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PRACTICE AND PROCEDURE BEFORE NEBRASKA WORKMEN'S COMPENSATION COURT

Joe P. Cashen*

I. IMPORTANT HISTORICAL DEVELOPMENTS OF THE NEBRASKA COMPENSATION ACT

The procedures involved in presentation and determination of disputed issues in compensation matters is a product of evolution, and a brief history of the act will be beneficial in understanding the present procedural aspects as they now exist.

In Nebraska prior to 1914 the relationship of employer and employee was governed by common-law rules of negligence, and employment injury disputes were for the most part submitted to the district courts. In 1911 a resolution was passed by the legislature creating a commission to investigate the subject of employer's liability and compensation laws and to report their findings together with a recommended bill. When the commission undertook its investigation, it was learned that there was exceptional delay in the culmination of a dispute between an employee and an employer. For example, in Douglas and Lancaster Counties the time ranged from approximately three and one-half to four and one-half years between the date of the injury and the ultimate settlement. The commission recommended the adoption of a compensation law. It was adopted and ultimately become effective on the first of December 1914.

The major purposes for the passage of such an act were: insuring the certainty of payment to the employee during this period of temporary total disability, paying medical and hospital expenses, eliminating delay and promptly settling claims. At the outset, the administration of the initial act was committed to the district courts. The act provided that in the event a claim submitted to arbitration could not be mutually agreed upon, either party could submit the questions of disputed facts concerning the nature and effect of the injuries, and the amount of compensation requested to the district court of the county having jurisdiction of the parties. The court after hearing the cause as a suit in equity, would enter a final judgment determining

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all questions of law and fact in accordance with the provisions of the act. The act further provided for the filing of a verified petition in the district court and service of summons upon the adverse party as in civil cases. The return was to be made within four days from the issuance of such summons. Seven days after the return date of the summons the answer was to be filed admitting or denying the averments of the petition and stating other contentions of the defendant with reference to the matters in dispute. The act, in part, stated:¹

At the expiration of the time fixed for filing answer the court shall proceed to hear and determine the cause without delay and shall render judgment thereon according to the form of law. Any appeal from such judgment shall be prosecuted in accordance with the general laws of the state regulating appeals and actions at law except that such appeals shall be perfected within thirty days from the entry of the judgment and the cause shall be advanced for hearing in the Supreme Court so as to bring said cause on for argument before such court within sixty days from the filing of the appeal and said Supreme Court shall render its judgment and opinion in such cases within thirty days after submission.

Lump sum settlements could be computed only with the consent of the district court. In 1917 the administration of the act was changed from the district court to the labor department, and a compensation division in the bureau of labor was created. The commissioner of labor was made the compensation commissioner.² The commissioner of labor was authorized to appoint a chief deputy commissioner to aid in the administration of the act. The amendments included provisions for filing a petition with the compensation commissioner rather than in the district courts for the initial hearing. Either party had a right to submit a verified petition to the district court on appeal in the event of dissatisfaction with the ruling of the compensation commissioner or his deputy. The purposes of the amendments were to simplify procedure and allow more speedy determination of the issues. Evidence of this desire may be seen as follows:³

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.

¹ Neb. Laws c. 198, § 39, at 596 (1913).

² Neb. Laws c. 85, §§ 27, 131 (1917).

³ Neb. Laws c. 85, § 29(b) (1917).

However, due to the fact that the compensation commissioner was also the labor commissioner and a new official was usually appointed with each new administration the desired continuity was not present. In addition, the work of the compensation division of the labor department had increased substantially and was beginning to overshadow the other duties of the labor department. Suggestions were made that a separate commission be established. Because of a question of constitutionality and other difficulties, the problem was ultimately resolved by establishment of the present Nebraska Workmen's Compensation Court under the constitutional provision which allows for the creation of courts inferior to the supreme court.⁴

The present court came into existence in 1935, and the act creating this court adopted substantially the previous procedures for the filing of a petition, service of summons and the filing of answers. There was, however, an additional hearing provided for. It allowed a rehearing before the compensation court en banc. Appeal to the district courts was retained as an alternate procedure because it was felt that it might be more convenient for persons living far distant from Lincoln to proceed with a rehearing *de novo* before the district court rather than to await a rehearing before the compensation court.

Thus it can be seen that the procedural aspects of the presentation of a compensation case through the compensation court and into the district court has changed from the time of the initial passage of the act.

