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MEDICAL TREATISES AS EVIDENCE IN COURT AND IN WORKMEN'S COMPENSATION PROCEEDINGS

Medical evidence is often an important source of proof for litigants in both workmen's compensation proceedings and court trials. In attempting to present persuasive proof of their claims, parties have often sought to use authoritative medical treatises. This, in turn, has raised the question of the applicability of the hearsay rule to the introduction of such evidence.[1]

Exclusion of evidence under the hearsay rule is generally based upon four arguments: (1) that such evidence is not subject to the solemnity of a court-administered oath; (2) that it is impossible for the trier of fact to test the authority's credibility by observing his demeanor as could be done with a witness; (3) that the hearsay may be inaccurately reported to the triers of fact; and (4) most importantly, that there is no opportunity for cross-examination of the person whose opinion is being offered.[2] These arguments are compelling where oral hearsay is offered at trial. But where written hearsay is offered, the case for exclusion is less persuasive, especially when an authoritative treatise is offered in conjunction with expert opinion evidence. Moreover, when the treatise is sought to be used in a workmen's compensation proceeding rather than a court trial, the arguments against admission lose much of their vitality. This is particularly true where an expert witness is present at such a proceeding.

Medical Treatises as Evidence at Trial

The question of whether medical treatises should be admitted at trial is separable into two more specific questions. *First,* should medical treatises be admitted as independent evidence without corroboration by expert testimony? *Second,* if not independently admissible, should they be admitted in conjunction with expert opinion evidence?

Admissibility Without Corroboration. The rule excluding hearsay evidence has generally been applied not only to oral testimony but also to written evidence, including treatises by acknowledged authorities.[3] The soundness of the application of this rule to authoritative writings is questionable. The introduction of treatises causes no serious problem concerning accuracy of presentation, because it is clear that the precise words of the author are being presented.[4] Since it is likely that the treatise will have been written long before the accrual of the cause of action, it would probably not have been written with a view to the litigation. It is therefore not necessary to be concerned that the evidence is not subject to oath or that the author's demeanor cannot be observed.[5] Although

[1] Gallagher v. Market St. Ry., 67 Cal. 13, 6 Pac. 869 (1885); Ashworth v. Kittridge, 66 Mass. 193 (1853); People v. Hall, 48 Mich. 482, 12 N.W. 665 (1882); Eckleberry v. Kaiser Foundation Northern Hosps., 226 Ore. 616, 359 P.2d 1090 (1961); cases cited in Annot., 84 A.L.R.2d 1338, 1341-43 (1962); Comment, "Medical Textbooks in the Courtroom," 2 U.C.L.A.L. Rev. 252 (1955).

[2] McCormick, Evidence § 224 (1954); 5 Wigmore, Evidence § 1362 (3d ed. 1940).

[3] See, e.g., Isley v. Little, 219 Ga. 23, 131 S.E.2d 623 (1963); Edwards v. Union Buffalo Mills Co., 162 S.C. 17, 159 S.E. 818 (1931).

[4] In Davis v. Arkansas Best Freight Sys., Inc., 393 S.W.2d 237 (Ark. 1965), the doctor, testifying in a workmen's compensation proceeding, read from a copy of an excerpt taken from a medical text. Possible inaccuracy of the presentation might still be a matter for concern in such a case.

[5] See 6 Wigmore, supra note 2, § 1692.

it is possible that the jury could be confused or misled by the presentation of technical or outdated material,[6] or of excerpts read out of context, these dangers can be reduced if counsel for the opposing party calls an expert witness.[7] It is debatable, however, whether the burden of obtaining such witnesses should be shifted to the other party in this manner.

The cross-examination argument, however, retains its persuasiveness as applied to the independent introduction of a treatise.[8] The opposing counsel has no opportunity to test by cross-examination the process of reasoning and experimentation which was employed in reaching particular conclusions[9] or to ask the author whether he still believes those conclusions to be valid.[10] The total lack of opportunity for cross-examination makes the admission of authoritative writings at trial without expert corroboration undesirable.

