Denver Law Review

Volume 31 | Issue 11 Article 3

January 1954

The Admissibility of Hearsay in Hearings before Workmen's Compensation Commissions

Clyde J. Cooper Jr.

THE ADMISSIBILITY OF HEARSAY IN HEARINGS BEFORE WORKMEN'S COMPENSATION COMMISSIONS

CLYDE J. COOPER, JR.*

The law pertaining to Workmen's Compensation Acts cannot be traced to the Code of Justinian nor did Lord Mansfield coin a rule concerning any phase of it. As law it is a babe in the woods, sired by social necessity and mothered by a desire to solve an age old problem in a modern, rational manner.

This new body of law first began to grow approximately forty-five years ago when the legislatures, responding to the call for a new remedy to solve the ever increasing problem of industrial accidents, began to draft and make into law the first Workmen's Compensation Acts.

Although the basic objectives and theories underlying these acts are relatively simple, the many problems encountered in their administration are numerous. The courts, unwilling as they have been to accept these acts in their original tenor and to interpret them in the light of legislative intent, have not only hampered somewhat their effective operation but have in some instances completely derogated their original purpose. The majority of courts often refused to give "full faith and credit" to the provisions of these acts, especially those which purport to free the tribunal from the technical rules of evidence.

The scope of this article will be limited to one of these problems and its aspects—the admissibility of hearsay viewed in the light of the underlying motives and economic considerations which brought these acts into being.

The legislatures in passing these acts realized the "unadaptibility of a common law system of proof rooted in the history of the jury, to the solution of this pressing social problem"[1] and all but a few[2] put the enforcement of these acts in the hands of administrative tribunals which would not be bound by the technical and complex procedures of the common law. "The legislatures heeded the deep sense of injustice felt by workers that the burden of proof rested always on them and that probative evidence was often kept out because it was hearsay."[3] This feeling was ably expressed by Justice Winslow in *Borgnis v. Falk Company*: "To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for food."[4]

---

* Student, University of Denver, College of Law.

[1] Ross, *The Applicability of Common Law Rules of Evidence in Proceedings Before Workmen's Compensation Commission.* 36 HARV. L. REV. 263 (1922-23).

[2] Alabama, Louisiana, New Hampshire, New Mexico, Rhode Island, Tennessee, and Wyoming.

[3] Note 1 *supra.*

[4] 147 Wis. 327, 348, (1911).

THE PROBLEM IN GENERAL

Let us begin the discussion with this general premise; hearsay is always admissible if no objection is made by the party adversely affected. This is well settled and in line with the principles of the common law. The problem arises when such evidence comes in over the objection of the one adversely affected or after being admitted, it forms the sole basis for an award in favor of the proponent of said evidence.

Why is hearsay so subject to objection? The following are the major reasons advanced for its exclusion, contrasted with arguments urged for its general application. It is said that hearsay is inadmissible because it is incompetent and inherently weak; and also, that its probative value is so slight that it does not justify the time spent in sifting it about in an attempt to find whatever element of truth it might contain. On this point Chief Justice Marshall had this to say:

> Hearsay evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its inherent weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.[5]

If we adopt this position then we must say that *all* hearsay is unreliable and under no circumstances does its value justify its admission. "It would be as reasonable to insist that generality and certainty require all killings to be punished as murder or all promises to be enforced as contracts as on this basis to require that all hearsay be excluded as untrustworthy."[6]

The very nature of workmen's compensation cases make them difficult of proof, especially where there has been a death. The usual case is that a workman has been injured on his job, struck with a block of ice or had his nose pierced with a splinter, and there are neither witnesses to the accident nor any official accident report. However, the worker may tell a fellow worker about the accident or relate the incident to his wife upon returning home that evening. Several days later he dies from a brain hemmorrhage, blood infection or even *delerium tremens*. What evidence of the cause of death do we have other than the hearsay testimony of the fellow worker or the widow? What will be their reaction when they are told that their testimony is "legally" incompetent or inherently weak? The obvious injustice of such a ruling is clear. We can see that it would be far better to grant an award based on this hearsay testimony than to force the family

[5] Mima Queen and Child v. Hepburn, 11 U. S. 290, 295 (7 Cranch—1813).
[6] *The Role of Hearsay in a Rational Scheme of Evidence.* 34 ILL. L. REV. 788.

