pa. 1986)9

Merco Construction Engineers, Inc. v. Municipal Court, 581 P.2d 636 (Cal. 1978)16

Perto v. Board of Review, 654 N.E.2d 232 (Ill. 1995)13

Phoenix Mutual Life Insurance Co. v. Radcliffe on Delaware, Inc., 225 A.2d 698 (Pa.
1970)16

Probst v. Department of Transport, Bureau of Driver Licensing, 849 A.2d 1135 (Pa.
2004)18

Rue v. K-Mart Corp., 713 A.2d 82 (Pa. 1998).....8, 9, 10,
11, 12, 13, 14
15, 17, 18, 20

<u>Shortz v. Farrell</u> , 193 A. 20 (Pa. 1937).....	10, 11, 12, 13, 14, 19
<u>State Bar of Michigan v. Galloway</u> , 369 N.W.2d 839 (Mich. 1985).....	13
<u>Unauthorized Practice of Law Committee of Supreme Court v. Employers Unity, Inc.</u> , 716 P.2d 460 (Colo. 1986).....	13
<u>United States Postal Svc. v. Unemployment Compensation Board of Review</u> , 620 A.2d 572 (Pa. Commw. Ct. 1993)	19
<u>Walacavage v. Excell 2000</u> , 480 A.2d 281 (Pa. Super. 1984).....	16

STATUTES

34 PA. CODE § 101.85(a)(2005)	19
34 PA. CODE § 101.105(a)(2005).....	19
42 PA. CONS. STAT. § 723 (2005)	4
43 PA. CONS. STAT. § 822 (2005).....	19

MISCELLANEOUS

<i>National Commission on Unemployment Compensation Final Report</i> , § 7.3 (July 1980) (Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 411(a) 90 Stat. 2667, 2681 (1976), reprinted in 26 U.S.C. app. § 3304 (1976)).....	15, 16
S.B. 464, 189th Gen. Assem., Reg. Sess. (Pa. 2005).....	20

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of six *Amici* parties, which represent a broad spectrum of employer entities, and all of which, although diverse, join in concern about the effect of the *Harkness v. Unemployment Compensation Bd. of Review* (No.150 CD 2004) decision handed down by the Commonwealth Court of Pennsylvania on February 3, 2005, which prohibits the long-standing practice of permitting non-attorneys to represent employers before the Unemployment Compensation Board. A more detailed description of each *Amici* party appears below:

Amicus Curiae The Society for Human Resource Management (“SHRM”) is the world’s largest association devoted to human resource management. Representing more than 200,000 individual members, the Society’s mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society’s mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

Amicus Curiae The Pennsylvania Chamber of Business and Industry (“Chamber”) is a non-profit corporation devoted to representing the interests of the business community throughout the Commonwealth of Pennsylvania. The Chamber has over 10,000 member corporations, trade associations and local chambers of commerce. The Chambers’ members employ more than half of the private workforce in Pennsylvania. The Chamber strives to provide a competitive business climate for all Pennsylvania companies in an effort to create and maintain jobs in the Commonwealth.

Amicus Curiae The National Federation of Independent Business Legal Foundation (“NFIB Legal Foundation”), a nonprofit, public interest law firm established to protect the rights

of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB, including 29,000 in Pennsylvania, own a wide variety of America's independent businesses from restaurants to retail stores to manufacturing firms.

Amicus Curiae The Association of Unemployment Tax Organizations ("AUTO") is a non-profit 501(c)(6) trade association composed of members who provide unemployment compensation management services to employers throughout the United States. Between 30% and 40% of all unemployment claims administered nationally are handled by third party UI administration firms. AUTO serves to protect and improve the integrity, administration and operation of the unemployment compensation system for employers, who finance the UI system, and to protect and improve the ability of AUTO members to represent employers in unemployment compensation matters.