Alabama is the only state which, as a matter of common law, has generally admitted written hearsay so long as the facts are relevant to the issue of the case being tried.[11] Though some states have enacted statutes which make historical works and books of science and art written by "persons indifferent between the parties . . . prima facie evidence of facts of general notoriety and interest,"[12] medical treatises do not meet the "general notoriety and interest" requirement.[13] Some states have statutes permitting medical books to be introduced in malpractice cases if the author is a recognized expert in his profession.[14]

Admissibility in Support of Expert Opinion Evidence. The argument that medical treatises should not be admissible because the author is not available for cross-examination loses much of its vitality when the writing is used only in conjunction with an expert's opinion and the opposing party is given adequate

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[6] See Gallagher v. Market St. Ry., supra note 1; Huffman v. Click, 77 N.C. 55, 57 (1877); St. Louis, A. & T. Ry. v. Jones, 14 S.W. 309 (Tex. 1890), all involving outdated material. The argument for inadmissibility based on this possibility is applicable to the use of all scientific evidence, including opinion testimony itself. 6 Wigmore, supra note 2, § 1690. See Ruth v. Fenchel, 37 N.J. Super. 295, 315, 117 A.2d 284, 295 (App. Div. 1955), aff'd, 21 N.J. 171, 121 A.2d 373 (1956).

For discussion to the effect that technical language is a factor weighing against admissibility, see Bixby v. Omaha & C. B. Ry. & Bridge Co., 105 Iowa 293, 75 N.W. 182 (1898); Ashworth v. Kittridge, supra note 1, at 195; People v. Hall, supra note 1.

[7] Ruth v. Fenchel, supra note 6, at 314-16, 117 A.2d at 295; 6 Wigmore, supra note 2, § 1690, at 4.

[8] Gallagher v. Market St. Ry., 67 Cal. 13, 6 Pac. 869 (1885); Bixby v. Omaha & C. B. Ry. & Bridge Co., supra note 6. Ashworth v. Kittridge, 66 Mass. 193 (1853); People v. Hall, 48 Mich. 482, 12 N.W. 665 (1882); Tucker v. Donald, 60 Miss. 460 (1882); Eckleberry v. Kaiser Foundation Northern Hosps., 226 Ore. 616, 359 P.2d 1090 (1961).

[9] See Danville & I. H. R.R. v. Tidrick, 137 Ill. App. 553 (1907); Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291 (1948); St. Louis, A. & T. Ry. v. Jones, supra note 6.

[10] See Ashworth v. Kittridge, supra note 8, at 194; Huffman v. Click, supra note 6.

[11] See City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Burns v. State, 226 Ala. 117, 145 So. 436 (1932); Watkins v. Potts, 219 Ala. 427, 122 So. 416 (1929); Batson v. Batson, 217 Ala. 450, 117 So. 10 (1928).

[12] E.g., Cal. Civ. Proc. Code § 1936, replaced without change by Cal. Evid. Code § 1341 (effective Jan. 1, 1961). Similar provisions may be found in several other states. Ala. Code tit. 7, § 413 (1960); Idaho Code Ann. § 9-402 (1948); Iowa Code Ann. § 622.23 (1950); Mont. Rev. Codes Ann. § 93-1101-8 (1964); Neb. Rev. Stat. § 25-1218 (1964); Ore. Rev. Stat. § 41.670 (1965); Utah Code Ann. § 78-25-6 (1953).

[13] Union Pac. Ry. v. Yates, 79 Fed. 584 (8th Cir. 1897); Gallagher v. Market St. Ry., supra note 8; Bixby v. Omaha & C. B. Ry. & Bridge Co., 105 Iowa 293, 75 N.W. 182 (1898). But see the cases cited in note 11 supra.

[14] See Mass. Ann. Laws ch. 233, § 79C (1956), applied in Thomas v. Ellis, 329 Mass. 93, 106 N.E.2d 687 (1952); Nev. Rev. Stat. § 51.040 (1963), applied in Foreman v. Ver Brugghen, 81 Nev. 86, 398 P.2d 993 (1965).

notice of its intended use. For this reason, some states permit this limited use of medical treatises at trial. New Jersey has recently adopted a new court rule which provides that "an expert witness may refer to and read excerpts from learned treatises in support of his testimony provided notice is given before trial when reference thereto in the direct testimony is contemplated."[15] South Carolina has a statutory provision of very limited scope which makes medical books admissible where there is an expert available for testimony and "the question of sanity or insanity or the administration of poison or any other article destructive of life is involved . . . ."[16] It appears that the case law of Connecticut gives the trial court discretion as to whether medical texts may be read to the court or jury for the purpose of supporting an expert's testimony.[17] Also, as pointed out above, Alabama's case law permits the admission of written hearsay generally.[18]

Usually, however, the actual reading of medical treatises in connection with an expert's opinion evidence is not permitted.[19] The author is still not available to disclose the basis for his conclusions or any possible change in his views, nor can he guarantee that his conclusions would necessarily follow in the exact factual situation of the case being tried.[20] On the other hand, the expert witness himself is available to explain the technicalities and to be cross-examined about the conclusions of the author. This argument supports the view permitting the reading of excerpts from medical treatises so long as an expert is present. Under this approach, the evidence is admissible regardless of whether the expert originally utilized the treatise to support his conclusions, or is merely present for the purpose of corroborating the statements in the treatise where it was introduced into evidence by counsel.

