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ARTICLES

THE MONTANA WORKERS' COMPENSATION COURT: A STATUS REPORT

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I. HISTORY

Montana entered a new era in the adjudication of workers' compensation cases with the passage of House Bill 100[1] by the 1975 Legislature. The bill created the Office of the Workers' Compensation Judge, terminating the prior adjudication procedure used in disputed cases involving employees injured in "the course and scope of their employment." Growing out of the public outcry raised in response to a much-publicized scandal involving the Division of Workers' Compensation and the attorneys who handled cases before the division, the bill was meant to provide a legislative solution to abuses within the system.

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1. 1975 Mont. Laws ch. 537, codified at MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 2-15-1014, 39-71-2901 through -2909 (1979).

The legislation did not provide a perfect solution, however. In fact, it has raised new questions and created ambiguities not anticipated by the drafters. The frequency of appeals to the Montana Supreme Court, the question of whether the Montana Administrative Procedure Act applies to workers' compensation trials, and the uncertain relationship of the Workers' Compensation Court to the judiciary reflect some of the continuing problems facing the Montana court.

The so-called "workers' compensation scandal" resulted from an audit[2] conducted by the legislative auditor of the Division of Workers' Compensation.[3] The audit found that one of the key problems with the agency, and a factor from which many of the scandal's controversies and resulting penal violations arose, was the dual role assumed by the division's administrator. He was charged with the fair administration and enforcement of workers' compensation laws, as well as the administration and primary execution of the state insurance fund program — the largest single insurance company underwriting workers' compensation insurance in Montana. The dual roles played by the administrator posed an inherent conflict of interest. On the one hand, the administrator had responsibility for adjudicating an injured worker's claim, while, at the same time, he acted as an adversary since he had the responsibility for making certain that the insurance program maintained its integrity and was wisely managed.[4]

The auditor's report also disclosed several other problems. Lump sum settlements, as contemplated by statute,[5] had become the rule rather than the exception, as required by case law.[6] The report criticized the methods of negotiating compromise settlements, the lack of documentation, and the administrator's personal involvement in disputes. The report also detailed aspects of internal procedure and organization that were considered improper or inappropriate.[7]

As a direct result of the audit, the Forty-third Legislature

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2. Department of Labor and Industry, Workmen's Compensation Division, *Report on Review of Certain Insurance and Disability Compensation Operations*, prepared by the Office of the Legislative Auditor (June 1974) [hereinafter cited as *Compensation Report*].

3. Any designation of "board" with reference to the Industrial Accident Board was replaced with "division" by 1975 Mont. Laws ch. 23. The designation "workmen's" was likewise changed to "workers'." Hereinafter these new designations will be applied whenever appropriate.

4. *Compensation Report, supra* note 2, at 134-42.

5. MCA § 39-71-741 (1979).

6. Davis v. Industrial Accident Bd., 92 Mont. 503, 507, 15 P.2d 919, 921 (1932).

7. *Compensation Report, supra* note 2, at 134-42.

passed Senate Joint Resolution 70[8] and House Joint Resolution 53[9] which mandated the formation of a select committee on workers' compensation. These resolutions directed the select committee to make recommendations to the legislature based on the legislative auditor's report.

The select committee's recommendations were enacted by the legislature. The legislation removed the adjudication process from the Division of Workers' Compensation and placed it in the Office of the Workers' Compensation Judge. The judge was given the power to adjudicate disputes between claimants and insurers[10] and to disapprove an order of the division administrator allowing a full and final compromise settlement of a claim for compensation.[11] The legislation also eliminated the adjudicatory function of the Division of Workers' Compensation as to industrial accidents and the review or appellate function of the district courts of the state.[12]

II. PROCEEDINGS

A. *Overview*

The Workers' Compensation Court has been variously described as administrative,[13] quasi-judicial,[14] and judicial.[15] Appeals from the court are made directly to the Montana Supreme Court,[16] but the court proceeds in accordance with the Montana Administrative Procedure Act, where "appropriate."[17] The original subject matter jurisdiction of the court is limited to trials of industrial disputes,[18] but the court also acts as an appellate court for occupational disease[19] and crime victims compensation.[20] The court is at-

8. 1974 Mont. Laws, S.J. Res. 70.
9. 1974 Mont. Laws, H.J. Res. 53.
10. MCA § 39-71-2905 (1979).
11. MCA § 39-71-2908 (1979).
12. MCA § 39-71-2904 (1979). The former appellate procedure through the district court, codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947] § 92-833, was repealed by 1975 Mont. Laws ch. 537.
13. Hert v. J.J. Newberry Co., __ Mont. __, 584 P.2d 656, *reh. denied*, __ Mont. __, 587 P.2d 11 (1978).
14. Skrukrud v. Gallatin Laundry Co., __ Mont. __, 557 P.2d 278, 280 (1976).
15. 38 Op. Att'y Gen. No. 27 (1979).
16. MCA § 39-71-2904 (1979).
17. MCA § 39-71-2903 (1979).
18. MCA § 39-71-2905 (1979).
19. MCA § 39-72-702 (1979). An appeal from a final determination by the Division of Workers' Compensation as to benefits to which a claimant is entitled under provisions of the Occupational Disease Act, is made to the Workers' Compensation Judge. He may set aside the division's determination only when it is
(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;

tached to the Department of Administration under the executive branch for "administrative purposes" only.[21] Its budget is subject to approval by the legislature.

For operational purposes, the court is divided into three general divisions: (1) the administrative division, which consists of the clerk of court, deputy clerk of court, and a legal secretary; (2) the

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(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

MCA § 39-72-612(2) (1979). *See* note 137 *infra*. No provision is made in the statute for appeal from the decision of the Workers' Compensation Judge.

