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Al Cooter

Robert Kelley

It thus seems that the holding of the Colorado Supreme Court in the *Smith Brothers* case was unfortunate because price fixing is clearly a *quasi* legislative function [18] and, as such, no notice and opportunity to be heard are necessary.

As the United States Supreme Court said in *Bi-Metallic Co. v. Colorado*:[19]

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or on assembly of the whole. . . . There must be a limit to individual argument in such matters if government is to go on.

USE OF EVIDENCE IN HEARINGS BEFORE COLORADO ADMINISTRATIVE AGENCIES

AL COOTER and ROBERT KELLEY *

It is hardly necessary to call attention to the confusion which exists with regard to the application of technical rules of evidence to hearings had before the myriad administrative bodies which have been created in Colorado. In proceedings before the various boards, commissions, and agencies there is no homogeneous or even similar procedure to be followed with regard to the exclusionary rules of evidence. Some of the larger and better known agencies, such as the Public Utilities Commission and the Industrial Commission, are governed by rather comprehensive statutory requirements which have become well defined by subsequent rules adopted by these commissions themselves as well as by custom and prior experience.

Because the list of administrative agencies is continually growing, the frequency of litigation before these bodies is increasing at a corresponding rate. Adding to that fact the common knowledge that our society is becoming more and more complex, the resulting inference is that litigants seeking redress will continue to grow in number, thus presenting an opportunity and a duty on the part of the bar to provide adequate representation.

In many cases, the individual who has a grievance or who has been called before one of the agencies for a violation of some activity within its control will feel that he does not need an attor-

[18] "Rate making, of course, is a legislative process," Prentis v. Atlantic Coast Line, 211 U. S. 210, 226; "In the fixing of rates—*a legislative act*—the legislature has a broad discretion which it may exercise directly or through a legislative agency in accordance with standards prescribed by the legislature," St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38; "Process in the form of a notice to a corporation to be affected by a contemplated or intended order (as to rate making) of the commission . . . is neither contemplated nor provided for, . . . nor is essential to the validity thereof," Randall Gas Co. v. Star Glass Co., 88 S. E. 840, 78 W. Va. 252.

[19] 239 U. S. 441.

* Students, University of Denver College of Law.

ney to represent him because the proceeding is not in a court of law. For various reasons, this assumption may be correct in a number of instances. On the other hand, adopting such a premise may be incorrect, for a hearing before an administrative agency is *quasi* judicial in nature, and in some of the larger agencies it is difficult to discern any difference between the hearing conducted by them and those instituted before a court of law. Such agencies as the Industrial Commission and the Public Utilities Commission conduct their hearings in a room very similar to a court room, the referee or trial examiner is an attorney, and usually the parties are represented by attorneys. In view of these facts, it is understandable that hearings of this nature are conducted in much the same manner as any judicial trial.

In order not to distort the picture and because it is not feasible for the purposes of this article to present a complete summary of the similarities and dissimilarities of administrative tribunals as compared to those of the judiciary, it is thought desirable by these writers to indulge in a few generalities. Many of the more than one hundred administrative bodies in Colorado are small in size and in the scope of their functions, and frequently they are staffed by only two or three persons. Necessarily, the manner in which their hearings are conducted may not be analogous to that of the larger agencies aforementioned. Oftentimes the "courtroom" of such an agency is composed of a desk and a chair; the hearing is conducted by a layman, albeit an expert in his administrative field; and the party litigant is not represented by qualified counsel. In such a proceeding there is no semblance of a judicial trial. It does not follow, however, that a party before such an unimpressive board hearing does not require the services of counsel. He can as easily be deprived of his liberty or property without due process of law in such nondescript settings as he can before one of the more impressive, judicial type agencies; perhaps more so.

It is the underlying theory of administrative law that the hearings are to be conducted informally, on a non-technical, flexible basis.[1] As a general rule, administrative agencies conducting hearings are not bound by the strict or technical rules of evidence which are employed in jury trials.[2] Whether or not a trial examiner will admit or deny the introduction of certain types of evidence will depend upon the attorney's ability to persuade him that the rule in Colorado calls for its admission or exclusion. The trick is to find the rule.

It may be fairly asked, "What, then, is the status of Colorado law on this aspect of administrative law?"

When an attorney in Colorado is first confronted with a hearing before one of our administrative bodies, he will likely find it difficult to ascertain with any certainty the existing and controlling law with reference to the presentation of evidence by both

[1] Robert H. Jackson, *The Administrative Process*, 5 Journal of Social Philosophy 143 (1940).