Since cross-examination of the expert witness might not be as complete as cross-examination of the author, additional safeguards are needed. These can be supplied by the "necessity" and "trustworthiness" tests. Courts have established exceptions to the hearsay rule for certain types of situations where both of these tests are met.[21]

The principle of "necessity" is concerned with the value of evidence to the party introducing it. There is no requirement that it be the only possible evidence on the particular point; there need not be the threat of the entire loss of a person's evidence in order that necessity be found, "but merely of some valuable source of evidence."[22] The presence of an expert witness, therefore, does not make the principle inapplicable. Where the author of a treatise is unavailable or

[15] N.J. Rule of Evidence 63(31) (codified with N.J. Stat. Ann. §§ 2A:84A-1-32 (Supp. 1965)). Compare Uniform Rule of Evidence 63(31) which makes admissible:

A published treatise, periodical or pamphlet on a subject of . . . science . . . to prove the matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

[16] S.C. Code Ann. § 26-142 (1962). See Edwards v. Union Buffalo Mills Co., 162 S.C. 17, 159 S.E. 818 (1931); Baker v. Southern Cotton Oil Co., 161 S.C. 479, 159 S.E. 822 (1931).

[17] See Kaplan v. Mashkin Freight Lines, Inc., 146 Conn. 327, 150 A.2d 602 (1959) (dictum), citing Richmond's Appeal, 59 Conn. 226, 22 Atl. 82 (1890).

[18] See note 11 supra, and accompanying text.

[19] See, e.g., Brown v. Los Angeles Transit Lines, 135 Cal. App. 2d 709, 287 P.2d 810 (Dist. Ct. App. 1955); State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (1886).

[20] Huffman v. Click, 77 N.C. 55, 58 (1877).

[21] 5 Wigmore, supra note 2, §§ 1421-22; 6 Wigmore, supra note 2, §§ 1691-92. See Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961).

[22] 5 Wigmore, supra note 2, § 1421.

the cost to the litigant of securing his testimony would to too high (as would usually be the case), it should be possible for the book, if trustworthy, to be read in the author's absence.[23] If he is one of the foremost authorities on his subject, his treatise should easily qualify as a valuable source of evidence. Moreover, the medical expert usually bases his testimony on the writings of the eminent members of his profession anyway.[24]

> [B]y the very exclusion of material deemed hearsay, often as the result of rather legalistic, technical reasoning, much that is of value to the doctor in his practice and to the court in the determination of the medical facts of the case is lost.[25]

The test of "trustworthiness" involves both sincerity and accuracy.[26] While eminent writers may have a bias in favor of a theory, "it is a bias in favor of the truth as they see it; it is not a bias in favor of a lawsuit or of an individual."[27] Hence, they can be considered sincere. Moreover, the author of a learned treatise is concerned about accuracy since he "knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded . . . ."[28] It has been said that these writers are at least as trustworthy unsworn and unexamined in court as witnesses who receive a payment from one of the litigants for their appearance.[29]

Although it could be argued that the "necessity" and "trustworthiness" tests would also be satisfied where the treatise is introduced as independent evidence, the lack of an available expert witness would still prevent the clarification of technical passages and the cross-examination of anyone knowledgeable in the subject. Hence, these tests provide sufficient safeguards only when supporting evidence is furnished.

Assuming, then, that the trustworthiness and value of the treatise and the presence of an expert other than the author overcome the cross-examination argument, concern might still be expressed over the reading's psychological effect on triers of fact who do not possess expertise regarding the subject matter.

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[23] Dallas County v. Commercial Union Assur. Co., supra note 21, at 396; Ruth v. Fenchel, 37 N.J. Super. 295, 318, 117 A.2d 284, 297 (App. Div. 1955), aff'd 21 N.J. 171, 121 A.2d 373 (1956). While the broad language of the appellate division in Ruth was not adopted by the New Jersey Supreme Court opinion, which affirmed the holding permitting use of medical treatises on cross-examination, the dictum of the appellate division was given effect by the adoption N.J. Rule of Evidence 63(31); see note 15 supra.