Amicus Curiae UWC-Strategic Services on Unemployment & Workers' Compensation ("UWC") is the only nationwide association exclusively devoted to representing the interests of employers on national unemployment insurance and workers' compensation public policy. UWC members are employers, third party administrators and service providers, and national and state associations representing employers and service providers, all of whom share an interest in sound, cost-effective unemployment compensation and workers' compensation systems. UWC also manages the National Foundation for Unemployment Compensation & Workers' Compensation, which collects data, conducts research, and analyzes current issues relating to unemployment compensation and workers' compensation for use in informing public policy affecting unemployment and workers' compensation. The Foundation publishes the Highlights

of State Unemployment Compensation Laws, which is widely considered the “bible” of reference works on unemployment insurance laws.

Amicus Curiae The Pennsylvania Association of Resources for People with Mental Retardation (“PAR”) is the only statewide provider association dedicated solely to improving the quality of services and supports provided to individuals with mental retardation and their families. Staff of PAR members provides the full range of supports and services to individuals with mental retardation of all ages in over 3,200 sites in the Commonwealth in addition to numerous non-residential and in-home supports. PAR members employ over 24,000 people in the Commonwealth providing services to persons with mental retardation. PAR is committed to the improvement of total quality in the human services system. This extends to human resource issues, including improving the Commonwealth's unemployment compensation system in terms of fairness and cost-effectiveness.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 42 PA. CONS. STAT. § 723 (2005).

STATEMENT OF THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

Amici accept the statement of the scope and standard of review of appellant Department of Labor & Industry.

ORDER IN QUESTION

The Order of February 3, 2005, states as follows in pertinent part:

AND NOW, this 3rd day of February 2005, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is vacated and the case is remanded to the Board to remand to the Referee for proceedings consistent with this opinion.

Jurisdiction relinquished.

/s/

BERNARD L. MCGINLEY, Judge

STATEMENT OF THE QUESTIONS PRESENTED

1. **SHOULD THE DECISION OF THE COMMONWEALTH COURT BE REVERSED BECAUSE IT MISCONSTRUED THE NATURE OF UNEMPLOYMENT COMPENSATION PROCEEDINGS, IGNORED PRECEDENT AND MISAPPLIED THE LAW IN CONCLUDING THAT NON-ATTORNEYS MAY NO LONGER REPRESENT EITHER PARTY BEFORE THE UNEMPLOYMENT COMPENSATION BOARD OF REVIEW?**

Suggested answer in the affirmative.

2. **DOES PUBLIC POLICY FAVOR CONTINUING THE LONG-STANDING PRACTICE OF PERMITTING NON-ATTORNEYS TO REPRESENT EITHER PARTY BEFORE THE UNEMPLOYMENT COMPENSATION BOARD OF REVIEW?**

Suggested answer in the affirmative.

STATEMENT OF THE CASE

Lani G. Harkness (“Claimant”) applied for unemployment compensation benefits after Federated Logistics-Macy’s Department Store (“Macy’s”) discharged her for being rude to a customer on August 23, 2003. *Harkness v. Unemployment Compensation Bd. of Review*, No. 150 CD 2004, 2005 WL 245622 at *1 (Pa. Commw. Ct. Feb. 3, 2005). Her application was denied on the ground that her termination was for willful misconduct. *Id.* Claimant obtained a lawyer and appealed the decision to an unemployment compensation referee. *Id.* Macy’s was represented by a non-attorney employee of TALX UC EXPRESS, a company whose business is the representation of employers in unemployment compensation proceedings. *Id.* Claimant objected to the non-attorney’s representation of Macy’s, but was overruled by the referee, who also affirmed the decision to deny benefits to Claimant. *Id.*

On appeal, Claimant argued that it was an error for a non-attorney to represent Macy’s, because by cross-examining Claimant and providing documentary evidence to the referee, the representative engaged in the unauthorized practice of law. *Id.* at *2. The Commonwealth Court vacated the Board’s order and remanded the matter back to the Board for a new hearing. *Id.* at *6. In so doing, the Commonwealth Court found that Macy’s non-attorney representative had indeed engaged in the unauthorized practice of law when he appeared before the unemployment compensation referee. *Id.* at *3.

