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Appellate Review of Workmen's Compensation Cases in Nebraska

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Comment

APPELLATE REVIEW OF WORKMEN'S COMPENSATION CASES IN NEBRASKA

I. INTRODUCTION

The current procedure governing appellate review of workmen's compensation cases in Nebraska is the product of numerous and uncoordinated legislative actions. The state's first workmen's compensation statute, enacted in 1913, provided that "report[s] of all settlements and releases [in compensation cases] shall be filed by the employer with the Labor Commissioner . . . ."[1] The legislature also provided in 1913 that all contested compensation cases were to be adjudicated by the district courts.[2] This procedure for review of compensation cases was first altered in 1917. In that year the legislature created the office of compensation commissioner and made it the commissioner's duty to execute the compensation statute.[3] The commissioner's actions were appealable to the district courts for a trial *de novo*.

Nebraska's compensation system was administered under the 1917 administrative agency format until 1935 when it was substantially revised. In that year the legislature, recognizing that "an impartial and efficient administration of the Nebraska Workmen's Compensation Law is essential to the prosperity and well-being of this state," created the Workmen's Compensation Court under the Judicial article of the state constitution.[4] Under the 1935 legislation one judge of the compensation court was directed to first hear and make findings and awards in contested cases;[5] these awards were made reviewable by the compensation court *en banc*.[6] The legislature then made the judgments of the compensation court *en banc* appealable to the district courts in the form of an error proceeding.[7] But the 1935 amendments to the compensation act retained the previously enacted procedure for appeals from the compensation commission by allowing a party to waive a rehearing by the workmen's compensation court *en banc* and appeal directly

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[1] Neb. Laws c. 198, § 45 (1913).

[2] Neb. Laws c. 198, § 39 (1913).

[3] Neb. Laws c. 85, § 27 (1917).

[4] NEB. COMP. STAT. § 48-162 (Supp. 1935).

[5] NEB. COMP. STAT. § 48-174 (Supp. 1935).

[6] *Id.*

[7] *Id.*

to the district courts for a hearing *de novo*.[8] Any judgment of a district court, whether made after a rehearing by the compensation court *en banc* or not, was made appealable to the Nebraska Supreme Court.[9] Substantially this same procedure is employed in workmen's compensation cases in Nebraska today.

II. OBJECTIVES OF NEBRASKA'S COMPENSATION LAW

Workmen's compensation represents a significant departure from the earlier procedures through which an injured employee could redress grievances against his employer that accrued from injuries incurred in the course of his employment. Under workmen's compensation the ordinary negligence of the employee plays no role in the adjudication of the employee's claim for benefits provided by the compensation statute.[10] Rather, the injury must be sustained "in the course of and arising out of" the employment for recovery to be possible under the workmen's compensation law.[11] Before the adoption of the compensation law, redress of a work related injury depended upon general tort theory, i.e., upon the fault of the employer and the absence of any common law defenses. The workmen's compensation system has wholly supplanted the tort approach to the litigation of these cases.[12]

In addition to the substitution of a definite benefit in the form of compensation for the unpredictable tort approach to redress of an employee's claim against his employer, there was a strong legislative policy to afford injured persons a speedy and inexpensive procedure for the determination, review, adjustment, and payment

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[8] *Id.*

[9] *Id.*

[10] Only willful negligence on the part of the employee in the performance of his duties is relevant to the adjudication of compensation cases. NEB. REV. STAT. § 48-101 (Supp. 1971).

[11] The rule for determining whether one is entitled to compensation is embodied in NEB. REV. STAT. § 48-101 (Supp. 1971), which provides: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefore from his or her employer if the employee was not willfully negligent at the time of receiving such injury."

[12] The common law defenses were originally deleted from the law of workmen's compensation by NEB. COMP. STAT. § 3643 (1913). NEB. REV. STAT. § 48-102 (Supp. 1971), still prevents the use of these defenses. Although the workmen's compensation system was intended to replace traditional tort approaches to recovery, an injured employee can elect to seek recovery in tort and thereby waive his right to recover under workmen's compensation.

of claims for work-related injuries.[13] To this end the Nebraska Legislature enacted specific time-periods in which the compensation court is required to act on contested compensation cases.[14] Similarly, the district courts are required to hear and dispose of compensation cases appealed to them within fourteen days whether the court is in term or not.[15] Even the state supreme court is directed by the compensation statute to hear and dispose of appeals involving workmen's compensation more speedily than it must dispose of other docketed cases. The legislature specifically provided that:

> Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law. Such appeal shall be perfected within one month from the rendition of judgment by the district court, the cause shall be advanced for argument before the Supreme Court, and the Supreme Court shall render its judgment and write an opinion in such cases as speedily as possible.[16]

The Nebraska Supreme Court has frequently noted the nature of the legislature's mandate and has often reiterated the objective of the compensation system. The court has generally held that the compensation statute is remedial in character and that its purpose is to do justice without expensive litigation and unnecessary delay.[17] The court recognized this objective in an early case where it held that:

> [T]he employer's liability act was intended by the legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and his employer. It was intended to take the place of the tort action with its tedious delays and technicalities that so often clog and at times totally defeat the administration of justice.[18]

The supreme court has maintained this position so rigorously that it has affirmed the decision of a judge who heard only a portion of the evidence at the trial on the ground that the legislature had intended to provide for speedy adjudication of workmen's compensation claims.[19] Indeed, the Nebraska court noted that "in some

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[13] Schesselman v. Travelers Ins. Co., 111 Neb. 65, 195 N.W. 466 (1923).

[14] NEB. REV. STAT. § 48-164 (Reissue 1968).

[15] NEB. REV. STAT. § 48-184 (Reissue 1968).

[16] NEB. REV. STAT. § 48-185 (Reissue 1968).

[17] Gill v. Hrupek, 184 Neb. 436, 439, 168 N.W.2d 377, 379 (1969).

[18] Biedeck v. Acme Amusement Co., 102 Neb. 128, 131, 166 N.W. 193, 194 (1918).