of the deceased to bear the loss because it cannot meet the standard of proof. That the hearsay rule itself is too harsh is evidenced by its many exceptions. The whole theory behind workmen compensation acts is "to impose liability without fault to be borne by the industry rather than by the family of the deceased. It is unreasonable to suspect that a deceased before death, will make false statements so that relief may accrue to his family. If this type of hearsay evidence is excluded, the legislative aims are to such an extent defeated. Usually no one else can supply these essential facts. Applying the tests of necessity, availability, and reasonableness, such statements should be admitted."[7]

It is further contended that hearsay confuses the issues and is too difficult to evaluate. This argument has merit in so far as it offers protection to a jury, which it is said, is not capable of evaluating evidence according to its relative probative value. A jury is thus limited to basing its verdict on "legal evidence" only and is prevented from giving a verdict based on opinion or conjecture. But, it may be asked, are the personnel of a jury today so untrained or ill equipped that they cannot tell what is likely to be true and what is likely to be a falsehood? Far more decisions are rendered in today's complex world without the use of the hearsay rule than those reached by its application. Visualize for a moment the directors of a large corporation trying to make a policy decision based on employees' reports, or a housewife selecting a household appliance, basing her decision on reports from her friends. Can we say that in either case their decision is wrong because it is based on hearsay? Wigmore takes this position: "It is tolerably obvious to practitioners that the jury trial rules of evidence do not have a necessary relation to correctness of verdicts as today administered."[8]

Acknowledging then that the use of the hearsay rule has some merit in jury trial cases because of the inexperience of the jurors and the fact that they are dealing with numerous types of cases, we have a different situation when the tribunal is composed of experienced professional men who day after day inquire into the same general set of facts. Such is the situation with regard to industrial commissions. It is clear that these men have the ability to analyze accurately the evidence submitted and should be allowed to hear all the evidence, hearsay included, and then decide its relative probative value.[9] "Any attempt to apply jury trial rules of evidence to an administrative tribunal acting without a jury is an historical anomaly, pre-destined to probable futility and failure."[10]

Furthermore, if we require an administrative tribunal such

---

[7] *Fact Finding Boards and the Rules of Evidence*, 24 A.B.A.J. 630 (1938).

[8] WIGMORE ON EVIDENCE, VOL. I (3rd ed.) Sec. 4b.

[9] *An Approach to Problems of Evidence in the Administrative Process.* 35 HARV. L. REV. 364 (1942).

[10] WIGMORE ON EVIDENCE, VOL. I, (2nd ed.), p. 27.

as an industrial commission to adhere to the very technical hearsay rule, we must necessarily require that all the administrators be lawyers. If the legislatures had intended such a result, they would have put the enforcement of Workmen's Compensation Acts in the courts. It is clear that even today many lawyers do not fully understand the scope of the rule and its many confusing exceptions.

> The compensation commissioner before whom the testimony is taken is not required to be a lawyer and may not be versed in the technical rules of evidence that may be involved and applied in courts trying common law cases. Testimony that is relevant, reasonable and persuasive and which induces belief may be the basis of the findings of the commission and if its action and decision are free from fraud, unfairness or mis-conduct, and are based upon substantial and satisfactory evidence they will be upheld.[11]

By far, the principal objections to the use of hearsay is the fact that it is not subject to the test of cross-examination. This objection is difficult to meet, but is it a sufficient objection to keep out hearsay which may have probative value? Cross-examination is essentially a tool of strictly adversary proceedings, and as such is not necessarily applicable to industrial commission hearings. The underlying theory of workmen's compensation is "not a dispute between one individual and another but rather a dispute between an employee and the consumers in general,"[12] the cost of awards being considered as just another item of industrial overhead.

Furthermore, the test of cross-examination effects weight only and not relevancy. If the original declarant intends to fabricate a story, it is unlikely that an oath or the right of cross-examination is going to defeat this purpose. In addition, the circumstances surrounding the making of these statements, i.e. following an injury, lend a certain guarantee of trustworthiness to them. Most persons are concerned enough about their personal health that it is not likely they would lie as to the source of their injury at the risk of not receiving the proper treatment.

What has been discussed so far barely begins to touch the many complex problems involved in the subject of hearsay, but this brief introduction should give us sufficient awareness of the problem to proceed with a discussion of the present state of the law in regard to the use of hearsay evidence under the various state workmen's compensation acts.