20. MCA § 53-9-131 (1979). A claimant may appeal to the Workers' Compensation Judge for review of a final determination made by the Division of Workers' Compensation concerning any claims made under the Crime Victims Compensation Act. MCA tit. 53, ch. 9 (1979). Section 53-9-131(2), however, refers specifically to the Montana Administrative Procedure Act, MCA §§ 2-4-101 through -711 (1979), for the conduct of the hearing and provides identical supreme court review of disputes arising under the Workers' Compensation Act. MCA § 53-9-131(3) (1979). This statutory provision contrasts with review procedures under the Occupational Disease Act. MCA tit. 39, ch. 72 (1979).

21. MCA § 2-15-1014(1) (1979). MCA § 2-15-121 (1979) defines the phrase "for administrative purposes only" in the following manner:

Allocation for administrative purposes only.
(1) An agency allocated to a department for administrative purposes only in this chapter shall:
(a) exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department;
(b) submit its budgetary requests through the department;
(c) submit reports required of it by law or by the governor through the department.
(2) The department to which an agency is allocated for administrative purposes only in this title shall:
(a) direct and supervise the budgeting, record keeping, reporting, and related administrative and clerical functions of the agency;
(b) include the agency's budgetary requests in the departmental budget;
(c) collect all revenues for the agency and deposit them in the proper fund or account. Except as provided in 37-1-101, the department may not use or divert the revenues from the fund or account for purposes other than provided by law.
(d) provide staff for the agency. Unless otherwise indicated in this chapter, the agency may not hire its own personnel.
(e) print and disseminate for the agency any required notices, rules, or orders adopted, amended, or repealed by the agency.
(3) The department head of a department to which any agency is allocated for administrative purposes only in this chapter shall:
(a) represent the agency in communications with the governor;
(b) allocate office space to the agency as necessary, subject to the approval of the department of administration.

This statute apparently gives the Department of Administration considerable control over the Office of the Workers' Compensation Judge. *Cf.* 38 Op. Att'y Gen. No. 27 (1979), concluding that that the Workers' Compensation Court and all its employees are members of the judicial branch and independent from the Department of Administration.

adjudication division, which includes a hearing examiner appointed by the judge at his discretion to hear special cases, and which is headed by a chief hearing examiner; and (3) the court reporter whose function is similar to that of a district court reporter.

The Office of the Workers' Compensation Judge began operating in June of 1975 and has since that date been located in Helena. The judge generally has had exclusive state-wide jurisdiction of workers' compensation disputes, although until 1979 there was some question as to the jurisdiction that could be exercised simultaneously by the district courts. The 1979 Legislature apparently settled this question by providing that the Workers' Compensation Court would have exclusive jurisdiction.[22] The Montana Supreme Court has stated in this connection that prior to any procedures in district court, a workers' compensation matter should be brought to the Workers' Compensation Court for a determination of whether or not a claimant has been injured in the course of employment.[23]

The legislature has indicated its general satisfaction with the operation of the court, at least by implication. In 1977, an effort was made to reduce the court from the status of a district court to that of an administrative hearing office.[24] The effort was killed in committee through the combined efforts of the Montana AFL-CIO, the Governor's Office, the State Bar of Montana, and individual lobbyists.

Despite the apparent approval given by the legislature, the expressed goal of reducing the number of appeals has not been realized. Court records indicate that the supreme court heard an average of six appeals per year from 1970 through 1974, yet has heard a total of seventy-nine (an average of eighteen per year) since the inception of the Workers' Compensation Court. The figures do not necessarily mean the court has failed, however. Since 1973 the benefits available to an injured claimant have been extended to a period as long as the claimant's lifetime[25] and to include both com-

22. 1979 Mont. Laws ch. 63, § 4 amended MCA § 39-71-2905 (1979) to give the Workers' Compensation Judge "exclusive jurisdiction to make determinations concerning disputes under Chapter 71."

23. Jacques v. Nelson, ___ Mont. ___, 591 P.2d 186 (1979).

24. In the Forty-fifth Legislature, Senators William Murray and William Lowe introduced Senate Bill 330. This bill would have amended MCA § 2-15-1014 (1979) to make the appointment of the Workers' Compensation Judge subject to confirmation by the Senate, and eliminate the judicial nominating procedures that are part of the current appointment process, codified at MCA tit. 3, ch. 1, part 10 (1979). The bill also would have eliminated the requirement that the Workers' Compensation Judge have the same qualifications and salary as district court judges. The current retirement benefits would have been similarly excised.

25. MCA § 39-71-702 (1979).

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pensation and medical payments.[26] In addition, the 1975 Legislature provided that all agricultural workers[27] would be covered by workers' compensation. There are very few workers in Montana now excluded from the act. Arguably, the increased number of appeals reflects the increase in benefits and number of workers covered by the act.

B. *How the Court Functions*

The act creating the Office of Workers' Compensation Judge provides the following: the judge must have the same qualifications as a district court judge,[28] devote full time to his office and not engage in the private practice of law,[29] maintain the principal office in Helena,[30] employ such people as may be necessary to carry out his duties,[31] and conduct proceedings according to the Montana Administrative Procedure Act.[32] The act also provides that the judge is not bound by the common law or statutory rules of evidence,[33] nor by any portion of the Administrative Procedure Act that pertains to appeals.[34]

The court at present hears an average of 18.75 petitions per month. The petitions are filed by claimant employees or insurers. As might be expected, the majority of cases are filed by employees, nearly all of whom are represented by counsel. The court assists claimants who have no counsel, but their limited record of success attests to the need for representation by someone who understands workers' compensation law and the medical aspects of industrial accidents.[35] The procedure to be followed by the unrepresented claimant is simple. He need only write a letter in his own words requesting relief of the court. A member of the clerk's staff will respond to the claimant and advise him as to how to proceed with the dispute.[36]

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26. MCA § 39-71-704 (1979).

27. MCA § 39-71-118 (1979). Agricultural workers are included under coverage of the act by virtue of the fact that they are not excluded from the statutory definition of "employee."