From the very first, the Nebraska Supreme Court has held that the compensation act is to be liberally construed and that technical refinements should not defeat just compensation claims.

II. PRESENT PROCEDURE

A. REPORTS

The only reports required, where litigation or settlement is not involved, include the employer's first report of the accident⁵ and the receipts showing payment (form 4).⁶ The employer's first report can be secured from the workmen's compensation court in the state capitol building in Lincoln, or in the compensation courtroom in the courthouse in Omaha. A first report is

⁴ NEB. CONST. art. V, § 1.

⁵ For an example of the first accident report see 6 LIGHTNER, NEBRASKA FORMS ANNOTATED § 7316 (2d ed. 1951).

⁶ For an example of receipt form see *Id.* § 7348.

required regardless of whether or not any compensation is paid. The receipt showing compensation payments (form 4) should set forth the amount of compensation paid, and amounts paid for medical, hospital and other services. In the event the employee does not receive any compensation himself, there is no need for the claimant's signature on the receipt (form 4). Periodic reports are to be made to the compensation court when compensation is paid over a period of more than thirty days. The periodical statement (form 3)⁷ may also be secured from the compensation court.

In the event any questions arise with reference to the handling of any compensation matter, the personnel of the court are always willing to aid and assist in any way possible.

B. REQUIREMENTS FOR PRESENTATION OF CLAIM

We now turn to considerations of the procedural steps required in making a claim, filing a petition, trying the case and appealing to the compensation court or district court either after waiving the rehearing or after rehearing. No attempt is made to cover the procedure involved for preparation and presentation of a lump sum settlement to the compensation court and district court.⁸

Three basic requirements of notice, claim and petition must be met in order that a case may be presented to the compensation court for original hearing.

(1) *Notice of the Injury*

Notice of the injury must be given to the employer as soon as practical after the happening of such accident.⁹ Section 48-133 of the act indicates that the notice shall be in writing stating in ordinary language the time, place and cause of injury, and be signed by the injured employee. However, as a practical matter, written notice is rarely given. In most instances the employer is given oral notice. The same section of the statute provides that want of written notice is not a bar to proceedings under the act if it is shown that the employer otherwise had notice or knowledge of the injury. It has been held to be sufficient notice

⁷ For an example of periodical statement see *Id.* § 7346.

⁸ Suggested forms and requirements for lump sum settlements may be found in 6 LIGHTNER, *op. cit. supra* note 5, §§ 7343-45.

⁹ NEB. REV. STAT. § 48-133 (Reissue 1960).

where there was a request for medical services,¹⁰ or where timely notice was given to a foreman whose duty it was to report accidents.¹¹ Furthermore, timely notice is excused where the injury is said to be latent and progressive, but notice in that instance must still be given within six months from the time the employee acquires knowledge of the compensable nature of his disability. Generally speaking, notice of injury which is given late is considered only with respect to the good faith of the claim that is being made.¹² Lack of notice in and of itself, although it appears to be a requirement, has been held not to bar the claim where the claim is made within six months, and a petition filed within one year.

(2) *Claim for Compensation*

A claim for compensation must be made within six months of the date of the accident or in the event of physical or mental incapacity, within six months after the removal of such physical or mental incapacity.¹³ The requirements of a claim are fulfilled when a request is made to the employer for compensation or for payment of the medical expenses of the employee.¹⁴ The requirement of a claim is dispensed with in the event the employer makes any payments of compensation or medical expenses.¹⁵ Knowledge by the employer that the employee was injured does not waive the necessity to make a claim even though formal notice of injury is thereby waived by knowledge of such injury. Failure to make a claim within six months is grounds for denying recovery even though a petition is filed within one year. The time in which a claim is to be made is extended where the injury is of a latent and progressive type. Then the claim must be made within six months of the time the employee is charged with knowledge of the compensability of his disability.¹⁶

The six month limitation period does not begin to run in cases of injury to a minor employee until six months after the removal of any physical, mental or legal incapacity. In event

¹⁰ *Gilbert v. Metropolitan Util. Dist.*, 156 Neb. 750, 57 N.W.2d 770 (1953).

¹¹ *Clary v. R. S. Proudfit Co.*, 124 Neb. 582, 247 N.W. 417 (1933).

¹² *Good v. City of Omaha*, 102 Neb. 654, 168 N.W. 639 (1908).

¹³ NEB. REV. STAT. § 48-133 (Reissue 1960).