Various Provisions Contained in Workmen's Compensation Acts

Although the same thread of simplicity and non-technicality

[11] Coe v. Koontz, 129 Kan. 581, 283 P. 487.
[12] Note 1 *supra*.

runs through most of the compensation statutes, they are by no means all alike. The majority of acts contain provisions relating either to a simplified mode of procedure or to relief of the tribunal from strict adherence to the common law rules of evidence. Other acts either give the tribunal the power to make its own provisions in regard to procedure and the use of evidence or are silent on the subject altogether. Acts which have spoken can be divided into four general groups:

(1) Where the acts provide that the tribunal shall "not be bound by the common law or statutory rules of evidence" and a provision is usually added that "technical and formal rules of procedure shall not apply."
(2) Where the acts provide that the tribunal shall not be bound by the technical rules of evidence (procedure).
(3) Where the acts merely say that the process shall be as simple and summary as possible.
(4) Where state statutes contain no provisions relating to evidence. However, the commission is usually given power to make its own rules.

As we shall soon see, the wording contained in the various statutes is not indicative of the procedure to be followed under them. The courts in the majority of cases still refuse to give "full faith and credit" to the obvious intent of the legislature.

The following are some of the principal cases interpreting the provisions contained in the different types of workmen's compensation acts.

I. *Where the tribunal is not bound by the common law or statutory rules of evidence—technical and formal rules of procedure shall not apply.*

The leading case on the interpretation of this type of statute is *Carrol v. Knickerbocker Ice Company* decided in New York in 1916.[13] It illustrates the typical situation found under these acts and is therefore worthy of detailed discussion.

In this case, the driver of defendant's ice wagon was allegedly injured when struck by a cake of ice while unloading the ice wagon. Several days later he died of *delirium tremens* which it is alleged was caused by the injury. The only evidence in support of this contention was certain declarations made by the decedent to his wife and to the doctor who first treated him. Refuting this allegation were several eye-witnesses who testified that they knew nothing of the alleged accident. An award was granted by the Workmen's Compensation Commission based on the declarations of the deceased. This award was affirmed by the appellate division with two justices dissenting. The New York Court of Appeals in reversing the appellate division announced the rule that has been

[13] 218 N. Y. 435, 117 N. E. 507 (1916).

followed by a majority of jurisdictions in the interpretation of this type of provision:

> The act may be taken to mean that while the commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may, in its discretion, accept any evidence that is offered, still in the end there must be a residium of legal evidence to support the claim before an award can be made.

There were two dissents to this holding. Judge Seabury felt that if the hearsay was of sufficient probative value, it should be allowed to support a claim and that the requirement of a residuum of legal evidence is in direct conflict with the spirit of the act. Judge Pound dissented on the ground that the hearsay rule is essentially for the protection of the jury and that its probative value should be left to the discretion of the tribunal.

Thus, a court is called upon to interpret a statute which expressly frees from the common law rules of evidence and yet the court holds that they are binding.

Wigmore contends that the rule for a "residuum of legal evidence" rests on the assumption that the legal evidence is always credible and sufficient while the illegal evidence is never credible nor sufficient.[14]

Regardless of the criticism of the rule announced in this case, it is nevertheless followed in the majority of jurisdictions regardless of the type of statute. The advocates of the rule holding that hearsay is not a technical rule of evidence say that "it is founded upon the experience, common knowledge and conduct of mankind."[15]

In an Iowa case, the court said, "Of course, the provision in the Compensation Act, abolishing the common law and statutory rules of evidence, does not dispense with the necessity for legal evidence in support of a claim."[16]

The Colorado Statute is in this group and is interpreted in accord with the New York rule.[17]

In the case of *Olson-Hall v. Industrial Commission*,[18] the claimant's husband was alleged to have been injured when he fell from a ladder, and it was alleged that his death was a direct result of the fall. The only evidence of the accident was certain reports and alleged conversations between the deceased and his wife prior to his death. In opposition to this allegation was the unanimous testimony of certain doctors that decedent's death was a result of an organic disorder. The Industrial Commission excluded the hearsay evidence offered by the claimant and refused her claim.

---

[14] Note 8 *supra*.
[15] Swim v. Central Iowa Fuel Co., 204 Iowa 546, 215 N. W. 603 (1927).
[16] Renner v. Model Laundry, C. & D. Co., 191 Iowa 1288, 184 N. W. 611 (1921).
[17] COLO. STAT. ANN., c. 97, § 24.
[18] 71 Colo. 228, 205 P. 527 (1922).