[19] Western Newspaper Union v. Dee, 108 Neb. 303, 187 N.W. 919 (1922). The trial judge whose judgment was affirmed in this case had heard only a portion of the evidence put on at trial because the trial had been recessed while the parties negotiated, and during the recess the original judge had left the state.

respects compensation cases take precedence over other cases by a specific enactment of the legislature."[20]

In its efforts to provide for speedy and inexpensive adjudication of compensation claims, the Nebraska Legislature gave the Compensation Commission, the body that then exercised original jurisdiction over the claims of injured workmen under the act, wide discretion for conducting cases and arriving at decisions. The legislature originally provided that:

> The compensation commissioner shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of Article 8, chapter 35, Revised Statutes of Nebraska for 1913, and any act or acts amendatory thereof.[21]

This expression of legislative policy indicates that the courts with original jurisdiction were not only to have wide latitude in awarding or refusing compensation but also that appellate courts were to modify the findings of the lower courts only where the errors were material. This limited appellate review was to apply with particular force where the errors of the lower courts were factual, not legal, in nature. Had the legislature not intended to secure the findings of the trial courts from review by the appellate courts, except for material errors, there would have been no reason for granting the trial courts such wide discretion in judging compensation cases. It is clear, then, that under the original workmen's compensation statute, Nebraska's appellate courts were to have only limited power to review the findings of the lower courts.

III. OBSTACLES PREVENTING EFFECTIVE APPELLATE REVIEW IN COMPENSATION CASES

The objectives of the compensation system, i.e., to provide speedy, inexpensive and equitable procedures for processing the

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[20] *Id.* at 306, 187 N.W. at 921.

[21] This articulation of the legislature's desire to have the courts sacrifice technical precision for compliance with the objectives of the compensation system was first recorded at Neb. Laws c. 85, § 29(b) (1917). The language of the 1917 statute is still a part of the compensation law except that the final line of the section now reads: "but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of sections 48-101 to 48-190." NEB. REV. STAT. § 48-168 (Reissue 1968). As a matter of practice, however, the compensation court is inclined to adhere to the formal rules of evidence though they are not bound to do so by the statutes.

claims of injured workmen, remain substantially unfulfilled. In many compensation cases the procedures outlined by the current statute have proven to be tedious and cumbersome. The sluggish nature of this process has greatly disadvantaged the injured employee who must have his case settled promptly to be able to support his family.

Among the most overt causes of the failure of the compensation system to meet its objectives are the increased number of cases on the docket of the compensation court,[22] the superior bargaining position of the employer and the ready availability of expert witnesses for the employer who enjoys greater affluence than the injured employee. Additionally, recovery of compensation is frequently delayed because insurance companies that carry compensation insurance for the employer must be consulted in the negotiation or defense of compensation cases. Insurance companies may be less anxious to see cases settled quickly than employers. An employer, unlike an insurance company, has an interest in having his employee's claim settled quickly and justly so his other employees are not disquieted by their employer's attitude toward his injured workman.

Numerous procedural devices in Nebraska's compensation law are designed to equalize the respective positions of the injured employee and his employer. The legislature provided, for example, that proceedings for compensation cannot be maintained "unless notice of the injury shall have been given to the employer as soon as practicable after the happening thereof . . . ."[23] The Nebraska Supreme Court construing this provision of the compensation law has held that an employee need not give formal written notice of an injury if the employer has actual notice thereof.[24] The judicial interpretation of this legislative requirement has been so liberal as to hold that even a request for medical service was sufficient to satisfy this section of the statute.[25]

The quest for speedy disposal of compensation claims can cut against the interests of the injured workman. The Nebraska Su-

[22] This increase is reflected in increases in both the estimated number of workers covered per month and in the amount of compensation paid. STATISTICAL ABSTRACT OF THE UNITED STATES, No. 447, at 295 (1970). Statistics cataloged in the *Annual Reports of the Nebraska Workmen's Compensation Court* for 1971 indicate that over the past eleven years the number of cases filed in Nebraska has risen from 41,670 in fiscal year 1960 to 48,940 in fiscal year 1971.

[23] NEB. REV. STAT. § 48-313 (Reissue 1968).

[24] Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N.W. 688 (1930).

[25] Gilbert v. Metro. Util. Dist., 156 Neb. 750, 57 N.W.2d 770 (1953).

preme Court has held on numerous occasions that a claim for compensation is barred unless it is filed with the compensation court within six months or unless a petition is filed within one year of the date of injury.[26] This rule is not applied in cases involving latent injuries.[27]

The court has generally held that "the applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficient purposes may not be thwarted by technical refinement of interpretation."[28] This rule of liberal construction seeks to attain the objectives of the workmen's compensation system; hence, it applies only to questions of law and does not mitigate the plaintiff's burden of proof of facts sufficient to support his case.[29] This apparently means that the lower courts must comply with the objectives of the compensation act even if the cost of attaining the goals of the system is forfeiture of the requirement of strict compliance with the technical procedures delineated by the statute.

Despite the judicial doctrine of liberal construction of the compensation act which allows only limited review of questions of fact and which allows injured employees to obtain compensation even if they fail to comply with the technical procedures of the statute, the primary objective of the system has not been satisfied. Contested compensation cases still must pass through expensive and sluggish appeals before the injured workman can get the statutory benefits that he seeks.[30]

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[26] The time periods during which a claim is required to be filed are prescribed by NEB. REV. STAT. § 48-133 (Reissue 1968). The supreme court has held that failure to comply with these technical provisions of the compensation law will bar an injured workman from recovering compensation. Walton v. Swift & Co., 125 Neb. 455, 250 N.W. 661 (1933).

[27] Bame v. Lipsett, Inc., 172 Neb. 623, 111 N.W.2d 380 (1961). However, the burden of proof of the latent nature of the injury is on the plaintiff. Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N.W.2d 237 (1965).

[28] Wheeler v. Northwestern Metal Co., 175 Neb. 841, 845, 124 N.W.2d 377, 380 (1963).

[29] Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N.W.2d 159 (1964).

[30] With reference to the problem of providing for speedy determination of compensation claims in Ohio, which has a procedure that resembles Nebraska's, it has been said that:

> "[C]ases are not speedily brought to trial even though the law specifically requires that such cases be given priority for hearings. It is not unusual to have several thousand compensation cases, some of which have lain dormant in the courts for as long as 5

IV. REVIEW OF CURRENT COMPENSATION PROCEDURE

The Nebraska Workmen's Compensation law requires that all disputed claims for compensation be submitted to the Nebraska Workmen's Compensation Court for determination.[31] That court is empowered to examine parties or witnesses under oath, to issue subpoenas and to enforce its judgments.[32] It is also charged with the duty of conducting itself reasonably to carry out the intent of the compensation act.[33]

A compensation case is heard for the first time by a single judge of the workmen's compensation court.[34] This one-judge court, like the workmen's compensation court *en banc,* is empowered to receive and examine evidence, to make determinations and to enforce them.[35] It is not clear from the statutes whether the legislature wanted a record made of the original hearing before the one-judge court; in practice, however, no record is made at the original hearing of a compensation claim.[36] The burden is on the claimant to establish by a preponderance of the evidence that he is entitled to compensation, and the rule of liberal construction of the Act applies only to questions of law and not to questions of fact.[37]

Appeals from the findings made at the conclusion of the original hearing can be taken in either of two ways: (1) the appeal can be taken to the Nebraska Workmen's Compensation Court *en banc;*[38] or (2) the appeal can be taken directly to the district court of the county in which the accident occurred.[39] In either case the claim

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years, awaiting a trial. That being the case, a claimant depending upon compensation benefits is seriously inconvenienced by the neglect and delay to promptly hear his case. This certainly is not the intent or spirit of the law." Keller, *Recommended Changes in Ohio Workmen's Compensation,* 17 CLEV.-MAR. L. REV. 122, 125 (1968).