28. MCA § 2-15-1014(3)(a) (1979).

29. MCA § 2-15-1014(3)(b) (1979).

30. MCA § 39-71-2901 (1979).

31. MCA § 39-71-2902 (1979).

32. MCA § 39-71-2903 (1979).

33. *Id.*

34. MCA § 39-71-2904 (1979).

35. Of a total of three claimants who sought relief by their own efforts, only one made any recovery.

36. N. GROSFIELD, WORKERS' COMPENSATION MANUAL, State Bar of Montana § 13.32 (1979) [hereinafter cited as MONTANA WORKERS' COMPENSATION MANUAL]. This manual details the requisite procedures to present a petition of a disputed claim before the Workers'

Regardless of who files the petition, the clerk of court examines it to see if it meets the requirements of Rule 1 of the Procedural Rules of Court.[37] If the petition qualifies, the clerk mails a notice to the parties which informs them of the time and place of the pretrial conference and the trial.[38] Even though the petition of an unrepresented claimant seldom meets the requirements of Rule 1, the clerk follows the same procedure.

Parties to a Workers' Compensation Court hearing can predict the time and place of the hearing by referring to Rule 8 of the Procedural Rules of Court which sets forth the court's scheduling mechanism.[39] Except for emergency hearings, all cases are expected to be conducted at the time and place provided for in Rule 8. Parties may, however, stipulate to a different time and place for their hearing if the court consents. The court may continue the matter at the pretrial conference or at the hearing, but only after hearing evidence which shows that the delay will not inflict further hardship on the claimant, even when the claimant himself requests the continuance.[40] A continuance is seldom granted to the insurer unless the claimant is receiving compensation or is employed and not entitled to the biweekly compensation payments.

The pretrial conference is attended by the court-appointed hearing examiner or the judge and by the parties to the disputed claim.[41] The conference establishes the issues to be resolved at trial and uncontested issues of fact and law are stipulated. A pretrial order is prepared, usually by defense counsel, which sets out the

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Compensation Court. In addition, the manual contains a comprehensive summary of Montana case law in the field of workers' compensation, and provides samples of many of the forms and documents to be used in presenting a petition for hearing.

37. PROCEDURAL RULES OF THE WORKERS' COMPENSATION COURT, Rule 1 [hereinafter cited as W. COMP. CT. R.]. A copy of these rules is contained in the "Blue Book" published by the Division of Workers' Compensation. This publication is sold by the division and may be obtained by writing to the executive secretary. The rules are also published in the *Montana Lawyers' Rule Book* or they may be obtained by writing to the Clerk of the Workers' Compensation Court, P.O. Box 4127, Helena, MT 59601. A copy from the court will be furnished at no cost. Finally, the rules are also published in the Montana Administrative Register 504 (Issue No. 11, 1979). The Administrative Rules of Montana uses a confusing decimal numbering system. For clarity and simplicity, the numbering system used hereinafter will be that employed in the "Blue Book."

38. MCA § 2-4-601 (1979) is the portion of the Montana Administrative Procedure Act relating to notice. *See* W. COMP. CT. R. 8.

39. W. COMP. CT. R. 8.

40. W. COMP. CT. R. 14.

41. Pretrial conferences are not always held. Time limitations may prevent the conferences in some cases. In the Miles City and Glasgow areas, which include most of the counties in eastern Montana, pretrial conferences are part of the hearing. The present caseload in those areas has not justified the time and expense involved in holding a separate pretrial conference. Emergency hearings are never accompanied by a pretrial conference.

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facts according to Rule 12.[42] The order forces the parties to clarify and narrow the issues and encourages settlement where it appears desirable.[43]

The trial is usually conducted twenty-one days after the pretrial conference and follows the format and procedure of a non-jury trial. Proper foundation is required for all witnesses and exhibits formally presented at trial.[44] All proceedings at trial are of record. Upon completion of the trial, the court may request proposed findings of fact and conclusions of law and briefs from counsel, and will issue its own findings and conclusions after all proposals and briefs have been submitted.[45]

C. *Areas of Ambiguity*

1. *Administrative or Judicial Tribunal?*

a. *View of the Adjudicatory Process in Other States*

In an overview of workers' compensation procedures across the nation, Arthur Larson states that the initial handling of disputed claims for compensation, and perhaps also the initial review, are considered administrative processes in all but a few states.[46] The administrative process was selected over the judicial in order to rid workers' compensation disputes of cumbersome procedure and pleadings and to facilitate reaching a proper decision by the shortest possible route. At the same time, however, the scope of the commissions' tribunals definitely fall "toward the judicial end of the spectrum"[47] with their jurisdiction and authority being that

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42. W. COMP. CT. R. 12, reads as follows:
Pretrial conference. (1) A pretrial conference shall precede every trial unless otherwise ordered by the court. (2) The court shall make an order which recites the action taken at the conference and shall set forth the following:
(a) statement of jurisdiction pursuant to 39-71-2905 MCA;
(b) motions of either party;
(c) uncontested facts which the parties may agree are true and which will require no proof;
(d) issues of fact and law;
(e) exhibits which may be introduced;
(f) witnesses which may be called;
(g) pretrial discovery desired, i.e. depositions, interrogatories;
(h) estimated length of trial, time and place; and
(i) such other matters as may aid in the disposition of the matter.

43. MONTANA WORKERS' COMPENSATION MANUAL § 13.44.

44. *Id.* at §§ 13.51 to 13.55. *See also* W. COMP. CT. R. 15.