The district court in affirming the decision of the commission said:

> It is true that workmen's compensation statutes of most states provide that the industrial commission shall reach their conclusions without regard to technical rules of evidence. It is manifest, however, that the rule against hearsay is not technical, but vitally substantial, and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition and injustice. If a claimant be permitted to make out a case upon the essential facts of accidental injury upon hearsay *alone* there is no limit to the frauds and wrongs that may be encouraged and made possible.

This view was seconded in *Empire Zinc v. Industrial Commission of Colorado.*[19] In that case, an accident report plus the conduct of the company in paying the funeral expenses of the deceased and the fact that they did not deny liability within fifteen days as required were held to be sufficient evidence to sustain an award.

In *Public Service Company of Colorado v. Industrial Commission,*[20] the court said:

> The weight of the evidence is a matter exclusively for the determination of the Industrial Commission. It is only where there is *no* competent evidence to support the finding of the industrial commission that the court will interfere with its award.

As time has passed, the courts have apparently felt the rule requiring a residuum of legal evidence was too harsh, for they have gone to great extremes to find the all important residium. In two cases, the court felt that an employer's admission in a report was sufficient residuum added to hearsay to support an award.[21] In the case of *Attschuller v. Bressler* [22] "facts and circumstances" constituted the necessary residium. The court in that case declared:

> The court has never required that such residium should independently of the hearsay establish the accident. The sufficiency of the residuum of legal evidence cannot be measured by any mechanical formula. There must be evidence setting forth facts of a probative character outside of hearsay statements to prove the award and show it is just and fair.

In Minnesota, the legislature has put the residuum rule into their law. Although the commission is not bound by the common

[19] 94 Colo. 98, 28 P. 2d 337.
[20] 89 Colo. 440, 3 P. 2d 799.
[21] Anthus v. Rail Joint Co., 185 N. Y. Supp. 314; Lindquest v. Holler, 164 N. Y. Supp. 705.
[22] 289 N. Y. 463, 46 N. E. 2d 886 (1943).

law or statutory rules of evidence, the statute expressly requires that "all findings of fact shall be based only upon competent evidence."[23]

In a recent Utah case,[24] the court, after praising the merits of the residuum rule, stretched the doctrine of *res gestae* all out of proportion to support a claim based on statements made by a deceased workman to a fellow employee and later to his wife. The cause of the death was alleged to be a bump on the head received by the decedent in the course of employment. There were no witnesses to the accident, but a fellow worker testified that the decedent shouted to him "to be careful because when he (deceased) got up quickly he gave his head a dirty bump"; and later when the deceased was asked by his wife how he received the bump on his head, he replied, "he had given his head a 'hell of a crack' at work." These statements were held to be part of the *res gastae* and thus competent evidence to support an award.

Colorado has likewise come through the backdoor of *res gestae* in order to find the all important residium of "legal" evidence. In the case of *Fotis v. The Industrial Commission,*[25] the deceased (Fotis) was alleged to have injured his hip "kicking a switch at the mine." An infection developed and he died shortly thereafter. The only evidence of the injury was "statements made by him (Fotis) to other witnesses who made written reports based thereon, to the company's physician who made a report based upon what Fotis told him and by Fotis to his wife on his return home." This evidence was excluded by the industrial commission as hearsay and the claim was denied. This was reversed by the district court which held that the evidence should be admitted. On review this decision was upheld with the court finding that these statements were part of the *res gestae.* Said the court:

> *Res gestae,* while often spoken of as an exception to the hearsay rule is generally not such in fact. Ordinarily it relates to statements which, because of their intimate relation to facts become a part of those facts and are therefore admitted as such . . . Suffice it to say that cases could be found which would justify the admission of this evidence under a liberal construction of the rule of *res gestae.* We prefer, however, to base our decision upon the broader and more certain ground of one of the exceptions to the hearsay rule.

It is clear that this case goes farther than the Utah case in an attempt to justify the award of a claim based solely on hearsay evidence, without violating the chastity of the residuum rule. One wonders if there is any limit to the statements which could be held admissible under this "liberal construction of the rule of *res*

[23] Minn. Gen. St. Sec. 4313 (1923).
[24] Ogden Iron Works v. Industrial Comm., 102 Utah 492, 132 P. 2d 376 (1942).
[25] 112 Colo. 423, 142 P. 2d 657 (1944).

gestae". Thus we see the same courts which refuse to recognize that a valid claim can be based solely on hearsay resorting to "legal gymnastics" to achieve a just result.