On March 7, 2005, the Department of Labor & Industry filed a petition for allowance of an appeal. Appeal Docket Sheet, docket number 113 MAP 2005. On September 28, 2005, the Pennsylvania Supreme Court granted the petition and consolidated it with the petition for allowance of appeal filed by intervenor Macy’s East, Inc. *Harkness v. Unemployment Compensation Bd. of Review*, 2005 WL 2382861 (Pa. Sept. 28, 2005); Appeal Docket Sheet, docket number 112 MAP 2005. *Amici* join in this appeal.

SUMMARY OF ARGUMENT

The Commonwealth Court erred in its decision to prohibit non-lawyers from representing all parties before a referee in unemployment compensation proceedings, a system that has been in effect for more than 60 years. Its decision was based on a misunderstanding of the nature of Unemployment Compensation (“UC”) proceedings, which are informal by design. In reaching its erroneous decision, the Commonwealth Court ignored one precedent of this Court and misinterpreted another.

In addition, prohibiting the long-standing practice of non-attorneys representing all parties in UC proceedings implicates public policy concerns not considered by the Commonwealth Court. The decision will dramatically increase the cost of administering the UC system to non-profits, businesses and taxpayers. It will call into question the role of non-attorney representatives for all parties and/or raise a due process issue if one side is allowed third-party assistance and the other is not.

Finally, the Commonwealth Court’s decision prevents the Unemployment Compensation Board from interpreting its own rules, and puts Pennsylvania in the small minority of states that do not permit non-lawyer representation in UC proceedings.

ARGUMENT

Introduction

The Commonwealth Court decision radically changed a system for compensating jobless workers, which is far removed from conventional litigation. Legal as well as policy considerations strongly support the proposition that neither employer representatives (including corporate employees and corporate consultants) nor employee representatives (including union representatives) who participate in unemployment compensation hearings are engaged in the unauthorized practice of law. *Amici* seek a narrow ruling from this Court that the historical practice of the Unemployment Compensation (“UC”) Board in permitting non-lawyer representation of both parties in informal proceedings before non-lawyer referees is a permissible exercise of administrative authority which does not improperly encroach upon the authority of this Court to regulate the practice of law.

I. THE DECISION OF THE COMMONWEALTH COURT SHOULD BE REVERSED BECAUSE IT MISCONSTRUED THE NATURE OF UNEMPLOYMENT COMPENSATION PROCEEDINGS, IGNORED PRECEDENT AND MISAPPLIED THE LAW IN CONCLUDING THAT NON-ATTORNEYS MAY NO LONGER REPRESENT EITHER PARTY BEFORE THE UNEMPLOYMENT COMPENSATION BOARD.

- A. The Commonwealth Court misconstrued the nature of unemployment compensation proceedings, which are unique by design and do not require legal representation.
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The Commonwealth Court’s decision in *Harkness v. Unemployment Compensation Bd. of Review*, No. 150 CD 2004, 2005 WL 245622 (Pa. Commw. Ct. Feb. 3, 2005), represents a fundamental misunderstanding of the nature of a UC proceeding. A UC proceeding is not a trial. *Rue v. K-Mart Corp.*, 713 A.2d 82, 85-86 (Pa. 1998) (UC proceedings “before a Referee clearly do not allow parties to litigate issues in the manner available in a court of record.”). Where a court trial is an elaborate and involved process, often featuring several lawyers on each side,

document production, months of preparation and thousands of dollars, a UC proceeding is far more informal, with little money at stake. *Id.* at 86. Its only purpose is to determine whether a former employee will receive unemployment benefits. *Id.* (quoting *California Dep't of Human Resources v. Java*, 402 U.S. 121, 136 (1971) (the system is “specifically designed to adjudicate matters quickly, because one of its primary goals is to ‘get money [] into the pocket of the unemployed workers at the earliest point that is administratively feasible.’”); *see also McNeill v. Unemployment Compensation Bd. of Review*, 511 A.2d 167, 169 (Pa. 1986) (proceedings conducted by a referee are brief and informal by design). Simply put: UC proceedings are different.