¹⁴ *Schmidt v. City of Lincoln*, 137 Neb. 546, 290 N.W. 250 (1940).

¹⁵ *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445, 225 N.W. 117 (1929).

¹⁶ *Park v. School Dist.*, 127 Neb. 767, 257 N.W. 219 (1934).

of death of a minor, dependents have only six months within which to file a claim. However, if the dependent is himself a minor, or physically or mentally incapacitated, the limitation period is extended to six months from the removal of the incapacity. Prior to the seventy-second legislative session in 1961, infant dependents were required to make claim within six months,¹⁷ but the law as amended extends that period to six months after the removal of any incapacity.¹⁸

Where an employer continues to pay an employee's wages after an accident but denies compensation, the statute of limitations begins to run as of the date of the accident or injury. Where the employer continues to pay the employee wages after the accident and does not deny that compensation payments are due, this eliminates the necessity for making a claim and extends the period in which a petition may be filed to one year from the date of the last compensation payment. It has also been held that notice and claim to a subcontractor operates as notice and claim to the prime contractor where the prime contractor has failed to require the subcontractor to carry workmen's compensation insurance as required.¹⁹

C. FILING OF PLEADINGS

Rule 1 of the Rules of Procedures of the Nebraska Workmen's Compensation Court provides:

The Office of the Nebraska Workmen's Compensation Court shall be deemed to be in the State Capitol Building in Lincoln, Nebraska. Hearing or rehearing of compensation cases may be held at any other place within the state as provided by statute but no such other place shall be deemed to be an office or branch office of the court.²⁰

Rule 2 provides: "No paper or pleading shall be deemed to be filed with the Nebraska Workmen's Compensation Court until the same has been received and recorded by the Clerk of said Court at the office of the Court in Lincoln."²¹

¹⁷ *Ray v. Sanitary Garbage Co.*, 134 Neb. 178, 278 N.W. 139 (1938).

¹⁸ L.B. 141, 72nd Neb. Leg. Sess. (1961).

¹⁹ NEB. REV. STAT. § 48-116 (Reissue 1960).

²⁰ See NEB. REV. STAT. §§ 48-177, -179, -186 (Reissue 1960); *Dolner v. Peter Kiewit & Sons Co.*, 143 Neb. 384, 9 N.W.2d 483 (1943).

²¹ NEB. REV. STAT. § 48-157 (Reissue 1960); *Dolner v. Peter Kiewit & Sons Co.*, 143 Neb. 384, 9 N.W.2d 483 (1943).

(1) *Petition*

A petition must be filed with the Nebraska Workmen's Compensation Court within one year.²² The petition should conform to the requirements of section 48-173. An agreement by the parties with respect to the amount of compensation due waives the necessity for filing a petition. Section 48-137 provides that the one-year statute of limitations is postponed where payments of compensation have been made. Thus the petition need not be filed until one year from the date of the making of the last payment of compensation. Compensation has been interpreted by the court to include the payment for medical, surgical or hospital services furnished by the employer.²³ Other exceptions to the one-year statute of limitations include mental or physical incapacity, or legal disabilities.²⁴ The limitation period is also extended where the nature of the injury is latent and progressive. In this event, the limitation period is one year from the date the employee learns of the compensable character of the injury.²⁵ Where the statute of limitations has run against an employee it is also a bar to a claim made by his dependents after his death.²⁶

The petition which is filed before the Nebraska Workmen's Compensation Court must be a verified petition setting forth the names and places of residence of the parties, and the facts relating to the employment at the time of the injury for which compensation is claimed. It should include description of the extent and character of the injury, the amount of wages being received at the time of the injury, the knowledge of or notice to the employer of the occurrence of the injury and any other facts as may be considered necessary for the information of the court. The petition should also state the matter or matters in dispute and the contention of the petitioner with reference thereto.

The compensation court has drafted a form petition which incorporates the above requirements leaving blanks to be filled in by the petitioner concerning the date of the accident, date of notice, nature of the injury and other pertinent material. These forms were drafted for the purpose of simplifying pleadings for the employee who is not represented by counsel. They are avail-

²² NEB. REV. STAT. § 48-137 (Reissue 1960).

²³ Baade v. Omaha Flour Mills Co., 118 Neb. 445, 225 N.W. 117 (1929).

²⁴ Simon v. Cathroe Co., 101 Neb. 211, 162 N.W. 633 (1917).