In Maryland, which adheres to the residuum rule, the court has taken a more modern, rational view and recognized that in certain cases a relaxation of the rule is wise and just if cautiously done. The court has said:

> We conclude therefore, that the courts are required to adapt themselves somewhat to the increased latitude allowed to the commission, and that this adaption must at the same time, and as far as it can consistently be done, avoid abandonment of cautions and safeguards which seem necessary, not only for constitutional due process of law, but also for the assurance of reliability in the basis of adjudication.[26]

The California Statute among all the stautes considered under this section best expresses the mandate of the legislature and leaves little room for judicial interpretation. The statute, in addition to containing the provision freeing the commission from the common law and statutory rules of evidence, contains this provision:

> No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation nor will such be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure.

Under this statute, it has been held that hearsay alone will support a claim. In the case of *Sada v. Industrial Accident Commission*,[27] the court said:

> Under the rule which obtains in proceedings before the commission the fact that a finding is supported solely by hearsay does not of itself invalidate the finding or stamp the proof as too unsubstantial to be credited. Inasmuch as hearsay is admissible, the weight to be given such evidence is a question for determination by the commission and if in its judgment the evidence carries convincing force, it may be sufficient to sustain an award.

Under this holding, the weight to be given hearsay is left solely in the discretion of the commission. The court will not reverse unless the hearsay used is incredible as a matter of law.[28]

Thus we see the very strict interpretation given by the major-

---

[26] Standard Oil Co. of N. J. v. Mealey, 147 Md. 252, 127 Atl. 850 (1925).

[27] 11 Cal. 2d 263, 78 P. 2d 1127 (1938).

[28] Pacific Employers Ins. Co. v. Indus. Accident Comm., 47 Cal. App. 2d 494 118 P. 2d 334 (1941).

ity of courts to the most liberal provision contained in any of the compensation acts. It is safe to assume that in our discussion of the remaining types this narrow interpretation will in most cases be observed.

II. *Where the tribunal is not bound by the technical rules of evidence (procedure).*

In a recent Pennsylvania case,[29] we again see the typical situation. An employee had been struck in the shoulder by a swinging timber. An infection developed and shortly thereafter he died. There were no witnesses to the accident, the only evidence being the statements of the deceased to a fellow worker and to his wife The wife testified however, that when he had left home the day of the accident there were no bruises on his body but when he returned home his shoulder was bruised and cut. The court held this fact was sufficient competent evidence to corroborate the hearsay. "Under this evidence we believe that it is reasonable to conclude that there was a natural connection between his work and the accident and that the circumstances would appear to be such as to satisfy 'reasonable and well-balanced minds' that an accident did occur." The court then sets up this test to determine the probative value of this evidence:

> The fact-finding body has a right to use the conclusions and tests of everyday experience and draw the inferences which reasonable men would thus draw from similar facts.

Thus, a court which follows the residuum rule finds that if the circumstances are such as to satisfy the "fair and rational man," the rule requiring some "competent evidence" has been satisfied.

In another Pennsylvania case, *Nesbit v. Vandervort and Curry*,[30] the court held that "where the facts are sufficiently established by circumstantial evidence, hearsay testimony, not inconsistent therewith, if relevant and material to the fact in issue, may be considered for the additional light if any, that it throws on the matter." Here the Pennsylvania court officially recognizes that hearsay does, in some cases, have definite probative value but still requires a residuum of legal evidence, no matter how slight.

The remaining states which contain this type of provision (Kansas, Missouri, and Montana) have likewise climbed on the "residuum rule bandwagon" holding that hearsay is admissible in the discretion of the tribunal but that there must be some legal evidence to sustain an award.[31]

---

[29] Lambing v. Consolidated Coal Co., 161 Pa. Super 346, 54 A. 2d 291 (1949).

[30] 128 Pa. Super 58, 193 A. 393 (1937).

[31] *Kansas*—Parker v. Farmers Union Mutual Ins. Co., 146 Kan. 832, 73 P. 2d 1032.

Missouri—Wills v. Berberick's Delivery Co., 339 Mo. 856, 98 S. W. 2d 596 (1936).

Montana—Ross v. Industrial Accident Board, 106 Mont. 486, 80 P. 2d 362 (1938).