45. W. COMP. CT. R. 17.

46. A. LARSON, WORKMEN'S COMPENSATION LAW § 78.10 (1976) [hereinafter cited as LARSON].

47. *Id.* § 79.90.

granted by the states' legislatures.[48]

The functions of the compensation boards and commissions are, however, in many cases recognized as judicial in nature.[49] In *Pigeon v. Employers' Liability Assurance Corp.*,[50] for example, the Massachusetts court stated that the Massachusetts Industrial Accident Board was not a court and its members were not judicial officers. Nevertheless, the court determined that:

> The power to take testimony and make rulings of law which are subject to review by the judicial department of the government goes far to indicate that in performing those functions they are to be guided and controlled by the same general principles which would govern judicial officers in discharging the same duties.[51]

In *Bonafield v. Cahill*,[52] a New Jersey judge of the workmen's compensation division sought to vacate his suspension for allegedly practicing law contrary to the statutory authority by asserting that he was a judicial officer and therefore removable only by impeachment.[53] The New Jersey court stated that a compensation judge could not be classified as a judicial officer since a "hallmark of a

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48. Industrial Comm'n v. Superior Court, 5 Ariz.App. 100, 103, 423 P.2d 375, 378 (1967); Robinson v. Zurich Ins. Co., 131 Ga.App. 796, 796, 207 S.E.2d 209, 209-10 (1974); Johnson v. Kostis Fruit Co., 281 A.2d 318, 320 (Me. 1971).

49. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, 493 (1916); Gawith v. Gage's Plumbing and Heating Co., 206 Kan. 169, 179-80, 476 P.2d 966, 974-75 (1970); *In re* Haley, 356 Mass. 678, 682, 255 N.E.2d 322, 325 (1970). In Kaiser v. Industrial Accident Comm'n, 109 Cal.2d 54, 240 P.2d 57, 59 (1952), the California Supreme Court said that the Industrial Accident Commission exercises judicial powers in the legal sense as a court.

The Oklahoma legislature gave the State Industrial Commission a new designation as an Industrial Court by OKLA. STAT. ANN. tit. 85, § 91 (West 1971). This statute designated the court as a court of record and gave the judges thereof the same prerogatives and powers as judges of other courts of record in the state. The Rules of the Court were revised in 1976 to make them conform, except as otherwise provided in the Workers' Compensation Act, to the rules of pleading and practice applicable in the state district courts. OKLA. STAT. ANN. tit. 85 ch. 4, App., Rule 2 (West 1971). These sections were construed together in National Zinc Co. v. Sparger, 560 P.2d 292 (Okla. 1977) to give the Industrial Court powers similar to those of district courts. OKLA. STAT. ANN. tit. 85, § 91 was repealed by 1977 Okla. Sess. Laws, ch. 234, § 62.

50. 216 Mass. 51, 102 N.E. 932 (1913).

51. *Id.* at 56, 102 N.E. at 935.

52. 125 N.J. Super. 78, 308 A.2d 386 (1973).

53. N.J. STAT. ANN. § 34: 15-49 (1937) provides that compensation judges be appointed by the governor, confirmed by the senate, and serve during good behavior. The New Jersey court in Mulhearn v. Federal Shipbuilding and Dry Dock Co., 2 N.J. 365, 66 A.2d 726 (1949) and Campbell v. Department of Civil Serv., 39 N.J..556, 189 A.2d 712 (1963) had held that the workmen's compensation division could not be classified as a court. Even though the division had acquired many of the attributes of a court, it was still considered to be outside the scope of the judicial article of the state constitution. The court held in *Bonafield* that the statutory change in designation from "commissioner" to "judge" was a change only in nomenclature, not in status. Bonafield, 125 N.J. Super. at 85, 308 A.2d at 389.

judge is his independence and freedom from interference and control by any authority outside the judicial establishment."[54]

A similar view of the workers' compensation adjudicatory process is found in Nevada. The Nevada procedure for determining contested claims is much like that used in Montana except that claims are heard before an appeals officer appointed by the governor.[55] Several claimants disputed the constitutionality of the Nevada procedure in *Nevada Industrial Commission v. Reese*,[56] charging that it amounted to an impermissible delegation of judicial powers to an executive agency. The principal argument raised in *Reese* had been that the new 1973 legislative amendments incorporating the Nevada Administrative Procedure Act into the Industrial Insurance Act and providing for the appointment of an appeals officer was a violation of the separation of powers doctrine. The Nevada court dismissed the argument relying in part upon *Mulhearn v. Federal Shipbuilding and Dry Dock Co.*,[57] in which the New Jersey court stated that the "failure to comprehend that administrative adjudication is not judicial springs from the erroneous notion that all adjudication is judicial."[58] The Nevada Supreme Court also held in *Reese* that the appeals officer was permitted to "exercise his administrative powers that are quasi-judicial in nature without violating the separation of powers doctrine."[59]

The Florida Industrial Relations Commission was recognized as being a judicial tribunal in *Scholastic Systems, Inc. v. LeLoup.*[60] In that case the Florida Supreme Court relied on a prior decision[61]

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54. Bonafield, 125 N.J. Super. at 84, 308 A.2d at 389. According to the New Jersey statutory scheme, the compensation judge is subject to control by the New Jersey Commissioner of Labor and Industry insofar as he (1) controls where the judge sits, (2) determines the nature and extent of the judge's caseload, and (3) prescribes the rules of practice and procedure to be followed by the court. N.J. STAT. ANN. §§ 34: 1A-3, 1-20, 1A-11, 54: 14B-3(2) (1937). Additionally, the statute which defines the term "judge" makes no reference to the workmen's compensation judge. *Id.* §§ 2A: 1B-1 *et seq.* The method of appeal from the workmen's compensation judge's decision is identical to appeals from other administrative decisions. *Id.* § 34: 15-66. *Cf.* CAL. LAB. CODE §§ 111-132 (West 1937); NEB. REV. STAT. §§ 48-152 through 48-185 (1978 Reissue). Both the California and Nebraska statutory schemes include comprehensive provisions for adjudication of workers' compensation disputes. Extensive power is granted to the compensation tribunal and indicates that the adjudicaton process is considered judicial in nature.

55. NEV. REV. STAT. § 616.542 (1975).

56. 93 Nev. 115, 560 P.2d 1352 (1977).

57. 2 N.J. 356, 66 A.2d 726 (1949).

58. *Id.* at 364, 66 A.2d at 730.