²⁵ Keenan v. Consumers Pub. Power Dist., 152 Neb. 54, 40 N.W.2d 261 (1949); Park v. School Dist., 127 Neb. 767, 257 N.W. 219 (1934).

²⁶ Price v. Burlington Refrigerator Express Co., 131 Neb. 657, 269 N.W. 425 (1936).

able at Lincoln and at the compensation courtroom in the Douglas County Courthouse in Omaha and may be secured by simply writing and requesting the court to forward copies. It should be noted that although other statutory requirements are included in the form petition, there is no allegation in this petition that the claim was made within six months as required by the statute. However, this allegation should be made. Of course, it is not necessary to use the form petition and counsel may draft his own petition, including the various allegations required, setting forth such facts as the petitioner feels will be of assistance to the court. Note, however, that the petition must be verified by the person signing it. Either party, employee or employer, may file a petition in the event of a disputed question of law or fact.²⁷

Generally, the court has not looked with favor upon pleadings such as Demurrers, Motions to Make More Definite and Certain and Special Appearances because in many instances such pleadings are used simply as delaying tactics and to hear arguments on these motions requires hearings in distant parts of Nebraska. The judge must make a special trip in many instances just to hear such motions. However, when such pleadings are warranted and an adequate explanation is given to the court, due consideration will be given these pleadings. The supreme court on one occasion indicated where a petition was filed, which on the face of the petition showed that more than one year had elapsed since the date of the injury, the petition was on its face demurrable. In that case, defendant raised the question by answer and thus the question became an issue in the compensation court.²⁸

(2) *Summons*

Section 48-174 provides that summons shall issue and be served upon the adverse party as in civil cases together with a copy of the petition.²⁹ Section 48-175 provides where the post office address of the defendant is known or may be ascertained, summons may be served by either registered or certified mail, placing a certified copy thereof in an envelope addressed to the party, return receipt requested and with direction to "deliver to addressee only." There are four methods of service provided: (1) as in civil causes, together with a copy of the petition, (2) an

²⁷ *Fidelity & Cas. Co. v. Kennard*, 162 Neb. 220, 75 N.W.2d 553 (1953).

²⁸ *Keenan v. Consumers Pub. Power Dist.*, 152 Neb. 54, 40 N.W.2d 261 (1949).

²⁹ NEB. REV. STAT. §§ 48-174, -175 (Reissue 1960).

acknowledgment on the back of the summons, (3) a voluntary appearance and (4) service by registered mail.³⁰

The compensation court will usually forward the petition and summons to the insurance carrier. Receipt of the summons is acknowledged on its back side and returned to the compensation court.

Generally speaking, the words "as in civil causes" plainly evidence a legislative intent that the provisions of the code of civil procedure relating to summons shall, except when inconsistent with the specific provisions therein, apply to and in all respects govern procedures under the compensation act.³¹

Section 48-175.01 provides for service of process on a non-resident employer. It became effective February 28, 1957. This section in effect appoints the clerk of the Nebraska Workmen's Compensation Court attorney and agent for service of process for outstate employers who perform work in Nebraska, or who having performed work in Nebraska then become a non-resident of the state.

(3) *Answer*

The answer must be filed within seven days.³² It must be verified, should admit or deny the substantial averments of the petition, and state the contention of the defendant with reference to the matters in dispute as disclosed in the petition. The general denial allows the defendant to introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For this purpose no other allegation in the answer is necessary.³³ If the question of the statute of limitations is applicable, the defendant should include in the answer specific allegations with reference thereto.

The answer should be filed by forwarding the original and sufficient copies for all other parties to the Nebraska Workmen's Compensation Court to the attention of the clerk in Lincoln, Nebraska.

³⁰ Clark v. Village of Hemingford, 147 Neb. 1044, 26 N.W.2d 15 (1947).

³¹ Kreil v. Farmers Irrigation Dist., 119 Neb. 503, 229 N.W. 898 (1930).

³² NEB. REV. STAT. § 48-176 (Reissue 1960).

³³ Towner v. Western Contracting Corp., 164 Neb. 235, 82 N.W.2d 253 (1957).