The Kansas court in *Parker v. Farmers Union Mutual Insurance Company* [32] adequately summed up the position taken by this group in regard to hearsay:

> Its admissibility is to be governed not by the venerable rules of Starkie or Greenleaf or Underhill on *Evidence* but under the liberal rule of evidence applicable to hearings before compensation commissions. Although desirable to the efficient administration of the compensation act that the examiner should understand the law of evidence, particularly the inefficiency of mere hearsay to support a claim for an award, the statute itself contemplates that the rigid rules prescribed for the trial of actions at common law shall not apply to proceedings under the compensation act.

Most of the courts which permit the admission of hearsay are much more liberal when the hearsay consists of statements of a deceased relating to the cause of his death. In this same case, the Kansas court announces the rule to be followed in that jurisdiction:

> Where a workman dies of his injuries, the statements he made to third persons touching the accident which caused his injuries may be received and accorded probative force if such statements are inherently reasonable and not intentionally made for the purpose of being used as evidence to base a claim for compensation, and where the other evidence and attendant circumstances corroborate the statements so convincingly as to establish the fact of the workman's accident and injury with moral certainty.

It appears that most courts feel that this class of hearsay is more trustworthy than other types. A more practical justification for taking a liberal view of this type of hearsay is that in most cases where the worker has died of his injuries, his declarations constitute the only evidence as to the cause of death; therefore, the courts must be liberal in order to achieve a just result.

The New York statute now expressly provides that statements of a deceased worker concerning his injury shall be received in evidence and "shall if corroborated by circumstances or other evidence, be sufficient to establish the accident or injury." This provision expressly puts the legislative stamp of approval on the doctrine announced in *Carrol v. Knickerbocker, supra.*

III. *Where the statute provides that the process shall be as simple and summary as reasonably may be.*

This provision being couched in the most general terminology of all the statutory provisions has, likewise, been subject to the widest diversity of interpretation.

[32] *Ibid.*

The courts in Virginia have repeatedly interpreted this provision to mean that not only is hearsay admissible but that a claim can be supported on hearsay alone.

In the leading case of *American Furniture Company v. Graves*,[33] a carpenter in the defendants plant struck his finger with a hammer. Shortly thereafter, he died of a serious blood infection. The only evidence that the injury had been caused by the blow on the finger was statements by the deceased to third persons. However, a doctor testified that the infection could have resulted from a ruptured boil. The Supreme Court of Appeals in affirming the award of the Industrial Commission based on the deceased's statements, said:

> It is admitted in the argument for the employer that under the Virginia Statute, the commission is not to be governed in the hearing by common law rules of evidence, and that the hearsay statements aforesaid, were properly admissible in evidence. But it is claimed that the commission, after hearing such evidence, should have given it no probative weight or value whatever in reaching its findings of fact, if the evidence, other than hearsay statements was not of itself sufficient to support the findings. We cannot bring our minds to assent to the correctness of such a position. To do so would be to hold that the statute, in making the hearsay evidence admissible, did a useless and senseless thing. On the contrary, we think that it follows inevitably from the fact that the hearsay is made admissible by the statute, that the commission is given the discretion to give it some probative weight, and that it is for the commission to determine, and not for the court what probative value, if any, they should give to it in arriving at the findings of fact. Manifestly, the court could not interfere with the exercise of such discretion without usurping powers which are conferred by the statute on the commission, since the commission is the sole tribunal provided, as aforesaid, to ascertain the facts.

This position has consistently been upheld whenever the question has arisen.[34] Virginia is the only state which has expressly overruled the doctrine requiring a residuum of legal evidence to support a finding of fact. Whether this court would go so far as to sustain an award based on "double hearsay" is uncertain, but it is likely that such a position would be held to violate the due process requirement that a finding must be based on some substantial evidence.

The Illinois Court has reached the exact opposite result in interpreting the same statutory provision. This jurisdiction has

[33] 141 Va. 1, 126 S. E. 213 (1925).