59. Reese, 93 Nev. at 120, 560 P.2d at 1356.

60. 307 So.2d 166 (Fla. 1975). *See* Rotter, *Florida Industrial Relations Commission: More than an Administrative Agency*, 29 U. MIAMI L. REV. 798, 804-05 (1975), *discussing Scholastic Systems, Inc. v. LeLoup.*

61. *In re* Florida Workmen's Compensation Rules of Procedure, 285 So.2d 601 (Fla. 1973).

and cited Black's Law Dictionary as authority for determining the meaning of "judicial function," "judicial power," and the term "judge."[62] The court did not, however, classify the Industrial Relations Commission as a court since creation of unenumerated courts is prohibited by the Florida constitution.[63] The court concluded, "Orders of the IRC [Industrial Relations Commission] are not *administrative* actions, but are *judicial* functions in their reviews of workmen's compensation appeals."[64]

The foregoing discussion indicates that other jurisdictions which have examined workers' compensation adjudicatory processes view the proceedings as being primarily administrative in nature. There is a recognition, however, that a gray area between judicial and administrative functions exists with respect to compensation adjudication. Since the creation of the Workers' Compensation Court, the Montana Supreme Court has tended to adopt this middle view.

b. *Montana's View of the Adjudication Process*

The Montana Supreme Court has stated that the intent of workers' compensation legislation is to protect injured workers and their dependents, as well as to determine employers' liability.[65] Re-

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62. Scholastic Systems, 307 So.2d at 169-70.

63. *Id.* at 170. *See* FLA. CONST. art I, § 9. The judicial nature of the IRC proceedings was recognized in *Scholastic Systems* as satisfying the Florida constitution's due process requirements.

The Nebraska standard for judicial review of Workmens' Compensation Court decisions is unusual in that it has been legislatively, not judicially adopted. The statutory scheme is also unusual in that apparently the Nebraska Supreme Court has not considered whether or not the Workmen's Compensation Court is judicial or administrative in nature. Interestingly, the scheme ties the Workmens' Compensation Court to the judiciary article of the Nebraska constitution. *See* NEB. REV. STAT. § 48-152 (1978 Reissue). *Cf.* MONT. CONST. art. 7, § 1 providing: "The judicial power of the state is vested in one supreme court, district courts, justice courts and such other courts as may be provided by law." MCA § 3-1-101 (1979), however, provides:

> The following are courts of justice of this state:
> 1) The court of impeachment, which is the senate;
> 2) the supreme court;
> 3) the district courts;
> 4) the justice courts;
> 5) the city courts and such other inferior courts as the legislature may establish in any incorporated city or town.

This statute is based on a California statute. The jurisdiction of none of these enumerated courts corresponds with that of the Workers' Compensation Court. In creating the Workers' Compensation Court, the Montana legislature made no reference to MCA sections defining the powers of the district courts. The legislation also made no reference to the judiciary article of the state constitution.

64. Scholastic Systems, 307 So.2d at 171 (court's emphasis).

65. State *ex rel.* Morgan v. Industrial Accident Bd., 130 Mont. 272, 279, 300 P.2d 954, 957 (1956).

lief is intended to be expeditious and without regard to proof of fault.[66] Additionally, the legislation is designed to shift the burden and cost of industrial accidents to the industry itself and to "secure prompt payment of compensation for such injuries by a simple and inexpensive method of procedure."[67]

To realize these legislative goals, it is important that the adjudication of disputes remains a relatively simple procedure. This is particularly true whenever an insurer contests the validity of a claim. If the adjudication process cannot expeditiously resolve a dispute, the goals of the legislation will be frustrated. In enacting House Bill 100 in 1975, the legislature faced the conflict of maintaining this simple, expeditious process and eliminating abuses that had developed with the adjudication procedures.

When the Office of the Workers' Compensation Judge was first created, the court proceeded with very vague guidelines to establish the court under the statutory mandate. Counsel for the legislative committee proposed that the court proceed according to Montana guidelines for adjudication found in the Administrative Procedure Act.[68] This proposal was not without its problems, however. Because appeals from the court are made to the supreme court[69] and the language of MCA § 39-71-2903 (1979) provides that the court is bound by the "appropriate"[70] provisions of the Montana Administrative Procedure Act, the precise nature of the court was unclear. Also, the directive that the Office of Workers' Compensation Judge is not bound by common law and statutory rules of evidence[71] indicates that proceedings before the compensation court differ from proceedings in district court.

Since the creation of the Workers' Compensation Court, the relationship of the court to the judicial and executive branches of government has not been satisfactorily clarified. The legislation creating the court did not expressly provide how the court should operate in relation to the judicial branch of government. Even the Montana Supreme Court has had difficulty classifying what kind of tribunal the Workers' Compensation Court is or ought to be.[72]

The Interim Study Report[73] prepared by the select committee on workers' compensation in contemplation of amending the adju-

66. *Id.* at 286, 300 P.2d at 962.
67. *Id.* at 288, 300 P.2d at 963.
68. MCA tit. 2, ch. 4, parts 6 and 7 (1979).
69. MCA § 39-71-2904 (1979).
70. MCA § 39-71-2903 (1979).
71. *Id.*
72. *See* discussion *infra* at notes 80-84.
73. MONTANA LEGISLATIVE COUNCIL, INTERIM STUDY OF THE SELECT COMMITTEE ON WORKMEN'S COMPENSATION (December 1974).

dicatory procedures indicates the committee's conviction that the office of the Workers' Compensation Court should be judicial in nature.[74] The committee's report, however, reflects vacillation in its perception of the court. For example, two alternative disqualification procedures were proposed for inclusion in the legislation: one patterned after the disqualification procedure found in the Montana Administrative Procedure Act and one patterned after the disqualification-by-right procedure used in district courts. The committee rejected the disqualification-by-right procedure on grounds that such a procedure "would defeat the purpose of having a [workers'] compensation judge with special expertise."[75] The members felt that no great harm was done by leaving it to the judge's discretion whether to disqualify himself.[76] The entire disqualification provision was eliminated from the final text of the legislation creating the judge's office.