The average lag times experienced in compensation cases processed through Nebraska's compensation system are delineated in the Appendix. The chart set out in the Appendix is from the *Annual Report of the Nebraska Workmen's Compensation Court* for 1971.

31 NEB. REV. STAT. § 48-161 (Reissue 1968).

32 NEB. REV. STAT. § 48-162 (Reissue 1968).

33 NEB. REV. STAT. § 48-163 (Reissue 1968).

34 NEB. REV. STAT. § 48-177 (Reissue 1968).

35 NEB. REV. STAT. § 48-178 (Reissue 1968).

36 Cashen, *Practice and Procedure Before Nebraska Workmen's Compensation Court,* 41 NEB. L. REV. 151, 160 (1961).

37 Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N.W.2d 159 (1964).

38 NEB. REV. STAT. § 48-179 (Supp. 1971).

39 NEB. REV. STAT. § 48-181 (Reissue 1968).

is retried in a trial *de novo,* and at this juncture, a record of the evidence and findings is made.[40] If either party to a compensation proceeding desires that the case be heard by the workmen's compensation court *en banc,* the right of a single party to be heard in that court preempts the waiver of a rehearing in that court by the opposing party[41] who has chosen, instead, an immediate appeal to the district court by way of trial *de novo.* This right is paramount to, and exclusive of, the right to appeal directly to the district court.[42]

If the case does go to the workmen's compensation court *en banc,* an appeal of a determination of that court must be taken, if one is desired, to the district court.[43] For the purposes of this appeal, a transcribed copy of the testimony and evidence taken before the compensation court *en banc* must be filed with the district court. This transcript becomes the bill of exceptions upon certification.[44] The appeal from the compensation court *en banc* to the district court is in the form of an error proceeding.[45] The district court, in this situation, must make its decision from the record and from the oral arguments of counsel. The district court can set aside or modify the findings of the compensation court *en banc* only if it finds one of the following: (1) the court acted without or in excess of its powers; (2) the order or award was procured by fraud; (3) the findings of fact of the court were not supported by the record; or (4) the findings of fact by the court did not support the order or award.[46]

The compensation act provides one procedure for appeal from a judgment of the district court to the Nebraska Supreme Court.[47] The state's highest court is statutorily limited to setting aside or modifying a judgment of the district court only upon grounds which resemble those by which the district court can modify or set aside a judgment of the compensation court *en banc.*[48] Originally, the statute provided that:

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[40] NEB. REV. STAT. § 48-181 (Reissue 1968); NEB. REV. STAT. § 48-179 (Supp. 1971).

[41] Light v. Nebraska Workmen's Comp. Court, 166 Neb. 540, 89 N.W.2d 833 (1958).

[42] Skalak v. Seward Co., 174 Neb. 659, 119 N.W.2d 43 (1963).

[43] NEB. REV. STAT. § 48-182 (Supp. 1971).

[44] *Id.*

[45] NEB. REV. STAT. § 48-184 (Reissue 1968).

[46] *Id.*

[47] NEB. REV. STAT. § 48-185 (Reissue 1968).

[48] *Id.*

> [A] judgment, order or award of the district court may be modified or set aside only upon the following grounds: (1) that the court acted without or in excess of its powers. (2) that the judgment, order or award was procured by fraud. (3) that the findings of fact are not *conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered de novo upon the record.* (4) that the findings of fact by the court do not support the order or award.[49]

An appeal to the supreme court, like that to the district court, is substantially in the form of an error proceeding since the grounds upon which the supreme court can make modifications in the judgments of the lower courts are limited. There is, however, one critically significant distinction between the appeal from the compensation court *en banc* to the district court and the final appeal to the state supreme court. The district court, in an error proceeding, is limited to the record made in the compensation court *en banc* and the oral arguments of counsel in making its determination. On appeal from the district court, however, the supreme court had, until recently, heard all compensation cases in the form of a trial *de novo* upon the record.[50] Of this procedure the Nebraska Supreme Court has stated that:

> The appellant contends that an appeal to the district court after a rehearing before the compensation court en banc, is in the nature of an error proceeding, and the district court is without authority in such a case to disturb questions of fact supported by evidence. The previous holdings of this court support this contention. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212, and cases therein cited. Even though the district court is so limited, an appeal therefrom to this court is considered de novo upon the record. Werner v. Nebraska Power Co., 149 Neb. 408, 31 N.W.2d 315. Under such circumstances the manner in which the district court considered the case is of little concern. Whether or not the trial court properly considered the controlling issues, the case is here de novo for all practical purposes. While the situation is an anomalous one, it has long been the rule.[51]

As the court tacitly stated, the mere fact that the present procedure has long been employed in deciding workmen's compensation cases in Nebraska does not present a compelling justification for perpetuating the use of those procedures.

The supreme court originally adopted the position that it had to hear compensation cases *de novo* upon the record because the legislature had provided that the judgments of the district courts

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[49] Neb Laws c. 57, § 13 (1935) (Emphasis added).

[50] *See, e.g.*, Murphy v. HiWay GMC Sales & Service Corp., 178 Neb. 397, 133 N.W.2d 595 (1965).