[24] 6 Wigmore, supra note 2, § 1691:

> The proper rule would be for the Court to allow the use of a printed treatise, approved and read aloud by a witness expert in that subject, unless in its discretion, considering all the circumstances, the author if available should be summoned. In practice, the Courts which allow the use of learned treatises apparently do not impose any such condition.

See Ruth v. Fenchel, supra note 23, at 314, 117 A.2d at 294; Rheingold, "The Basis of Medical Testimony," 15 Vand. L. Rev. 473, 482-86 (1962).

With respect to the author's qualifications, it might be necessary to show that he is regarded as an authority in his field before excerpts from his book could be read. See Ruth v. Fenchel, supra note 23, at 315, 117 A.2d at 295.

[25] Rheingold, supra note 24, at 527.

[26] Dallas County v. Commercial Union Assur. Co., supra note 21, at 397.

[27] 6 Wigmore, supra note 2, § 1692. See Ruth v. Fenchel, supra note 23, at 313, 117 A.2d at 294.

[28] 6 Wigmore, supra note 2, § 1692. See 5 Wigmore, supra note 2, § 1422.

[29] 6 Wigmore, supra note 2, § 1692, quoted in Ruth v. Fenchel, 37 N.J. Super. 295, 313, 117 A.2d 284, 294 (App. Div. 1955).

Where the mere statement by an expert witness might not be accepted as conclusive, reading from the work of an authority might have a great influence on the jury or the trial judge. This argument is relied upon primarily where an expert is available for testimony in court and the authoritative work is not needed as the sole source of evidence. Whether such influence is undue, as has been charged,[30] depends on whether the reading of treatises is justifiable under the tests of "necessity" and "trustworthiness." Once it is agreed that such justification exists, there is no problem in allowing the expert and the authoritative source to provide a unified presentation with whatever influence it might have.

There is another major reason why the general rule—that medical treatises are inadmissible to support expert opinion evidence—may be undesirable. It is established that where an expert corroborates his opinion by merely *referring* to scientific authorities, such reference is not deemed an introduction of the source into evidence and is therefore permitted.[31] Since the conclusion as stated by the expert will often, when combined with the fact that he has derived his own conclusion from the writing, indicate the substance of the writing, a rule prohibiting the reading or summarizing of treatises seems to create a distinction in theory where in practical effect there may be no difference.[32]

Medical Treatises as Evidence in Workmen's Compensation Proceedings

Admissibility. Even though, with the exception of Alabama, authoritative medical writings are not admissible at trial as independent evidence and in most states cannot be read at trial to support the opinions of expert witnesses, this is usually not the case in workmen's compensation proceedings. The nature of these proceedings makes the argument for admissibility much stronger. The workmen's compensation acts are intended to provide a proceeding which is as simple, inexpensive, and informal as possible.[33] In accordance with this philosophy, over half the states have enacted provisions which liberalize the rules

[30] See Huffman v. Click, 77 N.C. 55, 58 (1877). Cf. Osborn, The Problem of Proof 87 (1926), where the importance of reputation in the persuasion process is emphasized. But see Maguire & Hahesy, "Requisite Proof of Basis for Expert Opinion," 5 Vand. L. Rev. 432, 440 (1952), where the argument is criticized.

[31] Fidelity & Cas. Co. v. Meyer, 106 Ark. 91, 152 S.W. 995 (1912); Healy v. Visalia & T. R.R., 101 Cal. 585, 36 Pac. 125 (1894); State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (1886); Scott v. Astoria R.R., 43 Ore. 26, 72 Pac. 594 (1903).

[32] See Comment, 12 So. Calif. L. Rev. 424, 428 (1939). In Eagleston v. Rowley, 172 F.2d 202 (9th Cir. 1949), the Ninth Circuit permitted much more than mere reference. The court held that it was not reversible error for the trial court to permit the reading of excerpts from a medical treatise as long as there would still be sufficient evidence if the excerpt had not been read. Eagleston involved a nonjury trial. Thus, while the decision was not expressly limited to such trials, it leaves open the possibility that a jury-nonjury trial distinction will be drawn. See also, Fidelity & Cas. Co. v. Meyer, supra note 31, where the Arkansas Supreme Court permitted the witness to summarize the source cited.