D. HEARINGS

Original hearings are heard in the county in which the accident occurred; upon written stipulation of the parties, however, the cause may be heard in any other county in the state.³⁴

In all cases where the accident occurs outside of the State of Nebraska the hearing before the single judge of the compensation court is heard at Lincoln unless otherwise stipulated by the parties at least fourteen days before the date of the hearing.³⁵

The time usually allotted for an original hearing is one-half day, and the court, because of its busy schedule, will in most instances set two cases for the same day, one at 9:00 or 9:30 A.M., the other at 1:00 or 1:30 P.M. However, in the event the court is advised prior to the date of the original hearing that the production of evidence will exceed the normal time requirement, additional time will be allowed. Subpoenas for witnesses can always be secured upon request from the compensation court at Lincoln, or at the Douglas County Courthouse in Omaha when a judge is at the Omaha office.

There is no provision in the compensation statute itself for payment of a witness fee in conjunction with the subpoena or for mileage in connection therewith. The usual practice is to enclose one dollar with each summons that is served. Subpoenas are usually delivered to the parties requesting them, and the parties undertake the service either by certified mail, or by use of a local constable or sheriff. The court is empowered to enforce their subpoena orders by commitment for disobedience of these orders.³⁶

Hearings before the compensation court are somewhat less formal than hearings in district or county court, but for the most part they are very similar. Witnesses are sworn and testify under oath as in other courts. At the time of the original hearing no reporter is present unless requested by one of the parties. Thus, no record is made at the original hearing. The purpose of this procedure is to eliminate the expense incurred in making records in the numerous original hearings that are held. Opening statements are optional and are generally made when the pleadings do not fully reflect the issues involved. Plaintiff produces his evidence by calling witnesses who have information pertinent to the issues at hand as in other litigation.

³⁴ NEB. REV. STAT. § 48-177 (Reissue 1960).

³⁵ NEB. REV. STAT. § 48-186 (Reissue 1960).

³⁶ NEB. REV. STAT. § 48-162 (Reissue 1960).

E. BURDEN OF PROOF AND EVIDENCE

The burden of proof rests with the plaintiff, and he must prove his case by a preponderance of the evidence. The rule of liberal construction of the compensation act has been held to apply only to the law provisions of the act, and not to the evidence offered to support a claim. Liberal construction of the act does not dispense with the necessity that the plaintiff prove his right to compensation.³⁷ The Nebraska Supreme Court has held on many occasions an award made under the workmen's compensation act may not be based on possibilities, probabilities, or speculative evidence.³⁸ Nor can an award be based on inferences drawn from evidence if such inference can be reached only by speculation or conjecture.³⁹ Proof must be made by substantial evidence leading either to a direct conclusion or a legitimate inference that the injuries were caused by an accident arising out of and in the course of the employment, and that the employee's complaints are referable to such injury.⁴⁰ The Nebraska Supreme Court has held on several occasions that only competent evidence is admissible over objection. Evidence which would be incompetent as hearsay in other cases is not considered competent in compensation cases. By the same token, statements to a wife or to a doctor made some time after an alleged accident are not competent to prove the occurrence of the accident. However such history as given to the doctor by the patient is admissible as evidencing the history upon which he based his treatment.⁴¹ It has been held by the Nebraska Supreme Court that hearsay evidence tending to prove a material fact, if admitted without objection, may sustain a finding of the existence of that fact. The probative force of hearsay evidence is to be determined by the trial tribunal which has the function of ascertaining the facts. This evidence must be taken into consideration in light of other evidence in the case, and the surrounding circumstances.⁴² In light of the foregoing rules it appears that counsel should object to hearsay evidence as well as any other

³⁷ *McCauley v. Harris*, 164 Neb. 216, 82 N.W.2d 30 (1957).

³⁸ See, e.g., *Murray v. National Gypsum Co.*, 160 Neb. 463, 70 N.W.2d 394 (1955).

³⁹ *Ruderman v. Foreman Bros.*, 157 Neb. 605, 60 N.W.2d 658 (1953).

⁴⁰ *Lowder v. Standard Auto Parts Co.*, 136 Neb. 747, 267 N.W. 211 (1939).

⁴¹ *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945).

⁴² *Maul v. Iowa-Nebraska Light & Power Co.*, 137 Neb. 128, 288 N.W. 532 (1939).

incompetent evidence interposed during the course of a compensation hearing, at least when a record is made.

