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SCOPE OF JUDICIAL REVIEW

ROBERT G. ROGERS *

The material in this paper is limited to the scope of judicial review, by the appropriate appellate courts of Colorado, of the acts and findings of administrative agencies of the state. The material herein is further limited to a study of the scope of review with respect to the following specific problems: (1) Jurisdiction of Subject Matter; (2) Statutory Authority and Power of Agency; and (3) Review of Evidence and Findings of Fact.

Other matters such as notice and opportunity to be heard and the requirements of a fair hearing are covered elsewhere in this study of Colorado Administrative Law.

JURISDICTION OF SUBJECT MATTER

It is logical to assume that the first consideration of a court of review would be to determine whether the agency involved in the litigation had jurisdiction over the subject matter with which it had dealt.

There appears to be no doubt that Colorado courts are completely logical and orthodox in this respect as is illustrated by the case of *Speers v. Public Utilities Comm.*[1] In that case the petitioner, Speers, instituted an action before the Public Utilities Commission alleging that utility rates being charged him were excessive and unreasonable. The Commission dismissed the complaint for want of jurisdiction, and the dismissal was upheld by the district court. The Supreme Court, in holding the decision of the district court, did so solely on the grounds that the Commission lacked jurisdiction over the subject matter of the suit.

The court found that under the Constitution of the State of Colorado and the Charter of the City and County of Denver the latter was given power to fix the rates in question and that consequently the Public Utilities Commission was without jurisdiction in the matter.

The question of jurisdiction again arose in a case involving the same petitioner and the State Board of Health. In this case also the question of jurisdiction of the subject matter was considered by the Colorado district and supreme courts and a determination was made that the administrative tribunal did have jurisdiction of the matter in question.[2]

In *Glenwood Light and Water Co. v. City of Glenwood Springs,*[3] the Supreme Court states, "In determining that the P.U.C. exceeded its authority (jurisdiction) the district court was acting within its authority."

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[1] 100 Colo. 369, 67 P. 2d 1029.

[2] Speers Free Clinic & Hospital for Poor Children, Inc. v. State Board of Health, 220 P. 2d 872.

[3] 79 Colo. 307, 245 P. 720.

It does not appear to be necessary to belabor the point further that the scope of review of the courts in reviewing the actions of administrative agencies does extend to a determination of whether or not the agency had jurisdiction of the subject matter in the first instance. This is, of course, standard, orthodox law, and there is no more variance with respect to its application in cases involving administrative agencies than there is in any other type of litigation.

STATUTORY AUTHORITY AND POWER OF AGENCY

Another apparently well settled and orthodox result is reached with respect to extending the scope of review to include a review of the actions of the administrative tribunal to determine if its actions, awards or orders are within the limitations imposed upon it by statute or otherwise.

A typical case, in which the reviewing court determined that although the tribunal had jurisdiction of the subject matter, its order could not stand because it was violative of the statutory authority of the agency, is *Sapero v. State Board of Medical Examiners.*[4] The Supreme Court found in that case that the revocation of the license of the petitioning physician by the board was in excess of the authority of the board as conferred on it by the applicable statute. The advertising by the petitioner, which was the important issue in the case, was held not to be an infringement of the provisions of the applicable statute but was an infringement of "imaginary legislation" of the Board of Medical Examiners. The court found no power in the board to promulgate this "imaginary legislation" nor to revoke licenses of physicians who transgressed such "legislation." The board here clearly exceeded its authority by attempting to legislate. The court states that the board "abused its discretion."

There does not appear to be here, however, any "abuse of discretion" as the board had absolutely no authority to proceed along the lines it chose. There was no exercise of discretion but a bald attempt on the part of the board to usurp the function of the legislature, create its own law, then enforce it. This seems to be purely a case in which the administrative tribunal clearly exceeds its authority.

Further illustration of the principal that the scope of review extends to determine whether the acts of the administrative agency are in excess of its authority is the case of *O. P. Skaggs v. Nixon.*[5] In this case the Supreme Court reviewed the evidence on which the administrative tribunal had made a finding and determined that the finding was contrary to the uncontradicted evidence. In such case, the court said, the findings of the tribunal are in excess of its power.

In accord with the principal of review set out above is *Indus-*

[4] 90 Colo. 568, 11 P. 2d 555.
[5] 97 Colo. 314, 50 P. 2d 55.

trial Commission v. Employers Liability Assurance Corp.,[6] wherein the court said, "An award of the Industrial Commission may be set aside if the commission acted without or in excess of its jurisdiction."