[51] Miller v. Peterson, 165 Neb. 344, 346, 85 N.W.2d 700, 701 (1957).

could be modified or set aside if "the findings of the fact [were] not conclusively supported by the record."[52] The court concluded for the first time in *Werner v. Nebraska Power Co.*[53] that:

> If upon review [of the evidence by trial *de novo*] we find the award is conclusively supported by the evidence, that ends the matter. If, however, as a result of a review of the evidence on a trial de novo we find that the award should be sustained, it is not necessary to determine the question as to whether the award is "conclusively supported by the evidence." If we find as a result of a trial de novo that the award should be modified or set aside, then obviously it is not conclusively supported by the evidence. As a practical proposition our review here is de novo upon the record.[54]

After the *Werner* decision the legislature amended section 48-185 of the Nebraska statutes by removing the word "conclusively" from part (3) of that section.[55] Thus, the legislature directed the supreme court to hear compensation cases *de novo* upon the record only where the evidence did not support, as opposed to not conclusively supporting, the findings of fact made by the lower courts. The Nebraska Supreme Court, however, continued to hear compensation cases which had been appealed to it from a decision of the district courts under the "conclusively supported" criterion which had been a part of the original statute.[56] In June of 1971 the court recognized the legislative changes in the grounds for modifying or setting aside the judgments of the district courts. The court held in a unanimous opinion written by Judge McCown in *Gifford v. Ag Lime, Sand & Gravel*[57] that:

> We think it clear that a reasonable interpretation of section 48-185, R. R. S. 1943, as amended in 1953, is that the standards for modifying or setting aside a judgment or award, and in measuring the findings of fact by the trial court in a workmen's compensation case, are to be the same whether the review is by the district court or by this court. Appellate review in this court requires consideration and review of the record in all cases. That consideration must ordinarily take account of the determination of the trial court or jury as to the factual issues. This is particularly true in dealing

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[52] Neb. Laws c. 57, § 13 (1935).

[53] 149 Neb. 408, 31 N.W.2d 315 (1948).

[54] *Id.* at 409, 31 N.W.2d at 316.

[55] NEB. REV. STAT. § 48-185 (Reissue 1968).

[56] For an example of the kinds of things considered on de novo review by the supreme court see Arlauskas v. Western Electric Co., 180 Neb. 790, 145 N.W.2d 925 (1966). There the supreme court found as a matter of fact that: "Plaintiff looked like a man in severe shock with profuse diaphoresis," and, "Plaintiff could distinguish only gross objects and light, and his right eye appeared to be deviated externally." *Id.* at 791, 145 N.W.2d at 926.

[57] 187 Neb. 57, 187 N.W.2d 285 (1971).

> with appeals which are in the nature of actions at law. De Novo review implies an independent determination of the facts without restriction by any previous factual determinations made in the lower court. While the distinction may be technical, it is nevertheless a vital one. Appellate courts do not ordinarily determine factual issues de novo except when required by statute.
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> We therefore hold that on appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of evidence. We also hold that upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. To the extent that the holding of *Rapp v. Hale*, 170 Neb. 620, 103 N.W.2d 851, and subsequent cases on these issues are in conflict, they are overruled.[58]

The Nebraska Supreme Court has now decided to review compensation cases *de novo* upon the record only where there is no "competent evidence" to support the findings of fact of the lower courts.

Though the nature of this change in the standard for review of compensation cases is substantial, the impact which the change will have in practice is unclear. Past usage of the phrase "competent evidence" by the Nebraska court in compensation cases indicates that the *Gifford* standard for review may signify nothing more than a change in the lexicon of the court.[59] At any rate, it is probable

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[58] *Id.* at 63, 187 N.W.2d at 289.

[59] *See, e.g.*, Welke v. Ainsworth, 179 Neb. 496, 503, 138 N.W.2d 808, 812-13 (1965), where the court stated: "In reaching this conclusion, we are not unmindful of the fact that an award of compensation in a workmen's compensation case may not be based on possibility, *probability*, or speculative evidence. . . . As we said in . . . *Schwabauer v. State*, 147 Neb. 620, 24 N.W.2d 431: 'If a claimant has adduced *competent evidence* having a probative value which *preponderantly* convinces the trier or trier of fact . . . notwithstanding the trier of fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal therefrom must be sustained.'" (Emphasis added.) *Welke* indicates that "competent evidence" must preponderate in favor of a party or a judgment in that party's favor will be set aside on appeal. Assuming the phrase "competent evidence" has the same meaning in *Gifford* as it had in *Welke*, the *Gifford* standard for review of compensation cases still requires the evidence to preponderate in favor of the party who obtained judgment in the lower court or that judgment will be modified by the Nebraska Supreme Court. To determine whether the evidence properly preponderates to support the lower court's judgment, the supreme court must reweigh the evidence under the *Gifford* standard just as it did before. Hence, *Gifford* appears to do nothing more than set the old standard for review of compensation cases in different terminology.

that some cases will be tried *de novo* by the supreme court in the future. Clearly, according to both the mandate given the court by the legislature[60] and the holding of the court in *Gifford,* compensation cases must be so tried if the supreme court finds that the evidence supporting the findings of the lower courts is not reasonably competent.

Two workmen's compensation cases decided by the court since it announced its decision in *Gifford* have made the significance of *Gifford* in future compensation cases most difficult to foretell. In *Adler v. Jerryco Motors, Inc.*[61] the court waivered from its position in *Gifford* when it held that "In a workmen's compensation proceeding a district court finding against a party will be set aside if the evidence compels a finding for that party. When we set aside a material finding because of the evidence we will consider the cause de novo."[62]

Taken literally, it seems that the court in reaching its holding in *Adler* reverted to its old practice of reviewing the evidence to determine whether it "conclusively supports" the findings of fact of the lower courts and substantially disregarded its holding in *Gifford.* In *Johnson v. Hahn Bros. Construction, Inc.*[63] decided just two months after *Adler,* the court set out its holding in *Gifford* and applied that holding strictly. After reciting the facts and reviewing the *Gifford* decision, the court held in *Johnson* that:

> The evidence without dispute supports a finding that Johnson was on the work premises at the time of his injury; there is reasonable competent evidence to support a finding that at the time of his injury he was in the act of reporting to the foreman for the purpose of obtaining his work assignment. This brings him within the ambit of the rules just stated.[64]

Past usage of the phrase "competent evidence" and inconsistent application of the *Gifford* standard for appellate review have so obfuscated the import of that holding that it is impossible to gauge the significance that *Gifford* holds for future contested compensation cases. The *Adler* case, decided after *Gifford,* does make it clear that *de novo* review of compensation cases remains possible in the supreme court. For the reason that trial *de novo* upon the record remains possible in the supreme court, it is inevitable that the court will be called upon repeatedly to determine nothing more

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[60] NEB. REV. STAT. § 48-185 (Reissue 1968).

[61] 187 Neb. 757, 193 N.W.2d 757 (1972).

[62] *Id.* at 760, 193 N.W.2d at 760.

[63] 188 Neb. 252, 196 N.W.2d 109 (1972).

[64] *Id.* at 257, 196 N.W.2d at 113.

than whether the evidence in particular cases is reasonably competent to support the determinations made by the lower courts on issues of fact. Consequently, the change made by the *Gifford* case in the standard for review of contested compensation cases, whatever the extent of that change may be, is no panacea that will substantially lighten the case load of the supreme court. Despite *Gifford,* parties to contested compensation cases will still face the possibility of protracted litigation and will still be forced to bear the financial burdens that have long accompanied appellate review of compensation cases. Certainly the change effected by *Gifford* has not and will not result in abrupt realization of the aspirations of the provisions of the compensation act relating to appellate review.