A typical UC proceeding consists of a referee, who is not a lawyer, let alone a judge, the former employee, known as a “claimant,” and a representative or “authorized agent” of the former employer, which can be a manager of the organization or outside representative. The claimant may be represented by counsel, but, due to economic constraints, is most likely accompanied by a union or lay representative, if at all.

Proceedings take place in neighborhood offices staffed by non-lawyer referees who tape the proceedings themselves on cassette recorders. A typical proceeding will be concluded in thirty (30) minutes or less. Indeed, this Court aptly described a UC proceeding as a “speedy, informal method for determining claims” in a decision that the Commonwealth Court completely ignored. *Rue*, 713 A.2d at 86.

In *Rue*, this Court recognized that UC proceedings are different from judicial proceedings in two significant ways: speed and minimal risk. *Id.* at 86-87. A UC proceeding is unique in that the application of the rules of evidence is not mandated, no pre-hearing discovery is permitted and the parties have no right to a jury trial. *Id.* at 86. Since the amount of money at stake is

generally quite small, an employer has “little incentive to litigate vigorously.” *Id.* As a result, this Court found that the parties lacked the ability to litigate fully and fairly their claims in a UC proceeding as they would in a formal court hearing, and therefore any fact finding by a referee should have no binding effect in subsequent proceedings in a court of law. *See id.* (“The substantial procedural and economic disparities between unemployment compensation proceedings and later civil proceedings negate the preclusive effect of a referee’s factual findings.”); *see also, Ewing v. Ewing*, 843 A.2d 1282, 1287 (Pa. Super. 2004) (the decisions of the Unemployment Compensation Bureau and “the factual findings in support thereof are not necessarily reliable in a subsequent civil action and have no preclusive effect in those later proceedings.”)

The Commonwealth Court misconstrued the nature of UC proceedings and its rejection of the long-standing practice of permitting non-attorney representation before the Board is simply wrong. A proceeding that is so speedy, informal and non-binding in nature surely does not rise to the level of a judicial hearing, in which attorneys are necessary to guide the court in interpreting the law.

- B. The Commonwealth Court erred in its analysis of the unauthorized practice of law because it confused the purpose and nature of an unemployment compensation proceeding with that of a workers’ compensation hearing.

The Commonwealth Court erroneously relied on this Court’s ruling in *Shortz v. Farrell* to conclude that non-attorneys who represent employers at UC proceedings engage in the unauthorized practice of law. *Harkness*, 2005 WL 245622 at *2. In *Shortz*, this Court found that insurance claims adjusters who prepared legal pleadings and conducted cross-examinations of witnesses before the Workmen’s Compensation Review Board engaged in the unauthorized

practice of law. *Shortz v. Farrell*, 193 A. 20, 24 (Pa. 1937). *Shortz*, then, deals with workers' compensation benefits, not unemployment benefits, two entirely different concerns. *Id.* at 21.

The formality and complexity of a workers' compensation hearing simply cannot be compared to the informality and simplicity of a UC proceeding. The Court in *Shortz* described a workers' compensation hearing as a true judicial proceeding, featuring pre-trial investigation, the filing of pleadings, depositions and discovery, substantial testimony by medical experts, a court reporter and cross examination, all within the confines of the rules of evidence. *Id.* at 20. A court in a subsequent proceeding cannot reverse the findings of the referee "if there is any competent evidence to support them." *Id.* The *Shortz* court observed that if the proceedings were "transferred to a court room and carried on before a judge, it would be readily perceived that they involved the same fundamental characteristics of the determination of property rights and obligations of parties as do other judicial proceedings." *Id.*

In short, the formality and finality of a workers' compensation hearing is in sharp contrast to the informal fact-finding nature of a UC proceeding. In fact, this Court recognized the differences in workers' compensation hearings and UC proceedings in *Rue* by noting that its holding was to be narrowly interpreted. *Rue*, 713 A.2d at 87 n.4 ("We note that our holding today is limited to the application of collateral estoppel in the unemployment compensation context. It has no bearing on the body of caselaw concerning the preclusive effect of workers' compensation proceedings *because of the distinct statutes and procedures at issue in those cases.*") (emphasis supplied). The refore, an analysis of the actions of a non-attorney appearing at a workers' compensation hearing is not germane to determining whether the actions of a non-attorney appearing at a UC proceeding constitute the unauthorized practice of law; one is nothing

like the other, and the Commonwealth Court erred in relying upon the reasoning in *Shortz*.¹ See also *Frederick v. Action Tire Co.*, 744 A.2d 762, 768 (Pa. Super. 1999) (explaining Workers' Compensation proceedings are different in form and substance from UC proceedings).