In the *Speers Free Clinic* case, *supra*, the court reviewed the evidence presented before the commission and determined that the Board of Health exceeded its authority by "attempting to usurp the functions of the legislature and set up a law of its own." The board had ignored the statutory provisions for licensing and had substituted its own provisions.

It appears then that the court will determine if the administrative tribunal has, in its functions, remained within the boundaries set out by applicable statutes, determining whether the agency has exceeded its authority by making findings on evidence which is uncontradicted, which findings are as a matter of law in error *(O. P. Skaggs* case, *supra)* or if it has attempted to substitute its own legislation for that of the State Legislature. It will further consider any other matters which in its determination may constitute an attempt by the tribunal to act in excess of its power or in abuse of its discretion.

REVIEW OF FINDINGS OF FACT AND EVIDENCE

One of the more difficult questions to answer is to what extent the reviewing court will extend the scope of its review with respect to disturbing the findings of fact of an administrative agency and to the reviewing of the evidence on which the findings of fact were made.

One instance in which the court reviewed the evidence and the findings of fact based thereon has been discussed briefly with reference to another subject *(Skagg* case, *supra)*. In that case the court examined the evidence and then viewed the finding of fact in the light of the evidence. By this process they determined that the evidence was uncontradicted and that the finding of fact, when viewed in the light of the evidence, was as a matter of law erroneous and could not stand. It is to be noted that the evidence in this case was uncontradicted. In such cases the court, in reviewing the action of the commission, is passing upon a question of law and not making a finding of fact.

Thus in *Meyers v. Lakewood County*,[7] the court says:

> Where there is no conflict in the testimony and it appears the award . . . is based upon unwarranted inferences or improper application of the law, the court may set aside the findings of the commission.

In *Arvas v. McNeil Coal Corp.*,[8] the question at issue was essentially whether or not the claimant was suffering from a certain disease. The evidence pertinent to this point presented before the administrative agency consisted of the testimony of three

[6] 78 Colo. 267, 241 P. 729.
[7] 220 P. 2d 371.
[8] 119 Colo. 289, 203 P. 2d 906.

physicians. One such witness said that the claimant was suffering from the disease in question; one said that he did not know; the third said "he might be." On the basis of this testimony, the commission found against the claimant. The court on review stated that they could not allow this order to stand. Their reason was that since there was no conflict in the evidence on the point at issue the court was not bound by the findings of the commission but could determine as a matter of law what the findings should have been.

In *Industrial Commission v. Elkas,*[9] the important issue was whether or not one John Denny was the same person as Christos Demetrious Elkas. The court reviewed the finding of the commission that they were not one and the same person and stated that the evidence showed that they were. The court stated that the evidenced showed, "conclusively, definitely and unequivocally" that they were one and the same person. Then the court went on to state:

> The award [of the administrative tribunal] is to be treated like the verdict of a jury and set aside when there is no evidence to support it . . . whether an award is supported by evidence is such question [question of law] and may be considered on review.

In the *O. P. Skaggs* case, *supra,* the court nicely sums up the problem of no evidence [or uncontradicted evidence] by saying:

> In such circumstances a court in reviewing the action of the commission is passing upon a question of law and not making a finding of fact and consequently is not usurping the fact finding power of the commission.

REVIEW WHERE EVIDENCE IS CONFLICTING

It appears to be in order now to consider the attitude of the court with respect to cases where the agency has made a finding of fact, and the evidence in the case *is conflicting.*

In *Zuzich v. Leyden Lignite Company,*[10] the court stated, "We have held uniformly that the findings of the Industrial Commission must be accepted by the courts if there is any substantial evidence to support them."

Similar statements appeared invariably in all cases reviewed by the writer, where there was a conflict in the evidence presented before the administrative tribunal. It appears from this and similar statements that the court on review will examine the evidence which was presented to the tribunal and then will test this evidence by some standard to determine if it will support the finding of the commission. In the *Zuzich* case, the court says:

> It becomes our duty to examine the evidence introduced at the hearing to determine whether the record con-

[9] 73 Colo. 475, 216 P. 521.

[10] 120 Colo. 21, 206 P. 2d 833. *See also*: American Mining Co. v. Zupet, 101 Colo. 238, 74 P. 2d 281; Ind. Comm. v. Valdez, 101 Colo. 482, 74 P. 2d 710; White v. Ind. Comm, 104 Colo. 372, 90 P. 2d 960.

> tains sufficient competent and relevant evidence, even though a conflict exists therein, to support the commission's [findings].