The appeal procedure recommended and adopted also distinguishes the Workers' Compensation Court from other administrative agencies. Besides expediting the adjudication process, the committee members wanted to reduce expenses. In proposing an appeals procedure, the select committee decided in favor of direct appeal to the supreme court for several reasons:

> First, the members sought to have an injured worker's claim adjudicated as expeditiously as possible and they felt this would help speed up final adjudications. Second, since the [workers'] compensation judge would not only have all the qualifications of a district court judge but also be an expert in his field, the committee members felt that an appeal to the district court would not only be merely a lateral movement but that it would also cause unnecessary expense and delay. Third, since the judge will be an expert in the field of [workers'] compensation, the committee members felt that there would not be a great volume of cases appealed.[77]

The change in the appellate process brought the wheel full circle. Originally industrial accident boards have been instituted because courts adjudicated workers' claims slowly. As Judge John J. Parker said many years ago:

> Workmens' compensation commissions were established very largely because the courts were not handling efficiently the claims arising out of industrial accidents and it was felt that they would

74. *Id.* at 6.
75. *Id.*
76. *Id.*
77. *Id.*

not administer the compensation acts as efficiently as administrative bodies.[78]

The Montana Supreme Court, though not expressly, has indicated that it views the Workers' Compensation Court somewhere between an administrative and judicial agency. In *Skrukrud v. Gallatin Laundry Co.*,[79] the first appeal from the Workers' Compensation Court, the supreme court characterized the Workers' Compensation Court as "administrative in nature and quasi-judicial."[80] *Stevens v. 4 B's Restaurant, Inc.*[81] followed this holding. In *Hert v. J. J. Newberry Co.*,[82] the court again affirmed this concept, recognizing that decisions of the compensation court are appealable directly to the supreme court, contrary to other administrative proceedings and additionally that the "only opportunity for a worker, an employer, or a carrier to obtain an evidentiary hearing with a record for review respecting the subject in dispute . . . is the hearing that is held before the Workers' Compensation judge."[83]

The Montana Attorney General also has made an assessment of the Workers' Compensation Court. After reviewing all of the appropriate statutory provisions, he concluded the following:

> [The] only viable alternative to finding the Office of Workers' Compensation Judge as part of the judiciary is to declare it to be an administrative agency which possesses quasi-judicial powers. However . . . there are numerous factors which distinguish the position from other administrative agencies and indicates the legislature intended to grant more than quasi-judicial authority.[84]

An analysis of these various opinions does not provide a satisfactory conclusion about the nature of the Montana Workers' Compensation Court. Although future events may require the Montana Supreme Court to analyze the role of the court in more detail, as of the present time, the uncertain nature of the workers' compensation adjudicatory process has not detracted from the effectiveness and near universal approval accorded the court.

3. *Presentation of Evidence in Compensation Proceedings*

Despite the statutory provision that the court is "not bound by

78. AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 5 (5th ed. 1971).
79. 171 Mont. 217, 557 P.2d 278 (1976).
80. *Id.* at 221, 557 P.2d at 280.
81. __ Mont. __, 575 P.2d 1326 (1978).
82. __ Mont. __, 584 P.2d 656 (1978), *reh. denied*, __ Mont. __, 587 P.2d 11 (1978).
83. Hert, __ Mont. __, 587 P.2d at 12.
84. 38 Op. Att'y Gen. No. 27 (1979).

the common law and statutory rules of evidence,"[85] the supreme court has increasingly applied rules of evidence to compensation decisions. Before the court was created, hearings conducted by the Board of Industrial Accidents were to be governed by rules of practice and procedure adopted by the board, not by technical rules of evidence.[86] More than one-half of all the states' statutory schemes provide that common law and statutory rules of evidence do not apply in compensation proceedings.[87] Compensation boards do not have an unfettered rein on the manner in which a disputed claim may be adjudicated, however. The generally adopted New York view is that a "residuum of legal evidence" will be required that would be considered competent by common law standards to uphold an award of compensation benefits.[88] Industrial commissions usually become adept and knowledgeable with respect to the evidence, particularly medical evidence, as it relates to industrial accidents.[89] In *Ross v. Industrial Accident Board,*[90] the Montana Supreme Court deferred to this expertise and recognized the board's superior advantage in considering the credibility of witnesses,[91] and held that the board was bound, just as the courts are bound, if the record contains uncontroverted credible evidence.[92]

The kind of evidence that will support an award and the standard of review of that evidence on appeal have been matters of some confusion, particularly in the case of hearsay evidence. The general rule in Montana has been that evidence will not be excluded in a compensation proceeding because it is hearsay, even though such evidence would be inadmissible in a judicial proceeding.[93] By means of contrast, in California, even though the statutes provide that the commission is not bound by technical rules of evidence, the judicial rule against hearsay evidence is considered to be more than a technicality and cannot be dispensed with by statute.[94]

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85. MCA § 39-71-2903 (1979).

86. R.C.M. 1947, § 92-812 provided that proceedings conducted by the Industrial Accident Board were to be governed by rules of practice and procedure adopted by the board, not by technical rules of evidence. This section was repealed by 1975 Mont. Laws ch. 537, § 7. *See* Annot., 87 A.L.R. 777 (1933).

87. LARSON *supra* note 46, § 79.30.

88. *Id.*

89. LARSON *supra* note 46, § 79.53.

90. 106 Mont. 486, 80 P.2d 362 (1938).

91. *Id.* at 495, 80 P.2d at 364.

92. *Id.*

93. Ross v. Industrial Accident Bd., 106 Mont. 486, 494-95, 80 P.2d 362, 364 (1938); Bergan v. Gallatin Valley Milling Co., 138 Mont. 27, 30, 353 P.2d 320, 321 (1960).