V. A COMPARISON OF NEBRASKA'S COMPENSATION PROCEDURE WITH THOSE OF OTHER JURISDICTIONS

The appellate procedure prescribed by the Nebraska workmen's compensation act is clearly atypical.[65] This is particularly true of the procedure employed on appeal to the Nebraska Supreme Court. In most jurisdictions in the United States, judicial review of awards made by lower courts or administrative bodies in compensation cases is confined solely to questions of law.[66] In these jurisdictions the evidence supporting the factual determinations made by the lower bodies is not considered by the appellate courts,[67] and the findings of fact made by the lower courts are conclusive and irreversible if they are supported by any substantial evidence or any reasonable interpretation thereof.[68] In many jurisdictions the appellate courts cannot modify or set aside the findings of fact made by the lower courts[69] even where they are convinced that the weight of the evidence is contrary to those findings.[70] This is, of course, not true in Nebraska where the findings of fact are redetermined by the appellate court in a trial *de novo* if they are not sup-

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[65] The general rule governing appellate review of workmen's compensation claims is succinctly stated in 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 80.00, at 244 (1970).

[66] *Id.* § 80.10, at 246.

[67] *Id.* § 80.20, at 264.

[68] This position was taken by the Supreme Court in Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947).

[69] *See* note 65 *supra.*

[70] For an example of where a state supreme court was bound to the findings of fact of the district court which were supported by the medical testimony of one doctor and were contrary to the testimonies of ten doctors see Richards v. J-M Service Co., 164 Kan. 316, 188 P.2d 939 (1948).

ported by "reasonably competent" evidence.[71] The Nebraska rule governing when and how extensively the findings of fact made by the lower courts can be modified or set aside is much less stringent than the majority rule. The uncommon nature of the Nebraska rule and the uncompromising character of the majority rule are implicitly stated in Larson's treatise on workmen's compensation law where it is observed that:

> Except in a minority of jurisdictions that have adopted a different standard of review, the reviewing court will not ordinarily weigh the evidence nor substitute its judgment for that of the commission on findings of fact or choices between conflicting testimony or inferences, even when it is convinced that the weight of evidence is contrary to the commission's findings.
>
> The rule in its undiluted form requires that, when the particular finding is supported by credible evidence, it must be affirmed when contrary, not only to the weight, but even to the clear preponderance of the evidence.[72]

The majority rule governing appellate review of compensation cases which allows judgments that are clearly against the preponderance of evidence to stand is harsh in its undiluted form. The Nebraska procedure, however, appears to have even more undesirable consequences. In addition to injecting an additional, superfluous and time-consuming step into the procedure for adjudicating compensation claims, the Nebraska procedure requires that the supreme court spend a substantial quantity of its time perusing highly technical facts just to determine whether those facts are reasonably competent to support the findings of fact of the lower courts.[73] This procedure seems particularly wasteful when it is observed that the lower courts in Nebraska, particularly the workmen's compensation courts, are specialized courts that function for the essential purpose of making decisions in cases involving highly complex and technical evidence.[74]

The Nebraska Supreme Court has clearly expressed its desire to have the legislature change the present procedure for review of workmen's compensation cases. In a recent case the court specifically stated that "[i]t is desirable that the Legislature simplify

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[71] NEB. REV. STAT. § 48-185 (Reissue 1968).

[72] *See* note 65 *supra.*

[73] For examples of cases in which the Nebraska Supreme Court has had to determine questions of a highly complex factual nature see Shoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N.W.2d 547 (1966), and Arlauskas v. Western Electric Co., 180 Neb. 790, 145 N.W.2d 925 (1966).

[74] NEB. REV. STAT. § 48-152 (Reissue 1968).

practice and proceedings in these cases."[75] The Nebraska State Bar Association, in accepting the reports of various committees, has also gone on record on five separate occasions as being in favor of changes in the procedures prescribed by the Nebraska Workmen's Compensation Act.[76]

VI. PROPOSED CHANGES IN NEBRASKA'S WORKMEN'S COMPENSATION PROCEDURE

The essential change in the procedure for supreme court review of compensation cases in Nebraska should be three-fold: (1) a procedure for direct appeal to the supreme court from the workmen's compensation court *en banc* should be provided; (2) the findings of fact made by the lower courts should bear a presumption of validity and should be disturbed only where supported by no evidence or only by evidence received and/or relied on through the commission of a material error of law;[77] (3) although the supreme court should be empowered to modify or set aside judgments based on improper evidence, that court should not be able to redetermine the facts, i.e., it should not be allowed to conduct a trial *de novo* upon the record. These are the three overt areas in which the Nebraska procedure for appellate review of workmen's compensation cases could be substantially improved.

Alteration of the procedure for appellate review of compensation cases in the three areas described above would alleviate the undesirable results which accrue from the system presently used

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[75] Marshall v. Columbus Steel Supply, 187 Neb. 102, 104, 187 N.W.2d 607, 609 (1971).

[76] Expressions of the sentiments of the Nebraska State Bar Association concerning the procedure for processing a compensation claim are clearly delineated in the proceedings of the Bar Association conventions reported in Nebraska State Bar Ass'n, *Report of Judicial Council,* 48 NEB. L. REV. 699 (1968); Nebraska State Bar Ass'n, *Report of Committee on Procedure,* 43 NEB. L. REV. 211 (1963); Nebraska State Bar Ass'n, *Report of Judicial Council,* 42 NEB. L. REV., 343 (1962); Nebraska State Bar Ass'n, *Report of Committee on Legislation,* 41 NEB. L. REV. 307 (1961); Nebraska State Bar Ass'n, *Report of Committee on Legislation,* 30 NEB. L. REV. 154 (1950).

[77] *See* Appendix. The statistical records in this chart empirically demonstrate that the district courts and the workmen's compensation court *en banc* come to very similar judgments upon review of compensation cases. Although it does not necessarily follow from this similarity in results, it would seem likely that these two courts possess nearly equal levels of competence. Hence, this chart indicates that the current review procedure, which allows appellate review of a compensation case by both of these courts, is wastefully duplicative.

in Nebraska and would also avoid the potential harshness of strict compliance with the procedures employed by the majority of the states to review findings of fact in compensation cases. The first specific change needed is to delineate more narrow and more specific grounds for supreme court review of the findings of fact made by the lower courts. Review of compensation cases by the Nebraska Supreme Court should be limited to questions of law. This approach would not preclude the supreme court from modifying any findings of fact made by the lower courts which were supported by no evidence or based upon mere speculation since such findings constitute errors of law.[78] It should not be the duty of the supreme court to determine questions of fact. Rather, the court should be able to, and be required to, rely upon the determinations of fact arrived at by the lower courts without having to reweigh the accuracy of those determinations in a trial *de novo*.