[2] Carrol v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507.

sides. In his preparation for the hearing, he will find five possible sources available: (1) 1935 Colorado Statutes Annotated; (2) Agency-Made Rules of Procedure; (3) Colorado Supreme Court Decisions; (4) Decisions of Federal Courts and Courts of the Several States; and (5) the U. S. and Colorado Constitutions. Each of these sources will be discussed herein.

1935 COLORADO STATUTES ANNOTATED

Using the statutory authority as a starting point, it must be called to the reader's attention that there is no convenient way in which to locate agency restrictions or requirements as to evidence. There is no such title as Administrative Law in the statutes.[3] Moreover, it is difficult to define the term so that the agencies can be located with any ease or accuracy. Of course, the problem at hand will indicate the subject title to look for in the index. This fact, however, will most likely be of small value for in very few of the sections creating agencies is the subject of evidence mentioned. For example, Ch. 19, "Barbers," Sec. 12, provides that the Board of Examiners:

> . . . shall have power to revoke any certificate of registration granted by it . . . provided that before any certificate shall be revoked the holder thereof shall have notice . . . and . . . be given a public hearing before said board, and full opportunity to produce testimony in his or her behalf, and to confront the witnesses against him or her.

Sec. 24 sets out the same thing in different words. There is nothing in the statute above quoted that specifies the kind or quality of evidence acceptable in the hearing, although these provisions do satisfy some of the requirements of procedural due process of law.

As a sidelight, it might be conjectured that perhaps a trial examiner could be persuaded to follow the statutory provisions of another agency on the theory that such provisions should logically apply to all agencies because of their similarity of creation and purpose. To illustrate, the Workmen's Compensation Act of Colorado [4] provides for a hearing, for notice to be given each interested party, that parties shall have a right to be present at any hearing in person or by attorney or other agent, and that they may present pertinent testimony and have the right to cross examine. It is also provided that:

> The Commission may receive as evidence and use as proof of any fact in dispute the following matters, in addi-

[3] There is a subject-head entitled, "Administrative Code," originally enacted in 1933, subsequently repealed and a new act passed in 1941 replacing it. It now appears as c. 3 (L. '41, p. 87, sec. 60). This act cannot in any sense of the word be likened to an administrative procedure act since its scope is restricted to organization and functions of governmental departments at the state level. It denominates and describes the powers of the nine administrative departments, attempting to classify subordinate sub-units, but achieves only partial success.

[4] COLO. STAT. ANN., ch. 97, sec. 373 (1935).

tion to sworn testimony presented at open hearings:

(1) Reports of attending or examining physicians.
(2) Reports of investigators appointed by the Commission.
(3) Reports of employers, including copies of time sheets, book accounts or other records.
(4) Hospital records in the case of an injured or deceased employee.

Provided, however, that the Commission may cause an examination to be made of the person of the injured employee, or without notice take testimony or inspect the time books, payrolls or other records of the employer. All *ex parte* evidence received by the Commission shall be reduced to writing and any party in interest shall have the opportunity to examine and rebut the same by cross examination or by further evidence.

It is to be noted that the above section is statutory authority for the admission of hearsay evidence in compensation cases. A careful search of the statutes failed to reveal any rule about the exclusion of hearsay or the abolition of the hearsay rule which was any more enlightening than the Workmen's Compensation Act above quoted. Accordingly, the Colorado statutes shed very little light on the question.

AGENCY-MADE RULES OF PROCEDURE

Turning next to the rules promulgated by each agency, it will be discovered that the problem of evidence has been given some treatment. The rules of some of the agencies are set out in pamphlet form [5] and are primarily designed to prescribe the methods employed in the administration of that particular act. For example, the pamphlet prepared by the Public Utilities Commission, one of the best organized agencies in Colorado, contains the following provision:[6]

Rule 12—Hearings. (j) Rules of Evidence.

In conducting any investigation, inquiry or hearing, neither the Commission nor any officer or employee thereof shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Com-

[5] Sec. 2 of the Industrial Commission Law, C. 97, COLO. STAT. ANN. (1935), provides: It shall be the duty of the Commission, and it shall have the power, jurisdiction and authority . . . to adopt reasonable and proper rules and regulations relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the mode and manner of investigations and hearings. . . . It shall also cause to be printed in proper form for distribution to the public proper pamphlets showing its orders, regulations and rules of procedure and shall furnish the same to any person upon application therefore.

[6] *Rules of Practice and Procedure Before the Public Utilities Commission of the State of Colorado*, effective January 1, 1951. (Decision No. 35628.)

> mission. Rules of evidence before Courts of Record of the State of Colorado will be generally followed but may be relaxed in the discretion of the Commission or hearing officer when deviation from technical rules of evidence will aid in ascertaining the facts. When objection is made to the admissibility of evidence, such evidence may be received subject to later ruling by the Commission. The Commission, or hearing officer, in its discretion, either with or without objection may exclude inadmissible evidence or order cumulative or irrelevant evidence discontinued. Parties objecting to the introduction of evidence shall briefly state the grounds of objection at the time such evidence is offered. The evidence to be admitted at hearings shall be material and relevant to the issue.