Indeed, the *Shortz* court took care to point out that its holding did not necessarily apply to administrative agencies other than the Workmen's Compensation Board.

The Workmen's Compensation Board, its functions and mode of operation, are not to be confused with those of other so-called administrative bodies and agencies. There is an ever-growing number of such boards and departments of government which are legislative or executive in character, rather than judicial² To what extent, if any, lay representatives of applicants, claimants and petitions, are, or should be, permitted to appear before such tribunals *is not relevant to the present inquiry*. It is sufficient to point out that the nature of the proceedings before the Workmen's Compensation Board differs essentially from that of most, if not all, of these other agencies. . . . The function of the Workmen's Compensation board is to adjudicate property rights between private citizens, and the determination of the law applicable to the facts in the cases which it handles constitutes by no means a mere routine or automatic process.

Id. at 22-23 (emphasis added). In addition, this Court in *Shortz* took note of the strong weight of authority in jurisdictions outside of Pennsylvania, which treated workers' compensation hearings as litigated proceedings, and which barred participation of claims adjusters as the unauthorized practice of law. *Id.* at 24. Applying the same scrutiny to authority in other jurisdictions regarding UC proceedings reveals the opposite is true.

In fact, the overwhelming majority of states permit non-lawyer representation in UC proceedings: 34 states unconditionally permit such representation and only three states other

¹ *Shortz* was decided in 1937, not long after the legislative enactment of the Unemployment Compensation Act. It is noteworthy that since the time of the *Shortz* decision, the legitimacy of the practice of non-attorney representation at UC proceedings has not been questioned.

² Examples given of such agencies are "the Interstate Commerce Commission, the office of the Commissioner of Patents, the United States Treasury Department, the United States Board of Tax Appeals, Public Service Commissions [and] Minimum Wage Boards." *Id.*

than Pennsylvania prohibit it.³ See Petition for Allowance of Appeal by Department of Labor & Industry, dated March 7, 2005, Appendix F. See also *Cleveland Bar Ass'n v. Compmanagement, Inc.*, 818 N.E.2d 1181, 1191 (Ohio 2004) (noting that lay representation before the board “has been the practice since the inception of Ohio’s unemployment compensation program in 1936” and approving the practice because board hearings should not be turned into “adversarial proceedings”); *Cleveland Bar Ass'n v. Perlman*, 832 N.E.2d 1193, 1196 (Ohio 2005) (approving the longstanding policy of permitting parties to be assisted by non-lawyers at UC hearings); *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 99 Cal. App. 4th 1094 (Cal. 2002); *Unauthorized Practice of Law Committee of Supreme Court v. Employers Unity, Inc.*, 716 P.2d 460 (Colo. 1986); *Perto v. Board of Review*, 654 N.E.2d 232 (Ill. 1995); *State Bar of Michigan v. Galloway*, 369 N.W. 2d 839 (Mich. 1985).

Further analysis of the reasoning found in *Shortz* reveals additional support for the argument that its holding does not apply to a non-attorney appearing at a UC proceeding. The *Shortz* court pointed to applying the “rules of evidence” as the sort of lawyer-like behavior in which a non-attorney representative engages at an administrative hearing. *Shortz*, 193 A. at 21. A non-attorney appearing at a UC proceeding cannot engage in such behavior, however, because the referee is not required to rely upon the rules of evidence. *Rue*, 713 A.2d at 86.