The competency of the lower courts should be respected.[79] It should be made statutorily impossible for the supreme court to reverse the factual determinations of the lower courts where those decisions are supported by any evidence.[80] Indeed, in states adhering closely to the majority rule, a statement of the inability of the appellate courts to review the decisions of the lower courts concerning issues of fact is "without any close competition, the number one cliche of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course."[81]

Even under these tightened procedures, the supreme court would be able to alter findings of fact which are grossly improper. It

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[78] Kastenek v. Wilding, 181 Neb. 348, 148 N.W.2d 201 (1967).

[79] *See* note 77 *supra*. The records of the judgments of the lower courts and the treatment of those judgments on review indicates that the lower courts now deserve to be considered competent.

[80] This limitation on supreme court review of findings of fact in compensation cases must be implemented in a manner consistent with the Nebraska Constitution. The constitution provides that: "All courts shall be open and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." NEB. CONST. art. I, § 13. This writer does not believe that such a limitation on appellate review of findings of fact would contravene the constitution. The effect of the change suggested would be to secure the findings of the compensation court to the same extent that findings by juries are secured from appellate review. Historically, at least, such a limitation is constitutionally valid.

[81] 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 80.10, at 245 (1970).

could, for example, continue to set aside findings of fact and remand cases where judgments are based upon a preponderance of possibilities because in Nebraska, conjecture, speculation or choice of possibilities is not proof of a sufficient nature to establish a case.[82] To recover in workmen's compensation cases the claimants would still be required to offer reasonable evidence to support their claims in all of their indispensible elements.[83] Workmen's compensation awards could still not "be sustained where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is mere conjecture."[84] And, as in the past, under the proposed changes in the review of compensation cases by the Nebraska Supreme Court, the rule of liberal construction of the compensation act would apply only to questions of law and would not apply to the evidence offered in support of a claim.[85] These rules would always be construed consistently with the objectives of the compensation system.

Only by deletion of the possibility of trial *de novo* upon the record in the supreme court can it ultimately be insured that compensation claims can be adjudicated with the speed that the legislature had hoped to secure when it enacted the original compensation statute in 1913.[86] Elimination of the possibility of trial

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[82] The rule that a judgment based on speculation is erroneous as a matter of law was settled in Raff v. Farm Bureau Ins. Co. of Neb., 181 Neb. 444, 149 N.W.2d 52 (1967).

[83] Dike v. Betz, 181 Neb. 580, 149 N.W.2d 750 (1967), holds that an injured workman must offer reasonable evidence to support his claim in all of its indispensible elements or he cannot recover compensation.

[84] *Id.* This rule would mean, if the proposed changes are adopted, that where a lower court finds that evidence gives rise to equal probabilities and the lower court gives judgment without a rational basis (e.g., judgment for the plaintiff though, in such circumstances, he has failed to prove his case by a preponderance of the evidence) the appellate court could review the judgment. If the lower court finds one of two nearly equal probabilities more compelling than the other that finding could not be reviewed by the appellate court.

[85] Pruitt v. McMaken Transportation Co., 175 Neb. 477, 122 N.W.2d 236 (1963).

[86] The need to alter Nebraska's workmen's compensation system in the areas suggested seems particularly acute when the current system is examined in light of the recently enacted court-reform measures. L.B. 1032, enacted by the 1972 session of the Unicameral, will significantly modernize and improve the county courts of this state. In addition, L.B. 1032 amends NEB. REV. STAT. § 26-1,104 (Reissue 1964), to streamline the method by which judgments of the county courts are reviewed on appeal by the district courts. This court-reform statute makes the procedures currently governing appellate review of compensation cases comparatively more antiquated than before.

de novo from the procedure for review in the supreme court is the only way to insure that that court will be forever removed from the arena in which it has felt compelled to weigh the evidence in particularly troublesome compensation cases.[87] No other procedural approach to supreme court review of compensation cases can insure that the court will not be called upon to weigh highly technical evidence in an effort to determine whether it will preponderate for one party or for the other. This approach has proven successful in other jurisdictions.[88]

As previously noted, in the majority of jurisdictions the "conclusive" evidence rule has been abandoned. In most of those jurisdictions the test now is whether the findings of fact arrived at by the lower courts are supported by any "substantial" evidence.[89] The substantial evidence rule does not require that the evidence preponderate for one side.[90] Indeed, if any substantial evidence can be found anywhere in the record to support the findings of fact, the appellate courts are bound to accept those findings[91] although the substantial evidence upon which they are based is clearly con-

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[87] The problem of weighing the evidence has proven particularly troublesome for the Nebraska Supreme Court. In fact, some members of the court have expressed what apparently constitutes their judgment that where the evidence is conflicting and there is no ponderance, the case cannot be decided or should not be decided, even in a trial *de novo*. Judge Clinton, the newest member of the court, has written: "What we are called upon to do is solely to judge the expertise of the experts. When we have to do that alone there is no proof by a preponderance of the evidence. Where as here the two specialists testified by deposition, the judgment gets down to measuring the length of the respective pedigrees." Conn v. ITL, Inc., 187 Neb. 112, 118, 187 N.W.2d 641, 644 (1971) (dissenting opinion).
Taken literally, this view would lead to the conclusion that because the facts of particular cases are difficult, there is no remedy; the case cannot be decided. Insofar as Judge Clinton may have meant that in such cases the findings of the lower courts should be sustained, this writer agrees with Judge Clinton's analysis.

[88] For a succinct tabulation of the procedures employed for judicial review in the several states see 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, Table 20, at 558-59 (1970).

[89] L. HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES, 107 (1952).