The first accident reports which are required to be filed with the compensation court are not admissible for the purpose of proving an accident, but may be admissible if signed by the employer to show that the employer had notice of the accident. The reports are not admissible to prove the accident since they are hearsay.⁴³ The usual exceptions to the hearsay rule are also applicable in the compensation court; for example, statements made within the *res gestae*.⁴⁴ The bar to testimony by interested parties under Section 25-1202 has been held applicable in compensation cases wherein officers and directors were held to have a direct legal interest in the result and were incompetent to testify as to any transaction or conversation between the witness and the deceased employee against the legal representative of the latter.⁴⁵

Medical evidence adduced at the time of the original hearing is usually presented by way of signed medical reports of the doctors who have examined or treated the employee. The court by Rule 15 of its promulgated Rules of Procedure allows written reports by the attending or examining physician to be introduced into evidence in the discretion of the court. Written medical reports are received in evidence in lieu of, or in addition to, the personal testimony of the physicians or surgeons. However, on rehearing before the full court, such reports may only be received on stipulation by the parties or on offer by either party without objection by the opposing party or if so ordered by the court itself.⁴⁶ The reasons for this rule are stated under the Rules to the effect that on rehearing a record of the testimony and the evidence is made upon which all subsequent proceedings, if any, are had. The compensation law contains no provision for the taking of additional testimony or the introduction of additional evidence on appeal after rehearing. Therefore, the right of parties to cross examine medical witnesses and fully develop their case should not be denied by the introduction of medical reports except as provided in the Rule.

Usually the introduction of statements for medical services, hospital services, x-rays, and drugs is undertaken by way of

⁴³ *Muff v. Brainard*, 159 Neb. 650, 35 N.W.2d 597 (1949).

⁴⁴ *Perry v. Johnson Fruit Co.*, 123 Neb. 558, 243 N.W. 655 (1932).

⁴⁵ *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198, 220 N.W. 255 (1928).

⁴⁶ See Procedural Rule 14, July 1, 1961 promulgated under NEB. REV. STAT. §§ 48-163, -168 (Reissue 1960).

testimony by the plaintiff that such services were rendered in connection with the injuries received. Generally the court on original hearing will accept the statements of medical expenses as introduced if itemized to show the costs and nature of the various services and if there is no testimony showing them unreasonable or exorbitant. In most instances counsel for the parties can agree and stipulate at the original hearing that if the various doctors were called they would testify that the services rendered were necessary and proper, and the charges therefor were reasonable for the services rendered subject, however, to reasonableness under the 1961 Relative Value Study as adopted by the compensation court.

In this respect, the Nebraska Workmen's Compensation Court has recently adopted, as a guide, the "1961 Relative Value Study" compiled by the Nebraska State Medical Association. These schedules are distributed by the compensation court. The Relative Value Study became effective May 15, 1961 and is a substantial variation from the previous medical fee schedule. The schedule has four sections: medical, surgical, radiological and pathological. The procedures encompass all of the commonly performed procedures with standard coding as developed by Blue Shield nationally. The relative study is a means whereby one may relate the charges for one procedure (where the practitioner is familiar with the regular charge) to another procedure in order to have the charge for the second procedure be in proper relationship to the charge usually made for the first known cost procedure. Conversion factors have been adopted by the compensation court which are applicable in compensation cases. The purpose here is not intended to furnish a complete understandable explanation of the Relative Value Study. It serves only to indicate to the practitioner that substantial changes have been made with respect to medical fees, and that the court is no longer using the prior "Proposed Fee Schedule for Governmental Agencies" as a guide.

Needless to say, the plaintiff's handwritten statements or the court reporter's statements may be used on cross examination for impeachment purposes after the proper foundation is laid. The relative value to be placed upon such statements is left to the discretion of the court.

While in many instances some evidence is admitted by the court which might under technical rules of procedure not be admitted, the parties may be satisfied that the court, in making its determination, will keep in mind the requirements of the statute that an award of compensation or a denial of compensa-

tion must be based upon competent evidence. The mere fact that some incompetent evidence is admitted is not in and of itself grounds for reversal if there is sufficient competent evidence upon which the court can base its order.

Closing arguments are again optional with the parties as is the filing of briefs with the court. Usually in the absence of briefs the case is decided within ten days after the hearing and the order forwarded to each of the parties by the compensation court. The controlling date for appeals from such order is stamped upon the face of the order rather than the date on which the order is received. In the absence of appeal by either party the award becomes final and binding fourteen days after the date of issuance.⁴⁷

F. REHEARING

Appeals from the original hearing may be had by requesting a rehearing before the compensation court en banc or by waiving such rehearing and appealing directly to the district court.