In this case when referring to the evidence which they must find in order to uphold the findings of the commission, the court describes such evidence by using the following words in various parts of the case: "sufficient, competent and relevant evidence"; "any substantial evidence"; and "evidence . . . from which it [the tribunal] could draw a reasonable inference." In *Jarret v. Cruse, Director of Internal Revenue,*[11] the court stated, "there was 'ample' evidence to support the findings of the [agency]." In the *Skaggs* case, *supra,* it is expressed thusly: "where there is 'competent evidence' to support its [the tribunals] findings, they are binding on all courts." In other cases there are various modifications and combinations of the words used above, with the expression, "any substantial evidence," seeming to dominate.

What is competent and relevant evidence is the subject of a separate study and is not considered here. Assuming that the evidence is relevant, what degree of persuasiveness must it attain in order to support the findings of the agency? An analysis of the cases in which this problem is presented leads to the conclusion that the standard of measurement of the requisite quantity of evidence needed to support the findings is essentially and necessarily nebulous and subjective. It appears that the evidence must be substantial in nature and more than a *scintilla* in quantity. Yet it does not have to be a preponderance. Neither does it have to equal contradictory evidence. Somewhere beyond the *scintilla* and short of equality lies the minimum line. It appears to be a line that is varied in position depending on the facts of the individual case and the subjective reasoning of the particular court. It is not suggested that it could be otherwise since by its very nature it defies specific limitations.

Where there is found this sufficient quantity of evidence to support the findings of the commission, the courts will not disturb such findings, even though had the court been the fact finding agency it could or probably would have found otherwise.[12] But if the evidence is insufficient to support the finding, the finding by the tribunal will not be allowed to stand by the court.[13]

It is to be noted that the scope of review is sometimes set out in the statute which creates the administrative tribunal. Typical of this is the statute relating to the Public Utilities Commission.[14] That statute limits the scope of review of the reviewing court to determining whether the order of the commission is just and reasonable and if the findings of the commission are in accordance with the evidence (in so far as we are here concerned). Does the

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[11] 117 Colo. 206, 185 P. 2d 787.

[12] Clayton Coal Co. v. Industrial Commission, 93 Colo. 145, 25 P. 2d 170; Moffat Coal Co. v. Industrial Commission, 108 Colo. 338, 118 P. 2d 769.

[13] State Civil Service Comm. v. Hovey, 38 Colo. 169, 293 P. 338.

[14] Vol. 4, ch. 137, sec. 52, COLO. STAT. ANN.

wording of that statute require more evidence than that required in the previous discussion? In *A. T. & S. F. Railway Co. v. Public Utilities* [15] the Colorado Supreme Court stated: "[We are permitted] to determine whether the order of the commission is just and reasonable, and whether its conclusion is in accordance with the evidence." Commenting on this in *Public Utilities Commission v. City of Loveland,*[16] the Supreme Court said that the above statement was correct if the writer meant "substantial evidence." This would seem to indicate that the requirements as to evidence under this statute are the same as those previously discussed. This is the opinion of the writer with respect to this and the other statutes in Colorado which limit the scope of review. It appears that the statutes which specifically limit the scope of review simply reiterate the principles already established in this field with respect to evidence, although their wording might make it appear otherwise.

That the requirements as to evidence under this statute are the same as those discussed earlier is further sustained by the *Public Utilities Commission v. City of Loveland* [17] case wherein the court quotes with approval a decision of the United States Supreme Court handed down in the case of *Interstate Commerce Commission v. Union Pacific Railway Co.*[18] in which the court said essentially the same thing the Colorado Supreme Court said in the *City of Loveland* case. In *Denver & Salt Lake Railway Co. v. Chicago, Burlington and Quincy Railway Co.,*[19] the Colorado court stated that it was not prohibited from considering the evidence to determine if the findings of the commission were in accordance with the evidence. The court then went on to say, "This includes whether there is a substantial conflict in the evidence which, if there is, we agree would prohibit us from overruling the commission's findings based thereon." The court continued, "Our conclusions are supported by the highest tribunal in the land." It then quoted to sustain that statement the case of *I. C. C. v. Louisville & Nashville Railway Co.*[20] wherein the Supreme Court of the United States stated:

> Administrative orders . . . are void if the finding was contrary to the undisputable character of the evidence or the facts proved do not as a matter of law support the order made. The court will not review the commission's findings of fact by passing on the credibility of witnesses or conflicts in the testimony. But the legal effect of the evidence is a question of law.

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[15] 68 Colo. 92, 188 P. 747.
[16] 87 Colo. 556, 289 P. 1090.
[17] Note 16, *supra.*
[18] 222 U. S. 541, 32 S. Ct. 108.
[19] 96 Colo. 334, 43 P. 2d 999.
[20] 227 U. S. 88, 33 S. Ct. 185.