[90] *Id.*

[91] K. DAVIS, ADMINISTRATIVE LAW § 29.02 (1958), defines the substantial evidence rule in these terms: "In recent decades the principal guide to the meaning of substantial evidence has been a Supreme Court statement written by Chief Justice Hughes, [in Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)]: 'Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' A later

trary to the preponderance of the evidence.[92] Hence, the supporting evidence need not be substantial in the face of the evidence on the opposing side, as has been argued,[93] but it must be *prima facie* substantial. If the rule did require appellate courts to weigh evidence supporting conclusions of fact against opposing evidence it would "as a practical matter . . . serve to tighten, and perhaps even to overemphasize, judicial control over administrative action."[94]

It would seem that much of the controversy and confusion concerning the meaning of the substantial evidence rule could be alleviated if more emphasis would be placed on the requirement that reasonable evidence, which may be neither substantial nor preponderate, must support the findings of fact. This approach would more accurately depict the role of the appellate courts as that of a body concerned with legal issues, not as a trier of fact.[95]

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statement [in NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)] clarifies further: Substantial evidence means evidence which is substantial, that is affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'"

92 L. HEADY, *supra* note 89, at 108.

93 Warren, *The Federal Administrative Procedure Act and the Administrative Agencies*, N.Y.U. SCHOOL OF LAW INSTITUTE, 587 (1947).

94 L. HEADY, *supra* note 89, at 109.

95 Reviewing courts are appropriately considered adjudicators of questions of law and not triers of facts. This is demonstrated by the Federal Employers Liability Act, 5 U.S.C. § 706 (1966), which provides: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity.

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

To this end, the effect of using the substantial evidence rule as the standard for appellate review of workmen's compensation cases should be to secure the findings of fact of the one-judge compensation courts from alteration by the appellate courts just as jury determinations in other cases are binding upon the supreme court of this state.

The fact-finding function in the workmen's compensation system should be vested wholly in the workmen's compensation court, which as a consequence of its hearing only compensation cases, could rapidly acquire the expertise necessary to speedily adjudicate compensation cases despite the presence of technical medical evidence. There is no reason to suspect that this approach would prove less workable or otherwise less satisfactory than the current procedure. The results obtained from the altered system should prove to be more desirable and the compensation procedure should be more effective than it is currently. Indeed, the compensation procedures of the majority of the states, which are similar to those proposed here,[96] have proven to be productive and efficient.

It seems desirable that the findings of fact of the lower courts be amenable to some judicial review where the evidence in question is of a highly technical nature as it frequently is in compensation cases. The Nebraska statutes, as noted above, now provide that findings of fact are reviewable by two appellate bodies, the district courts or the workmen's compensation court *en banc*[97] and the supreme court. Assuming that the supreme court is precluded from reviewing findings of fact except for errors of law, there would still be available to parties who are dissatisfied with the findings and rulings which issue after the initial hearing of a case, a procedure by which those findings of fact could be reviewed by way of a trial *de novo* in a competent court of law.[98] It would be preferable, however, that this procedure for review be simplified by the Nebraska Legislature.[99] It seems redundant, for example, to require a court of second instance to review without the benefit of a record the factual determinations of the court with original

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(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

[96] *See* note 65 *supra.*

[97] NEB. REV. STAT. §§ 48-179 and 48-181 (Reissue 1968).

[98] NEB. REV. STAT. §§ 48-179 and 48-181 (Reissue 1968).

[99] *See* Marshall v. Columbus Steel Supply, 187 Neb. 103, 104, 187 N.W.2d 607, 609 (1971); note 76, *supra.*

jurisdiction. In terms of docket time, judicial effort and expense, it is absurd to call, then recall witnesses; take, then retake depositions; and issue, then reissue subpoenaes. It should be required that a record be made of the evidence adduced at the original hearing. This record should then become the bill of exceptions upon being certified by the presiding judge for all subsequent litigation of that case. This procedure would avoid duplication of efforts and expenses which currently must be borne by both the judicial system and the litigants.

There has not been any substantial expression of dissatisfaction with the competence of the one-judge compensation courts and their decisions.[100] If cause for such dissatisfaction exists, that cause should be alleviated by improving the one-judge courts, not by complicating the procedure for reviewing contested compensation cases. Judicial interpretation of the Federal Employer's Liability Act has successfully made the findings of fact of the administrative agencies which administer the statute conclusive to the extent that findings of fact cannot be subjected to review by any court (except for review of errors of law upon which a factual determination might rest).[101] Hence, Nebraska could follow the model of the Federal Employer's Liability statute.

Appellate review of compensation cases could be simplified even more completely if the statutory procedure for election by the parties of the court to which they choose to appeal their cases was eliminated. The workmen's compensation court *en banc* is surely as well qualified as a district court to review questions pertaining to either the determinations of fact or the disposition of the issues of law made by the one-judge workmen's compensation court.[102] The extraneous nature of the alternative procedure provided by the current compensation act can readily be seen

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[100] *See* note 77 *supra.*

[101] The Federal Employer's Liability Act was interpreted as limiting judicial review of findings of fact made by administrative agencies to review for errors of law in Calderon v. Tobin, 187 F.2d 514 (D.C. Cir. 1951).

[102] *See* note 77 *supra.* There are clear indications in the statutes that the district courts and the workmen's compensation court possess similar levels of competence. NEB. REV. STAT. § 48-153 (Reissue 1968), specifically provides that the district court judges and the judges of the workmen's compensation court must possess the same qualifications to hold their respective offices. The annual salary of the judges of the compensation court is set at $25,000 by NEB. REV. STAT. § 48-159 (Supp. 1972). Before 1972 the district court judges were paid an annual salary of $22,000, in that year their salary was raised to $27,500 by NEB. REV. STAT. § 24-301.01 (Supp. 1972).

when one considers the similarity of the competence of the two courts and the burdens imposed by providing two possible appeals which an injured party must bear to receive compensation. The infrequency of reversals by the district courts of the decisions of the workmen's compensation court *en banc* seems to illustrate that alternative methods of appeal are unnecessary.[103]

Assuming the need to delete one of these appeal procedures from the compensation act, the issue becomes which of the procedures for appeal should be eliminated to properly achieve the objectives of the compensation system. To remain consistent with the previously considered problems of lay determination of factual questions involving highly technical evidence, it would seem logical to choose to eliminate the district courts from the Nebraska procedure. It is argued by some, however, that it is necessary to retain in the compensation system, at a level inferior to that of the state supreme court, a purely judicial process for the adjudication of compensation claims. In Kansas, where the district courts have the final review of all questions of fact, the Kansas Supreme Court has observed that:

> The final responsibility for reaching proper findings of fact in workmen's compensation cases, as in many others, rests upon the district courts. Such courts, from examination of the transcripts, should carefully consider the weight and preponderance of the conflicting medical and other evidence, the reflected ability and integrity of witnesses, and reach results which will cast credit upon the impartiality and rectitude of judicial tribunals because this court cannot consider such elements in an effort to perpetuate the high respect and esteem for courts which should follow from the exercise of the responsibility.[104]

There is certainly merit in the argument that a court below the state supreme court, one with a view to the totality of the processes of the law and their impact on the society, should make the ultimate determination on issues of fact involving difficult equities between adverse parties. However, the long established legislative policy of providing speedy decisions, the highly complex nature of the evidence frequently involved, and the extensive nature of our technological society opt for the conclusion that the area of workmen's compensation can best be served by allowing a specialized court[105] to service it in all cases involving disputes of

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[103] *See* note 73 *supra.*

[104] Richards v. J-M Service Co., 164 Kan. 316, 188 P.2d 939 (1948).