When either party desires rehearing, all that is required is a pleading captioned "request for rehearing" stating, in effect, that the party refuses to accept the findings, order, award or judgment of the court on the original hearing and setting forth the errors upon which the party relies.⁴⁸ The usual reasons include: (1) the findings of said judge were contrary to the facts, (2) the findings of said judge were contrary to the law, (3) the judge exceeded his powers in making the finding and award referred to, (4) the findings of fact by the court are not supported by the record, (5) the findings of fact by the court do not support the order or award, and also include any other specific ground for a reversal or modification of the award of the judge. A prayer for rehearing before the workmen's compensation court and modification or reversal of the original order should be included. The request for rehearing is considered a pleading and should be verified.⁴⁹

It should be remembered that the request for rehearing must be filed in the hands of the compensation court on or before fourteen days after the issuance of the order. Extra copies of the application should be forwarded to the court for additional parties. The compensation court then serves upon the other

⁴⁷ NEB. REV. STAT. §§ 48-170, -178 (Reissue 1960).

⁴⁸ NEB. REV. STAT. § 48-179 (Reissue 1960).

⁴⁹ A form for application for rehearing may be found in 6 LIGHTNER, NEBRASKA FORMS ANNOTATED § 7330 (2d ed. 1951).

parties, by mail or otherwise, a copy of this application, and notifies the parties of the time, date, and place when the rehearing shall be held. The act provides that rehearing shall be held in Lancaster County or in any other county of the state at the discretion of the court.⁵⁰ The usual practice is that the rehearing is held in the county where the accident occurred unless otherwise requested or stipulated by the parties. In cases of accidents which occur outside of the state the rehearsings must be set in Lincoln unless otherwise requested or stipulated. Although the statutes provide that the rehearing should be held on or within thirty days after receipt of the application for rehearing, this provision has been held to be directory rather than mandatory. For the most part, however, the court will attempt to set rehearing within thirty days of receipt of the application for rehearing.

At the time of rehearing the procedure is substantially the same as an original hearing. However, a court reporter records all of the testimony and evidence for the compensation court. All three of the judges of the court are present for the hearing. The presiding judge rules on all evidence and other motions during the course of the hearing. At the time of the rehearing unless stipulated to by the parties, medical reports will not be received and the testimony of the doctor is required. Opening statements, closing statements, and briefs, for the most part, are optional unless requested by the parties or by the court. Following the rehearing the orders are usually forthcoming within a period of a week or ten days.

G. APPEAL TO THE DISTRICT COURT

An alternate procedure for appeal from the order of the single judge is to file with the compensation court a waiver of rehearing and give notice of appeal to the district court. The statute indicates that the appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court—by filing with the district court an application for rehearing plainly setting forth the errors upon which the party relies for reversal and modification.⁵¹ The hearing before the district court is a *de novo* hearing. The same rules of evidence apply as would be applicable on a rehearing before the compensation court. In order to perfect the appeal to the district court, it is jurisdictional that the notice of waiver

⁵⁰ NEB. REV. STAT. § 48-179 (Reissue 1960).

⁵¹ NEB. REV. STAT. § 48-181 (Reissue 1960).

be filed with the Nebraska Compensation Court within fourteen days after the original order, and that the petition on appeal be filed with the district court.⁵² These are the only requirements and although transcript and pleadings and orders of the compensation court may be filed with the district court there is no jurisdictional requirement for such.⁵³

The rehearing before the compensation court takes precedence over an appeal to the district court. If one of the parties has filed a notice of waiver of rehearing and a petition in the district court and the other party later files a request for rehearing in the compensation court within the prescribed time, the request for rehearing will take precedence and the district court is without jurisdiction to hear and determine the cause.⁵⁴ Although a party is satisfied with the original compensation order he may desire a rehearing by the compensation court rather than a district court hearing. Thus in the request for rehearing a party may merely take exception to an alleged error such as a failure of the court to make a specific finding with reference to some portion of the order.

It will be noted that there is no provision in the compensation act for answers to the petitions on appeal either before the workmen's compensation court or in the district court. However, the usual practice is to file an answer in district court setting forth the reasons and contentions why the order should be upheld. Once the appeal is perfected either before the compensation court en banc or in the district court the case may not be dismissed by either of the parties unless by a joint stipulation that a dispute no longer exists between the parties.⁵⁵ The trial in each instance is a trial de novo and all of the issues raised in the original compensation court hearing are retried in district court or before the compensation court en banc. The name of the employer's insurance carrier may be included and it may be made an additional party at any stage of the proceeding.⁵⁶

H. APPEAL AFTER REHEARING

In the event either party is dissatisfied with the ruling of the full compensation court following a rehearing, either party

⁵² *Jolliffe v. City of North Platte*, 139 Neb. 431, 297 N.W. 666 (1941).