In addition, the *Shortz* court sets forth two concerns in justifying its conclusion: (1) preventing the “intrusion of inexpert and unlearned persons in the practice of law” so that the public gains “adequate protection in the pursuit of justice;” and, (2) ensuring the record before the administrative agency is “guided by persons learned in the history, development and

³ Non-lawyer representation is conditionally permitted for both parties in three states, and the position of the other nine states is unclear. See *id.*

philosophy of legal principles,” because the “factual record” of the administrative hearing is “fixed” in the proceedings before a court. *Shortz*, 193 A. at 24-25. Neither of those concerns is implicated here, however. A corporate employer that sends a non-attorney representative to a UC proceeding can hardly be considered the “public” the *Shortz* court was trying to protect. In creating a prohibition against the unauthorized practice of law, the legislature no doubt had in mind the protection of the general public - not sophisticated corporations - from unlearned or unscrupulous persons posing as attorneys.⁴

The second concern - that the “factual record” is “fixed” at a UC proceeding - is no concern at all, given the holding of this Court in *Rue v. K-Mart Corporation* that collateral estoppel does not apply to UC findings. *See Rue*, 713 A.2d at 86. Since a trial court is not collaterally estopped from hearing an issue already decided by a UC proceeding referee, the “danger” of a “fixed record” - at least for the purpose of a court appeal - does not exist. *Id.*

Because UC proceedings are so different from traditional court proceedings and other administrative agency hearings, a lawyer’s presence should not be required. A non-attorney who represents an employer in a UC proceeding cannot engage in the unauthorized practice of law because, unlike a workers’ compensation hearing, it is not judicial in nature: the rules of evidence do not apply, no discovery is permitted, neither party has a right to a jury trial, and factual findings are given no preclusive effect. *Rue*, 713 A.2d at 86. We respectfully suggest that the Commonwealth Court decision simply makes no sense, and this Court should recognize the specifically designed differences between a UC proceeding and other hearings, as well as its

⁴ While the “unauthorized practice of law” decisions also may be viewed as protecting lawyers against the encroachment of non-professionals on territory which has traditionally been reserved for lawyers, UC proceedings are hardly the place for the bar to take its stand. Unlike the Workers’ Compensation area, there is no vast UC bar that would be the victim of a rule permitting non-lawyers in UC proceedings.

own precedent in *Rue*, in permitting the long-standing process of allowing non-lawyer representation of both parties in unemployment compensation proceedings to continue undisturbed.

II. REPRESENTATION OF BOTH PARTIES BY NON-ATTORNEYS IN UNEMPLOYMENT COMPENSATION HEARINGS FULFILLS THE PURPOSE OF THE UNEMPLOYMENT COMPENSATION PROCESS AND PROMOTES SOUND PUBLIC POLICY

Judge Leadbetter's dissent in the Commonwealth Court eloquently sets forth the policy considerations that buttress *Amici's* legal argument. In addition to the concerns voiced by Judge Leadbetter, sound public policy dictates that the practice of permitting non-attorneys to represent parties at UC hearings should continue.

This policy was unanimously endorsed by the National Commission on Unemployment Compensation in its July 1980 Final Report. *See National Commission on Unemployment Compensation Final Report*, § 7.3 (July 1980).⁵ Although this commission of distinguished members of Congress, union leadership, business leaders and public representatives was unable to agree on many other issues, it concluded that "all parties involved must be provided at least the following due process safeguards: . . . right to be represented by a person of the party's own choosing . . .". *Id.* at 113-122. The Commission found that non-attorney representation "often

⁵ Congress established the National Commission on Unemployment Compensation (Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 411(a) 90 Stat. 2667, 2681 (1976), reprinted in 26 U.S.C. app. § 3304 (1976)), to "study and evaluate unemployment compensation programs in order to assess the long-range needs of the programs, to develop alternatives, and to recommend changes in the programs." *See* Title IV: National Commission on Unemployment Compensation, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d094:HR10210:TOM:bss> (discussing the background of PL 94-566). The Commission's work has been cited with approval by at least two courts: *Heinze v. Giles*, 490 N.E.2d 585, 589 (Ohio 1986) ("the Commission has recommended that state programs "permit all parties to a hearing to have representatives of their own choosing, irrespective of whether such representatives are members of the bar."); and *Edwards v. Valdez*, 602 F.Supp. 361 (D. Colo. 1985).