[34] Humphrees v. Boxley Bros. Co., 146 Va. 91, 135 S. E. 890 (1926); Derby v. Swift & Co., 188 Va. 366, 49 S. E. 2d 417 (1948).

repeatedly held that the rules of evidence in proceedings under the Workmen's Compensation Act are no less strict than those in actions at common law.[35]

As an example the Illinois court said:

> In proceedings under the Workmen's Compensation Act the rules respecting the admission of evidence and the burden of proof are the same as prevail in common law actions for personal injury. The procedure only is different. Before a claimant can recover compensation, he must prove by a preponderance of competent evidence all the facts necessary to justify an award. Liability under said Act cannot rest upon imagination, speculation, or conjecture, but must be based upon facts established by a preponderance of the evidence.[36]

However, this same court has refused to reverse a finding where hearsay was admitted without objection.[37]

The remaining states which have been called upon to interpret the meaning of this provision have generally fallen in line with the majority and held that although hearsay is admissible, it cannot form the sole basis of an award.[38]

IV. *Where the statute contains no provision regarding the subject.*

In Wisconsin, where the commission is given the power "to adopt its own rules of procedure," the court has held that an award must be based on some competent evidence and that hearsay is not competent evidence.[39]

The same position is taken in Maine,[40] Oklahoma,[41] and Rhode Island.[42]

And so it goes right down the list of remaining states, the courts generally holding, whether there is statutory authority or

---

[35] Brewerton Coal Co. v. I. C., 324 Ill. 89, 154 N. E. 412 (1927); Sidney Wanzer & Sons, Inc. v. I. C., 380 Ill. 409, 44 N. E. 2d 40 (1942); Selz-Schwab and Co. v. I. C., 326 Ill. 120, 156 N. E. 763 (1927).

[36] Inland Rubber Co. v. I. C., 309 Ill. 43, 140 N. E. 26 (1923).

[37] Kivish v. I. C., 312 Ill. 311, 143 N. E. 860 (1924).

[38] *Idaho*—Pierstoriff v. Gray's Auto Shop, 58 Ida. 438, 74 P. 2d 171 (1937).
Kentucky—Broadway & F.A.R. Co. v. Matcalft, 230 Ky. 800, 20 S. W. 2d 988.
Mass.—Johnson's Case, 258 Mass. 489, 155 N. E. 460 (1927).
Mich.—Green v. Sears & Roebuck & Co., 280 Mich. 274 N. W. 331, 568 (1937).
N. C.—Maley v. Thomasville Furn. Co.,214 N. C. 589, 200 S. E. 438 (1939).
Georgia—Merritt v. Continental Casualty Ins. Co., 65 Ga. App. 826, 16 S. E. 2d 612 (1941).
Indiana—White Swan Laundry v. Nuezolf, 111 Ind. App. 692, 42 N. E. 2d 391 (1942).
S. Carolina—Spearman v. Fs. Royster Guano Co., 188 S. C. 393, 119 S. E. 530 (1938).

[39] Milwaukee El. R. & L. Co. v. Giardiana, 222 Wis. 111, 267 N. W. 62 (1937).

[40] Crowley's Case, 130 Me. 1, 153 Atl. 184 (1931).

[41] Santa Fe Transp. Co. v. Vaughan, 146 P. 2d 827, 194 Okla. 16 (1944).

[42] Reymold v. Freemason's Hall Co., 198 Atl. 553 (1938).

not, that hearsay is admissible in the discretion of the commission but that an award will not be upheld if based solely on hearsay that has not been corroborated by other evidence which would indicate the trustworthiness of the hearsay.

SOME MODERN VIEWS ON THE SUBJECT

The Federal Administrative Procedure Act, Section 7 (c) provides:

> Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.

Clearly, under this provision the strict common law rule excluding hearsay as incompetent has been abrogated. The provision permits the introduction of any evidence which is relevant to the issues. Thus hearsay would clearly be admissible if found to be relevant. Furthermore, hearsay could be the sole basis for a finding if it were found to be "reliable, probative, and substantial;" that is, if the hearsay were "the kind of evidence on which reasonable persons are accustomed to rely in serious affairs,"[43] an award based thereon would be upheld.

The Model State Administrative Procedure Act contains this provision in Section 9 (1):

> Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rule of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

The effect of this provision clearly would permit the admission of hearsay which had probative value and would seem to permit a finding to be based on hearsay if of the type that reasonably prudent men rely on. But such is not the case. In Section 12 (7) (e), the act provides that a reviewing court may reverse if the decision is "unsupported by competent, material, and substantial evidence in view of the entire record as submitted." Thus the requirement of a residuum of legal evidence has been incorporated into the model code.

Dissatisfaction with the present law relating to hearsay is illustrated in the American Law Institute's Model Code of Evidence. Rule 503 states: "Evidence of a hearsay declaration is admissible if the judge finds the declarant (a) is unavailable as a witness (b) is present and subject to cross-examination."