⁵³ *Sporcic v. Swift & Co.*, 149 Neb. 246, 30 N.W.2d 891 (1948).

⁵⁴ *Light v. Nebraska Workmen's Compensation Court*, 166 Neb. 540, 89 N.W.2d 833 (1958).

⁵⁵ NEB. REV. STAT. § 48-177 to -179 (Reissue 1960).

⁵⁶ *Peek v. Ayres Auto Supply*, 155 Neb. 233, 57 N.W.2d 387 (1952).

may within fourteen days thereafter file with the district court in the county in which the cause arose, or upon written stipulation of the parties, in the district court of any other county in the state, a verified petition setting forth the contentions upon which the party relies for reversal or modification together with a transcript of the pleadings before the compensation court and the orders of such court certified by the clerk thereof.⁵⁷ Within thirty days from the date of the issuance of the order appealed from, the appellant must file a transcribed copy of the testimony and evidence taken by the court reporter before the compensation court. The transcript must be certified by the stenographer who made the record and it must be settled by the compensation court. This constitutes the bill of exceptions. Usually the transcript of the pleadings before the compensation court and the orders of the court certified by the clerk can be furnished on fairly short notice since they are usually not very lengthy. However, if one intends to appeal, sufficient time should be given the clerk of the compensation court to allow preparation of the transcript. The charge for a transcript is nominal. It should be remembered that transcribed copy of the testimony and evidence certified by the reporter and settled by the compensation court must be filed within thirty days from the date of the initial order being appealed—not thirty days from date of the appeal. In order to confer jurisdiction upon the district court in an appeal following a rehearing it is only necessary that the verified petition be on file together with a transcript of the pleadings and orders of the compensation court.⁵⁸ On appeal from the compensation court the bill of exceptions need not be served upon the adverse party or his attorney before it is filed in the district court.⁵⁹

Within seven days after the filing of the petition on appeal, a copy should be served upon the adverse party in the same manner as a summons. The return of service is to be made within five days thereafter.⁶⁰

The provision in the statute requiring hearing before the court within fourteen days is directory rather than mandatory and the court retains jurisdiction even though the hearing is not held within this period.

⁵⁷ NEB. REV. STAT. § 48-182 (Reissue 1960).

⁵⁸ *Geller v. Elastic Stop Nut Corp.*, 147 Neb. 330, 23 N.W.2d 271 (1946); *Henderson v. Wilson*, 137 Neb. 693, 291 N.W. 96 (1940).

⁵⁹ *Wrede v. City of David City*, 137 Neb. 194, 288 N.W. 542 (1939).

⁶⁰ NEB. REV. STAT. § 48-183 (Reissue 1960).

The statute sets forth the following grounds upon which a judgment, order, or award of the Nebraska compensation court may be set aside: (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 by the court are not supported by the record, and (4) the findings of fact by the court do not support the order or award.

It will be noted that the statute provides the judgment, order or award of the Nebraska Workmen's Compensation Court "shall be set aside" only upon certain grounds. It has been held by the Nebraska Supreme Court that the appeal to the district court after rehearing is in the nature of an error proceedings and as such is not a trial de novo on the record. In *Miller v. Peterson*⁶¹ the court stated: "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 the evidence. The previous holdings of this court support this contention."

The court has indicated, however, that in the event the district court exceeds its authority and tries the case de novo on the record rather than as a proceeding in error, the error is not prejudicial since the supreme court itself hears the case de novo.

It is also true with respect to appeal to the district court after rehearing that no provision is made in the act for answer by the defendant. However, in most instances the defendant files an answer setting up his contentions with respect to the order in question.

It may also be pointed out that in the event the plaintiff is unable to secure funds with which to procure the transcript and bill of exceptions, a poverty affidavit may be filed with the workmen's compensation court and the cost of such transcript and bill of exceptions will be paid by the compensation court upon presentation of the affidavit.⁶²

⁶¹ 165 Neb. 344, 85 N.W.2d 700 (1957).

⁶² NEB. REV. STAT. § 48-182 (Reissue 1960).