leads to speedier and more complete development of relevant facts.” *Id.* It concluded that requiring a worker or employer to hire an attorney “contributes nothing to the appeals process and deprives claimants and employers of the support and assistance that friends, paralegals, employees, business agents, relatives and others could otherwise provide.” *Id.* The Commission recommended that the federal government should require “as a condition for a fair hearing, that all States permit all parties to a hearing to have representatives of their own choosing, irrespective of whether such representatives are members of the bar.” *Id.*

- A. Prohibiting the use of non-attorneys to represent parties in UC proceedings will unnecessarily increase costs to the UC system as well as to businesses and taxpayers.

Corporations in Pennsylvania and elsewhere do not have the privilege of self representation in legal proceedings. *See Phoenix Mut. Life Ins. Co. v. Radcliffe on Delaware, Inc.*, 225 A.2d 698 (Pa. 1970); *Walacavage v. Excell 2000*, 480 A.2d 281 (Pa. Super. 1984); *Eckles v. Atlanta Technology Group, Inc.*, 485 S.E.2d 22 (Ga. 1997); *Merco Constr. Engineers, Inc. v. Municipal Court*, 581 P.2d 636 (Cal. 1978). If a UC proceeding is equated with a judicial hearing, then a corporation is prohibited by law from representing itself. The result: employers wishing to oppose unemployment compensation appeals by employees from desk decisions denying UC benefits will be required to retain legal counsel for all referee hearings. Such mandatory use of counsel may provide a boon for first year associates at large law firms who would get to litigate UC cases against unemployed workers. However, the use of attorneys will make participation uneconomical for employers of all sizes.

This problem will be especially onerous for many non-profits, such as colleges and universities, and small businesses, which employ approximately half of the more than 5 million paid workers in Pennsylvania. *See Statistics of U.S. Businesses: 2001: All industries Pennsylvania*, available at <http://www.census.gov/epcd/susb/2001/pa/PA--.HTM>. They will not

want to pay the \$150 per hour first-year big firm rate, or the higher rates of more experienced lawyers, to prepare and accompany employer witnesses to referee hearings.

The result will be that many employers will simply choose not to participate in the unemployment compensation appeals process, leaving no one to contest unmeritorious or even fraudulent claims for compensation. *See Rue*, 713 A.2d at 86 (explaining that because the amount at stake is so small, “the employer often has little incentive to litigate vigorously, or even to retain counsel and/or attend a hearing.); *Harkness*, 2005 WL 245622 at *5 (Leadbetter, J., dissenting) (“If employers were required to obtain legal counsel for every unemployment compensation case, they may not participate . . . [thus hindering] the fact-finding process by depriving . . . authorities of critical information, and allowing undeserving claimants to receive benefits by default.”) The financial burden of this default caused by so many UC claimants receiving undeserved benefits will fall largely on Pennsylvania employers who finance the unemployment compensation system.⁶ Any additional burden on Pennsylvania’s employers only serves to further reduce the Commonwealth’s ability to compete with other states for jobs.

On the other extreme, those employers with the resources and desire to contest vigorously unemployment compensation claims will have the ability to engage counsel who will ply their litigation skills against unrepresented claimants. In other words, requiring that corporations be represented by counsel may give employers an inherent and unfair advantage. They may be able to outlawyer an employee who, without a job, hardly can afford counsel let alone experienced counsel.⁷

⁶ In addition to employer contributions, employees support the system through a tax on their wages collected by employers.

⁷ In addition, the increased length of hearings and number of appeals likely from mandatory attorney representation will result in increased costs for employers because

- B. Prohibiting the use of non-attorneys for respondents in UC proceedings implicates the role of non-attorneys performing identical functions for the claimant.