94. Englebretson v. Industrial Accident Comm'n, 170 Cal. 793, 151 P. 421, 432 (1915). *See generally* Annot., 36 A.L.R.3d 12 (1971).

In *Bergan v. Gallatin Valley Milling Co.*,[95] the Montana court allowed hearsay evidence to be introduced, stating that in compensation cases it has consistently disregarded technical rules of evidence and has liberally construed the compensation act in favor of the claimant. The claimant in Montana must still establish his case and bear the burden of proof by a "preponderance of evidence." However, the evidence may include hearsay and the sufficiency of the evidence is determined by the board.[96]

The hearsay exception often lies at the heart of compensation proceedings. The theory is that all evidence ought to be allowed to be presented before the tribunal hearing the dispute. The tribunal then weighs and evaluates, exercising its discretion and superior knowledge to determine the award or order. The hearsay exception is particularly important in terms of medical evidence, which often takes the form of unsworn letters, reports, and other documents.

In *Hert v. J. J. Newberry Co.*,[97] the Montana court departed from the previously recognized practice which allowed hearsay medical evidence in compensation proceedings. Until *Hert* and under the prior practices before the board, the examining tribunal took judicial notice of the entire contents of the claimant's file as compiled by the Division of Workers' Compensation. The file often contained medical reports, recommendations, evaluations and course of treatment, and rates of impairment or disability—all in the form of unsworn documents. The court or the board considered the contents of the file for whatever value they had without attaching any particular significance or credibility to any of that information. In *Hert*, the court held that the compensation court cannot take judicial notice of non-adjudicative facts, citing Rule 201(a) and (b) of the Federal Rules of Evidence.[98] The court stated, "Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. . . . Judicial notice cannot supply evidence in the form of unsworn, hearsay testimony in letters, absent agreement of the parties."[99]

The court's position was clarified on a petition for rehearing where the court stated, in addition, "The Workers' Compensation judge is specifically exempted from common law and statutory rules of evidence. . . . This exception, however, does not apply to the right to cross-examination, which is a fundamental right and

95. 138 Mont. 27, 353 P.2d 320 (1960).
96. *Id.* at 31, 353 P.2d at 321.
97. ___ Mont. ___, 584 P.2d 656, *reh. denied*, ___ Mont. ___, 587 P.2d 11 (1978).
98. *Id.* at ___, 584 P.2d at 662.
99. *Id.*

not an evidentiary rule."[100] The court recognized that the compensation court is the last opportunity for an evidentiary hearing before supreme court review.[101]

The court also criticized the manner in which the medical evidence was introduced at the hearing. The court concluded that the only evidence to support the finding of the compensation court was in the form of medical information which was not properly exchanged with either the Workers' Compensation Court or with opposing counsel, contrary to Rule 10 of the Procedural Rules of Court and that the author of the medical information was not produced at trial, making the report clearly hearsay evidence.[102] While the court attempted to distinguish *Hert* from prior decisions,[103] the distinctions are far from clear. The Workers' Compensation Court is no longer free to consider evidence that each party has not had the opportunity to rebut. *Hert* also limits to some extent the discretion with which the Workers' Compensation Judge is allowed to view the evidence offered at hearing. The doctrine of judicial notice will extend only to undisputed facts.[104]

The problems raised in the *Hert* decision have been obviated to a large extent by implementing new practices to prevent evidence from getting into the record without the opportunity to cross-examine the author of the document. The file maintained by

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100. __ Mont. __, 587 P.2d at 12. The supreme court had previously recognized the *Hert* principle in Rumsey v. Cardinal Petroleum, 166 Mont. 17, 530 P.2d 433 (1975). There the Industrial Accident Board, unable to reconcile conflicting medical reports, asked for and received a written report favorable to the claimant. The insurance company appealed the award of disability, charging it had had no opportunity to cross-examine the author of the report. The court recognized that the rules of evidence were more relaxed in compensation proceedings, but held that the board was still bound by the due process requirement of the Fourteenth Amendment which provides that the opposing party must have reasonable opportunity to meet and rebut the evidence offered. *Id.* at 23, 530 P.2d at 437.

101. __ Mont. __, 587 P.2d at 12.

102. *Id.* at __, 587 P.2d at 13.

103. *Hert,* while not expressly doing so, effectively overruled several prior decisions regarding the hearsay exception. In Brurud v. Judge Moving & Storage, __ Mont. __, 563 P.2d 558 (1977), arising prior to the creation of the Workers' Compensaton Court, no medical evidence was presented at the hearing before the Division of Workers' Compensation although medical reports were contained in the division's file. The supreme court said it was proper for the examiner to consider the evidence since both parties knew what the reports said and neither party made objection or offered any rebuttal at the hearing. *Id.* at __, 563 P.2d 561. The court in Stevens v. Glacier General Assurance Co., __ Mont. __, 575 P.2d 1326 (1978) distinguished medical reports, where the parties are afforded no opportunity to rebut, and depositions. The court disapproved the practice of filing reports subsequent to the hearing, but approved depositions being taken subsequently to the hearing, citing with apparent approval W. Comp. Ct. R. 11 providing for such a procedure. *Id.* at __, 575 P.2d at 1330. *See also* Bond v. St. Regis Paper Co., __ Mont. __, 571 P.2d 372 (1977)(evidence in the form of unsworn medical reports could be considered by the workers' compensation court).

104. Hert, __ Mont. __, 584 P.2d at 662.

the Workers' Compensation Court no longer contains information formerly filed with the division, but instead is initiated with the filing of the petition for hearing by the claimant. Rule 10,[105] requiring the free exchange of all medical information, is strictly enforced by the court. Any failure to follow this procedure carries with it the strong likelihood of dismissal of the petition.