Certain other of the larger agencies also have available in pamphlet or mimeographed form, working rules of procedure. However, the preponderance of smaller administrative bodies have no such rules in printed form available.

COLORADO SUPREME COURT DECISIONS

Undoubtedly, the best source of law governing the reception of evidence in an administrative hearing will be the decisions of the Colorado Supreme Court. Although there are many such decisions wherein the hearing by the Industrial Commission or the Public Utilities Commission has been reviewed, there are relatively few Colorado cases dealing with the holding of other administrative bodies. Because of this fact, the case law of evidence is most easily found in the Colorado Digest under the headings of "Workmen's Compensation," "Public Utilities Commission," etc. Due to the relative newness of the field of administrative law, there is no such title as this in the body of the 1937 edition of the Colorado Digest; however, it does appear in the Cumulative Supplement to Volume 2. Unfortunately under this title in the aforementioned 1952 Supplement there are to be found only a few scattered cases and none under the sub section of "Evidence." Consequently, it is best to search the sections under specific titles as suggested above.

The body of administrative case law in Colorado covers such matters of evidence as hearsay, expert opinion, burden of proof, competency, weight and credibility and other related matters. Its decisions pertaining to evidence admissible in an administrative hearing are not at all uniform. In most cases, for example, the Supreme Court of Colorado has upheld the exclusion of hearsay,[7] but in other cases it has permitted its admission.[8] In the case of *Olson-Hall v. Industrial Commission,* the refusal of the Commission to admit in evidence a wholly unidentified statement of the employer respecting a claim of the employee Olson as to the acci-

[7] Olson-Hall v. Industrial Commission, 71 Colo. 228, 205 P. 527 (1922).
[8] Empire Zinc Co. v. Industrial Commission, 94 Colo. 98, 28 P. 2d 337 (1933).

dent and other hearsay evidence was assigned as error. The court said:

> These offers were properly excluded. It is true that the Workmen's Compensation statutes of most of the states provide that industrial commissions 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 testimony *alone* there is no limit to the frauds and wrongs that may be encouraged and made possible. (Italics supplied.)

At first blush, the above decision would seem to lay down the rule that hearsay evidence is not admissible at all. On closer examination, however, the phrase "hearsay testimony *alone*" has the effect of qualifying the rule to the extent of providing that hearsay is admissible, but it must be fortified by a *residuum* of legally sufficient evidence before it will support a finding. This view is supported by the leading case of *Carroll v. Knickerbocker Ice Co.*,[9] wherein the court reviewed the sufficiency of hearsay testimony to support a finding made by the Workmen's Compensation Commission. The statute in that case provided that the Commission was not bound by the common law or statutory rules of evidence. The finding of the Commission was based solely on the testimony of witnesses who related what Carroll, the injured employee, told them relative to how he was injured. The court, in reversing the finding of the Commission said:

> 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 evidence, . . . and it may, in its discretion, accept any evidence that is offered, still in the end there must be a *residuum* of legal evidence to support the claim before an award can be made.

In a later Colorado case [10] the Supreme Court was confronted with the same question as in the *Knickerbocker Ice Co.* case, i.e., whether there was any competent evidence to support the Industrial Commission's finding that the deceased employee had been injured in an accident arising out of or in the course of his employment. The Commission had admitted hearsay evidence in the form of a written report of the accident by the employer and the State Mine Inspector's report to the Commission, together with evidence of the fact that the employer had notified the Commission that it had paid the funeral benefits. Contrary to the *Olson-Hall* and *Knickerbocker* cases, the court affirmed the Commission's

[9] 218 N. Y. 435, 113 N. E. 507.
[10] Empire Zinc Co. v. Industrial Commission, *supra*, n. 8.

finding and said:[11]

> That the company report, the conduct of the company, and the report of the mine inspector, were proper evidence in the hearing before the Commission seems clear. That these supported a finding that the accident arose out of and in the course of the employment, notwithstanding the testimony of Medina (an eye witness) and that we are without power to interfere therewith, are equally clear.