[105] It should be noted that Nebraska is the only state that has a special court to hear compensation cases. All the other states operate their compensation systems through commissions or without either a special

fact. Workmen's compensation is, after all, a specialized area of law. It functions by virtue of the existence of a statute passed specifically to create and govern its administration.[106] In addition to being well situated to review the facts in compensation cases and, if necessary, to retry them, the specialized function of the compensation court makes it as capable of lending the air of serious judicial rectitude to the adjudication of such cases as are courts of general jurisdiction. In fulfilling its function as the arbiter of controverted compensation claims, the compensation court should develop a capacity for comprehending the equities in the cases brought before it which would enhance the court's effectiveness. This expertise will assist the compensation court in fulfilling its legislative mandate which requires that it impartially and efficiently administer the Nebraska Workmen's Compensation Act.[107] A court of general jurisdiction cannot develop this skill because it must remain more adaptive than the compensation court; such a court does not exist to oversee the administration of any particular area of the law. The district courts in Nebraska should, therefore, be excluded from the Workmen's Compensation system as appellate bodies.[108] They should review neither judgments of law nor findings of fact in compensation cases.

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commission or court to oversee the administration of workmen's compensation. Oklahoma has a State Industrial Court that administers its compensation system but that body is, in fact, more kin to a commission than a court.

106 NEB. REV. STAT. § 48-101 (Reissue 1968).

107 *Id.*

108 It has been argued that total elimination of the district courts from the appellate proceedings provided by the compensation statute would be unnecessary to secure speedy appellate review of compensation cases. The alternative to total exclusion of the district courts from review of compensation cases would be to provide a direct appeal from the Workmen's Compensation Court *en banc* to the supreme court, as well as an appeal to the supreme court from the district court. The effect of this kind of a compromise between the status quo and the changes proposed by this writer would be to allow any one party to take the case to the compensation court *en banc* and then to appeal, with the consent of the other party to waive review by the district court, directly to the supreme court. To the extent that this solution would streamline appellate review of contested compensation cases where both parties could agree to forego review by the district courts, it represents an improvement in the appellate procedure. It seems to this writer, however, that such a solution would leave an unwarranted step, i.e., possible review by the district courts, in the statute that could continue to delay the compensation process in contested cases. Judge Ben Novicoff, the presiding judge of the Nebraska Workmen's Compensation Court, submitted the following proposed statute to the Judicial Council of the Nebraska State Bar Association in 1968. This

VII. CONCLUSION

The Nebraska Workmen's Compensation Court *en banc* should possess the conclusive power to review findings of fact made by one-judge compensation courts in compensation cases. The findings of the one-judge courts should be reviewed *de novo* upon a record made by the one-judge courts; review of these findings should be subjected to the substantial evidence rule. The evidence should generally preponderate in favor of the party to whom judgment is awarded, but merely the quantity of the evidence presented on each of the respective sides in a case should not be determinative. The findings made or approved by the compensation court *en banc* should be subject to review by the state supreme court only for errors of law. If such an error is found, the case should be remanded to the workmen's compensation court *en banc*. The Nebraska Supreme Court should never retry compensation cases on the record of the lower court.[109]

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statute, if enacted, would effect a compromise between total elimination of the district courts from the appellate process in contested compensation cases and the role currently played by the district courts in that process. (References are to the Nebraska Revised Statutes.)

§ 48-182. Repeal in its entirety.

§ 48-183. Repeal in its entirety.

§ 48-184. Repeal in its entirety.

§ 48-185. Appeal to Supreme Court; time for taking appeal; grounds for reversal. Any appeal from the judgment of the district court *or from the compensation court after a rehearing* shall be prosecuted in accordance with the general laws of the state regulating appeals in action at law. Such appeal shall be perfected within one month from the rendition of judgment by the district court—*or compensation court after rehearing,* the cause shall be advanced for argument before the Supreme Court and the Supreme Court shall render its judgment and write an opinion in such cases as speedily as possible. *The findings of fact made by the district court or compensation court after rehearing acting within its powers shall, in the absence of fraud, be conclusive.* A judgment, order, or award of the district court *or compensation court after rehearing* may be modified or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) the findings of fact are not supported by *any* evidence as disclosed by the record, or (4) the findings of fact by the court do not support the order or award.

109 During printing, the court in *Klein v. Trinities Indus. Inc.*, 189 Neb. 117, —N.W.2d—(1972), further obscured the standard on review. Judge Smith (concurring) alludes to the problems discussed above.

APPENDIX

SUMMARY OF REHEARINGS AND APPEALS FOR THE FISCAL YEAR 1970-1971

	Applications for Rehearings before the Workmen's Comp. Court En Banc	Appeals to the District Court from the Comp. Court En Banc	Appeals to the Supreme Court from Dist. Ct. after Rehear. in the Comp. Court En Banc	Direct Appeals to the District Court from Original One Judge Comp. Court Hearings	Appeals to the Supreme Court from the Dist. Court's Direct Appeals
Application or Appeal Pending on 7-1-70	16	27	7	55	8
Application or Appeal Made in F.Y. 70-71	113	17	9	11	5
Total	129	44	16	66	13
Disposition of the Court					
Affirmed	34	14	11	9	10
Reversed	7	2	2	2	0
Modified	22	1	0	4	0
Settled	50	11	1	21	1
Pending on 7-1-71	16	16	2	30	2
Cases Pending on Both 7-1-70 & 71	1	8	0	26	1
Number of Cases Appealed to Higher Court	19	9	—	5	—
*Average Lag Between ** Date of Application or Petition & Judgment	101.6 (55.8)	203.1 (167.1)	282.4 (39.5)	635.2 (287.2)	279.0 (33.0)
*Average Lag Between ** Date of Application or Petition & Settlement	85.5 (53.3)	226.5 (168.4)	296.0 (0.0)	451.8 (577.5)	265.0 (0.0)
*Judgment Lag **					
Longest	280	618	344	1098	306
Shortest	16	12	224	164	211
*Settlement Lag **					
Longest	234	567	296	2573	265
Shortest	1	13	296	63	265

* Each number in parenthesis is the standard deviation associated with the lag above it.

** Numbers in these columns represent calendar days.