[43] N.L.R.B. v. Remmington Rand Inc., 94 F. 2d 862 (1938).

This rule if adopted would abolish the common law rule altogether. It is clearly indicative of the present trend not only in the field of administrative law but in all fields of law generally.

Morgan and Maguire have formulated what they consider should be the hearsay rule.

> Every statement having appreciable probative value upon any issue shall be admissible, not withstanding any rule of evidence to the contrary, if the trial judge shall find that it was made in good faith as of the personal knowledge of the declarant and that the declarant is unavailable for any reason other than the procurement of the proponent. This rule shall apply in all judicial or quasi-judicial proceedings of every kind.[44]

Many years ago, Thayer summed up this feeling in what he called the main rule of evidence—"That whatsoever is relevant is admissible."[45]

At the Cincinnati Conference of Functions and Procedure of Administrative Tribunals, the following questions were asked of the four hundred attorneys present:

1. Judging from your experience, is it practicable to require administrative tribunals to adhere to the common law rules concerning hearsay testimony?
   Yes—25; No—24; Not strictly—2.
2. Before what specific administrative tribunals do you believe the common law rules as to hearsay can safely be relaxed?
   All—8; None—6; Industrial Commissions—5; Public Utilities Commission—5; Tax Commission—3; National Labor Relations Board—3; Federal Trade Commission—1.

"The answers to the first question were almost equally divided; one more than half being in favor of relaxing the rule against hearsay testimony, the other half being in favor of its application. The bar is not ready as yet to discard the hearsay rule. It is possible that the reason for this reluctance is the conviction that the personnel of the tribunals is not as yet capable or experienced enough to determine the proper probative effect that should be given to hearsay statements. Only eight votes were recorded for relaxing the hearsay rule for all administrative tribunals. Some answers indicated that the trouble they experienced was a failure to apply the same rules of evidence to both parties in the case, or a complete failure to apply any rules of evidence."[46]

In our discussion of this problem, it has been shown that most of the courts have refused to recognize the fact that Workmen's Compensation Acts were intended to create an entirely new solution to an age old problem. This solution was to be reached by

[44] *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1936).
[45] THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW, Little, Brown and Co. (1898).
[46] 24 A.B.A.J. 288 (1938).

adopting a modern, rational method of procedure with the primary object of seeking the truth rather than providing a larger playing field for the practice of technical common law rules of evidence.

However, some progress has been made. In most of the states, the courts permit the commissions to give probative weight to hearsay if it is corroborated by some other evidence which would indicate its trustworthiness. In Virginia and California, the courts have left the probative value of hearsay in the discretion of the Commission. Maryland has recognized that in certain cases hearsay may be sufficient to sustain an award.

From a review of the cases, it is clear that hearsay does in some instances have definite probative value often times sufficient to sustain a claim. It would be erroneous to make an all inclusive statement that hearsay is always incompetent or, on the other hand that it always has probative weight.

Perhaps the answer lies in a clear, well-defined expression of legislative intent permitting flexibility on the part of the tribunal and leaving to their discretion the probative weight to be given hearsay evidence. And if it is of the type that men of affairs customarily rely on in serious matters, an award based thereon would be valid and within the requirements of due process.

The success of such a policy would be dependent on the experience and qualifications of the commissioners under the Act, but in the end, so does justice in a court of law depend largely upon the qualifications of the judges and attorneys who practice there.

NOTES AND COMMENTS

EVIDENCE: INCOMPETENCY v. INSUFFICIENCY—The recent decision of the Colorado Supreme Court in the case of *Wheelock v. Lindner Packing Co.*,[1] deals with an elusive distinction between incompetency and insufficiency in the law of evidence. The facts are not complicated. The plaintiffs delivered a shipment of frozen meat to the carrier for delivery to Ft. Worth. The shipment was refused by the receiver due to the spoiled condition of the meat at the point of delivery. The plaintiffs disposed of the meat at considerable loss and brought this action to recover damages. The plaintiff established by competent evidence that the meat was in proper condition upon delivery to the carrier, that the meat was rejected at the point of delivery, and that it was subsequently sold at a loss. Under the cases on interstate shipments, a shipper need only prove that the goods were in proper condition when delivered to the carrier and spoiled when received. The burden then rests upon the defendant carrier.

In the instant case, the plaintiff's only evidence as to the condition of the goods when received was clearly hearsay. This testi-

[1] — Colo. —, 273 P. (2d) 730.