The language of the preceding decision raises the question of what is necessary to constitute proper and sufficient evidence. Of course, the appellate court can do no more than consider and decide whether the decision of the agency is supported by sufficient and proper evidence. The Colorado Supreme Court has uniformly held, "that findings of the Industrial Commission as to facts must be accepted by the courts if there is any substantial evidence to support them." [12] The court in *American Mining Co. v. Zupet*,[13] stated:

> The matter of determining the probative effect of evidence in such cases, where there is a conflict, still remains *exclusively* with the Commission where there is evidence for its consideration or from which it could draw a *reasonable inference.*

As was stated in a New York Supreme Court decision, *Stork Restaurant, Inc. v. Boland*:[14]

> A finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere *scintilla* of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based. That requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Our Colorado Supreme Court has used similar language in stating, "that expert medical testimony given in a hearing before the Industrial Commission constitutes substantial, credible evidence." [15] Likewise, in *C. S. Card Iron Works Co. v. Radovich*,[16] the court held that opinion evidence of physicians is competent in Workmen's Compensation cases.

However, the Supreme Court felt that expert medical testimony in the case of *U. S. Fidelity & Guaranty Co. v. Industrial Commission* [17] was not competent evidence. Therein, three doctors testified as to the cause of claimant's heart attack to the effect that:

> The excitement *may* have been a precipitating factor.

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[11] *Ibid.*
[12] Zuzich v. Leyden Lignite Co., 120 Colo. 21, 206 P. 2d 833.
[13] 101 Colo. 283, 72 P. 2d 281.
[14] 282 N. Y. 256, 26 N. E. 2d 247 (1940).
[15] Skjoldahl v. Industrial Commission, 108 Colo. 140, 113 P. 2d 871.
[16] 94 Colo. 426, 30 P. 2d 1108.
[17] 122 Colo. 31, 219 P. 2d 315 (1950).

> . . . I don't know. . . . It is a *possibility. I couldn't say absolutely* but I guess statistically probably more infractions occur when people are lying quietly in bed than when they are exerting themselves but it is *quite within the realm of possibility.* (Emphasis supplied by the court.)

The court said the findings in favor of the claimant were unwarranted and could not be sustained. "A resort to mere conjecture of possibilities will not take the place of direct or circumstantial evidence. No number of mere possibilities will establish a probability."

Thus, as to the competency of expert opinion evidence, it is apparent that it is admissible for what it is worth. Even though administrative agencies are not bound by the technical rules of evidence, a court in reviewing a decision of such an agency must look for convincing evidence of a substantial and credible nature.

DECISIONS OF FEDERAL COURTS AND COURTS OF THE SEVERAL STATES

The value of citing decisions of the federal courts and courts of the several states is not peculiarly affected by the fact that they are based on a review of an administrative hearing. In other words, this source of authority is usable in the same manner as it is in the review of a judicial trial. The only point of interest is that this source is extremely large and diversified in comparison to that of Colorado cases alone. Of course, care must be taken to distinguish the cases which are based on statutory provisions, or, in the case of federal decisions, on the Federal Administrative Procedure Act.

THE UNITED STATES AND COLORADO CONSTITUTIONS

As a source of authority the constitutions are limited to the requirement of due process of law. Due process requires, among other things, that there be an opportunity to be heard and a finding in accord with the evidence. Therefore, if the creating statute failed to provide for a hearing, or if a party were deprived of the right to a hearing and to present evidence on his own behalf, a defense could be interposed that the statute or agency action was unconstitutional in that it deprived the party of his property without due process of law.

Moreover, the requirement that there be a finding in accord with the evidence presupposes that there is some "substantial evidence" upon which the finding is predicated. Thus, under the aforementioned views of the Colorado Supreme Court, a decision based solely on hearsay and not buttressed by any legal evidence would seemingly fall within this interdiction and therefore not be a finding in accord with the evidence as required by the due process clauses of the respective constitutions.

CONCLUSION

From the above discussion, it is submitted that the method of discovering the applicable law pertaining to the use of evi-

dence before administrative agencies in Colorado is not clear-cut or simple. Therefore, in view of the increasing number and complexity of administrative agencies in this state, it is submitted that the adoption by the Legislature of an administrative code of procedure would create desirable and much needed uniformity and simplicity. Such a code has been adopted in some of the other states and by the federal government.

The Model State Administrative Procedure Act was approved by the National Conference of Commissioners on Uniform State Laws at its 1946 Session. It represents an effort of the legal profession "to standardize by statute the practices and principles of administrative agencies which adjudicate or make rules." [18] Pertaining to evidence, sec. 9 provides:

> In contested cases:
>
> (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 rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.
>
> (2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.
>
> (3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.
>
> (4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

COLORADO REPORTS NEEDED

Two new District Court divisions were authorized for Denver by the 1952 General Assembly and will be in service within the month. Complete sets of the Colorado Reports and Colorado Appeals are urgently needed for these courts. Anyone knowing where such sets may be available should contact J. B. Goodman, Jr., clerk of the Denver District Court, at once. The search for these volumes deserves a special effort on the part of the bar.

[18] GELLHORN, ADMINISTRATIVE LAW 1119 (1947).