Judge Leadbetter's dissent raised the specter of due process concerns if one side may use non-lawyer third party representation and the other side may not. *Harkness*, 2005 WL 245622 at *5 (Leadbetter, J., dissenting) (citing *Probst v. Dep't of Transp., Bureau of Driver Licensing*, 849 A.2d 1135, 1143-44 (Pa. 2004) (discussing the degree of state interest that must be established to permit discrimination)). This understates the impact of the Commonwealth Court's holding. If it is the unauthorized practice of law for a non-lawyer representative of an employer to ask questions and make arguments at an unemployment compensation proceeding, so too is it the unauthorized practice of law for an employee representative to do so. Thus, a holding that such action constitutes the unauthorized practice of law will require the unemployed worker either to engage legal counsel (which very few unemployed workers will be able to afford) or to go it alone against the attorney-represented employer.

Indeed, requiring both parties to obtain lawyers for UC proceedings undermines the very purpose of the unemployment compensation system - to generate quick decisions while keeping costs low. *Rue v. K-Mart Corporation*, 713 A.2d at 86; see also *Heinze*, 490 N.E.2d at 589 (UC proceedings were designed to function as "alternatives to judicial dispute resolution so that the services of a lawyer are not a requisite to receiving a fair hearing and just decision.") Doing away with the traditional practice of parties appearing without counsel at UC proceedings will

the increased workload for the Department of Labor and Industry will divert limited financial resources needed to administer efficiently the entire state UC program, including the prevention and detection of fraud and improper payments, and the provision of re-employment assistance for unemployed workers.

transform the process into something it was specifically designed *not* to be - an adversarial proceeding.

C. The Unemployment Compensation Board should have the ability to interpret its own rules.

In a UC proceeding, both the claimant and the employer may be represented by counsel or an “authorized agent.” 43 PA. STAT. § 822 (2005); *see also* 34 PA. CODE § 101.85(a); 101.105(a) (2005). The Board has long interpreted its own rules to define “authorized agent” as any representative, regardless of whether he or she is an attorney. *United States Postal Svc. v. Unemployment Compensation Bd. of Review*, 620 A.2d 572, 574 (Pa. Commw. Ct. 1993); *see also Harkness*, 2005 WL 245622 at * 5 (Leadbetter, J., dissenting) (pointing out the UC Board has maintained a consistent policy of allowing both sides to be represented by a non-lawyer.) The Commonwealth Court ignored the Board’s interpretation of its own rules and inexplicably overlooked the court’s own holding that recognized the positive role which non-lawyer representatives play in UC proceedings. *Postal Service*, 620 A.2d at 574.

In *Postal Service*, the court accepted the appearance of an employee of the postal service as an “authorized agent” at a UC hearing, noting that the Board’s own regulations do not define the term. *Postal Service*, 620 A.2d at 574. In fact, the court characterized the common meaning of authorized agent as used by the Board - “union representatives, tax consultants and the like who are non-employees of a party and who frequently represent such parties before the agency” - as a “limited interpretation” of the rule permitting non-attorney representation. *Id.*

As a final consideration, this Court should take judicial notice that the legislative response to the Commonwealth Court’s decision in the *Harkness* case is consistent with this Court’s analysis in *Shortz*. On June 15, 2005, Governor Rendell signed a legislative bill designed to counteract the holding in *Harkness* and restore the UC proceeding practice of

permitting non-attorneys to appear. *See* S.B. 464, 189th Gen. Assem., Reg. Sess. (Pa. 2005).

The bill passed unanimously in the Senate, and only two legislators out of 197 voted against it in the House. *Id.* The overwhelming bipartisan legislative response to *Harkness* establishes a broad public consensus not limited to the business community that a rule which overly legalizes the UC process is more costly and less efficient for all participants in that system.

Just as it did in *Rue*, this Court can recognize that UC proceedings are different and that both parties in those proceedings should have the benefit of non-legal help in proceedings before referees. This Court should not find the actions of representatives for either party at UC proceedings constitute the unauthorized practice of law.

CONCLUSION

For these reasons, *Amici* respectfully join the employer and the Department of Labor & Industry in seeking a determination that the Commonwealth Court decision be reversed, and the Order of the UC Board of Review denying benefits to the Claimant be affirmed.

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CERTIFICATE OF SERVICE