3. *Judicial Review of Workers' Compensation Decisions*

The standard of review of compensation awards is an additional area that has undergone slight permutations since the court's inception. The general standard of review on appeal has traditionally been the "substantial evidence" test.[106] The standard in Montana prior to the creation of the Workers' Compensation Court was similar to the substantial evidence test, although additional evidence was allowed to be introduced at the district court level proceedings which in some cases became the equivalent of a trial de novo.[107]

Since the creation of the Workers' Compensation Court, the supreme court has not altered its articulation of the standard of review to be used. A decision rendered by the Workers' Compensation Court continues to carry with it a presumption of correctness. In *Jensen v. Zook Brothers Construction Co.*,[108] the court stated:

> The standard of review applicable in determining the sufficiency of the evidence to support the findings of the Workers' Compensation Court has been stated in this language: "Our function in reviewing a decision of the Workers' Compensation Court is to determine whether there is substantial evidence to support the findings and conclusions of that court. We cannot substitute our

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105. W. Comp. Ct. R. 10.

106. Kimball v. Continental Oil Co., 170 Mont. 86, 550 P.2d 912 (1976); Skrukrud v. Gallatin Laundry Co., 171 Mont. 217, 557 P.2d 278 (1976); Flansburg v. Pack River Co., ___ Mont. ___, 561 P.2d 1329 (1977).

107. A good discussion of judicial review of workers' compensation cases prior to the creation of the Workers' Compensation Court is found in Comment, *District Court Judicial Review in Montana Workmens' Compensation Cases*, 30 MONT. L. REV. 167 (1969). R.C.M. 1947, § 92-834 allowed a trial de novo in compensation cases that were appealed to the district court. Additional evidence was also allowed to be introduced. This statute created some question whether the district court could conduct only a review for abuse of discretion or whether it could retry the issues. The Montana Supreme Court in Dosen v. East Butte Copper Mining Co., 78 Mont. 579, 254 P. 880 (1927), indicated that the trial would be de novo only to the extent new evidence was introduced in district court, although the court vacillated on this position. Sykes v. Republic Coal Co., 94 Mont. 239, 22 P.2d 157, (1933). *Cf.* Paulich v. Republic Coal Co., 110 Mont. 174, 102 P.2d 4 (1940) (where the board failed to hold a hearing, the district court could proceed to make a determination of the dispute in the first instance).

108. ___ Mont. ___, 582 P.2d 1191 (1978).

judgment for that of the trial court as to the weight of evidence on questions of fact. Where there is substantial evidence to support the findings of the Workers' Compensation Court, this Court cannot overturn the decision."[109] (citations omitted)

Even though the standard of review of Workers' Compensation Court proceedings articulated by the Montana Supreme Court is the same standard of review for other administrative agency decisions, the supreme court has applied rules of evidence and civil procedure in reviewing compensation appeals. For example, in *Clark v. Hilde Construction Co.*,[110] the court held that the claimant must establish his claim by a preponderance of evidence. But the court went further, apparently applying rules of evidence to compensation court proceedings. The court cited MCA § 26-1-602 (1979)[111] and MCA § 26-1-303(6) (1979), the latter of which provides that:

[i]f weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.[112]

Certain rules of civil procedure may also be binding on the Workers' Compensation Court. In *McGee v. Bechtel Corp.*,[113] the supreme court treated the Workers' Compensation Court in effect as a district court. In that case, the court cited Rule 52(a) of the Montana Rules of Civil Procedure, and apparently applied the "clearly erroneous"[114] test from that rule.

The court went outside the scope of the Montana Administrative Procedure Act in *Dumont v. Wickens Brothers Construction Co.*[115] when, for the first time, the court applied rules of appellate civil procedure as well as other rules of civil procedure to workers' compensation cases. The Workers' Compensation Court was

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109. *Id.*, 582 P.2d at 1193.

110. ___ Mont. ___, 576 P.2d 1112, 1115 (1978).

111. MCA § 26-1-602 (1979) is part of the Montana statutory provisions on evidence and enumerates disputable presumptions.

112. MCA § 26-1-303(6) (1979) is the statutory instruction to a jury regarding evaluation of evidence.

113. ___ Mont. ___, 595 P.2d 1156 (1979).

114. MONT. R. CIV. P. 52(a) reads in pertinent part:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The "clearly erroneous" test was made applicable to actions tried by district courts and as well to causes tried before the Workers' Compensation Court in Hert, ___ Mont. ___, 584 P.2d at 659.

115. ___ Mont. ___, 598 P.2d 1099 (1978).

treated as a district court for purposes of filing notice of appeal from a final decision.[116]

III. CONCLUSION

The Montana Workers' Compensation Court, created in 1975 by legislative enactment, is an administrative body organized to carry out the judicial function of hearing and settling disputed workers' compensation claims efficiently and effectively. Since its creation the court has heard a burgeoning number of cases and has tried to formulate its procedural rules in conformity with the legislative mandate. The legislation has proved to be vague in several respects, however, including the very nature of the Workers' Compensation Court, and the kind of evidence and manner of its presentation that will be acceptable both to the court and the requirements of due process.

The Montana Supreme Court has interpreted the legislature's provisions numerous times. In its decisions the supreme court has gone to some lengths to ensure the Workers' Compensation Court a position somewhere between the executive and judicial branches of government. In addition, the supreme court's alteration of the hearsay exception rule and the application of the rules of civil procedure and evidence to workers' compensation proceedings reflect the increased inclination of the court to regard the Workers' Compensation Court as a judicial entity.

116. The Montana Supreme Court in *Dumont* applied MONT. R. APP. CIV. P. 4(a), 5, 21(a) and (c) and MONT. R. CIV. P. 77(d) to Workers' Compensation Court proceedings, the effect of which is to add three days to the prescribed thirty-day period for filing notice of appeal of a compensation proceeding where service of notice of final decision of the Workers' Compensation Court is by mail. The court analogized from the Montana Administrative Procedure Act, MCA § 2-4-623 (1979), which provides that "[p]arties shall be notified either personally or by mail of any decision or order . . ." to MONT. R. CIV. P. 77(d) which provides for notice of orders and judgments from the district courts. Dumont, ___ Mont. ___, 598 P.2d at 1103-05.