[33] See, e.g., Ex parte Puritan Baking Co., 208 Ala. 373, 94 So. 347 (1922); Long-Bell Lumber Co. v. Mitchell, 206 Ark. 854, 177 S.W.2d 920 (1944); State Compensation Ins. Fund v. Industrial Acc. Comm'n, 20 Cal. 2d 264, 125 P.2d 42 (1942); Shepard v. Carnation Milk Co., 220 Iowa 466, 262 N.W. 110 (1935); State ex rel. Morgan v. Industrial Acc. Bd., 130 Mont. 272, 300 P.2d 954 (1956); Streng's Piece Dye Works, Inc. v. Galasso, 14 N.J. Misc. 801, 187 Atl. 566 (Sup. Ct. 1936), aff'd, 118 N.J.L. 257, 191 Atl. 874 (Ct. Err. & App. 1937); Bigby v. Pelican Bay Lumber Co., 173 Ore. 682, 147 P.2d 199 (1944); Crane Co. v. Jamieson, 192 Tenn. 41, 237 S.W.2d 546 (1951); Woolsey v. Panhandle Ref. Co., 131 Tex. 449, 116 S.W.2d 675 (1938); Schneider Fuel & Supply Co. v. Industrial Comm'n, 224 Wis. 298, 272 N.W. 25 (1937); 1 Schneider, Workmen's Compensation § 3, at 7-8 (3d ed. 1941).

of evidence for these proceedings.[34] Some of the statutes provide that the commission is not bound by common-law rules of evidence;[35] others state that the commission is not bound by the *technical* rules of evidence;[36] and yet others permit "process and procedure" to be "as simple and summary as reasonably may be."[37]

In the workmen's compensation proceeding there is often the added safeguard of a trier of fact who has himself developed expertise.[38] The commissioner or referee, having acquired a familiarity with the problems and issues involved, may be better able to judge for himself which medical statements might be accurate and what weight should be given to the excerpts read and the opinions which they support. He probably would be less confused than jurors and trial judges by technical language used by the authorities. Because of his expertise, he may be better able than a juror or trial judge to separate relevant from irrelevant evidence.[39] It is therefore of little concern that irrelevant evidence might be admitted under the liberal evidentiary rules. While the statutes provide no basis for distinguishing independent hearsay from corroborated hearsay, the same reasons given for requiring an expert at trial would further strengthen the case for allowing the reading from medical books in compensation proceedings if an expert is present.

Ability To Support Award. Appellate courts in some states have greatly limited the effectiveness of legislation liberalizing the rules on admissibility of evidence in workmen's compensation proceedings. This has been done by limiting the weight which the workmen's compensation commission may accord hearsay. The California rule makes hearsay both admissible and capable of supporting an award,[40] thus giving full support to the legislative purpose. But under the New York rule, followed by a majority of states,[41] hearsay evidence is admissible but *by itself* cannot support an award. This rule requires that there be a "residuum" of legal evidence which provides some support for the claim before an award

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[34] 2 Larson, Workmen's Compensation Law § 79.30 (1961). See, e.g., Ariz. Rev. Stat. Ann. § 23-942 (1956); Ark. Stat. Ann. § 81-1327 (1960); Cal. Labor Code § 5708; Kan. Stat. Ann. § 44-523 (1964); N.J. Stat. Ann. § 34:15-56 (1959); N.Y. Workmen's Comp. Law § 118; Utah Code Ann. § 35-1-88 (1953); cf. La. Rev. Stat. Ann. § 23:1317 (1964) (court trials for disputed claims).

[35] See Horovitz, Workmen's Compensation 239 (1944), where the author lists the states of Arizona, Connecticut, Florida, Louisiana, Maryland, Minnesota, New York, Utah, Vermont and West Virginia; see Cal. Labor Code § 5708; N.J. Stat. Ann. § 34:15-56 (1959); Ohio Rev. Code Ann. § 4123.10 (Page 1965).

[36] See Horovitz, supra note 35, where Kansas, Missouri, Montana, and Pennsylvania are listed; see Ark. Stat. Ann. 81-1327 (1960).

[37] See Horovitz, supra note 35, at 242, where the author lists the states of Georgia, Idaho, Illinois, Indiana, Massachusetts, Michigan, North Carolina, South Carolina, and Virginia. Also, see Idaho Code Ann. § 72-601 (1949).

[38] See Cooper, "The Admissibility of Hearsay in Hearings Before Workmen's Compensation Commissions," 31 Dicta 423, 425 (1954). In Alabama and Louisiana, however, the merits of a disputed workmen's compensation claim are decided in the courts. See Ala. Code tit. 26, § 297 (1958); La. Rev. Stat. Ann. § 23:1311 (1964).

[39] But see Note, "Improper Evidence in Nonjury Trials: Basis for Reversal?" 79 Harv. L. Rev. 407 (1965), where it is suggested that this might not be the case in nonjury court trials. "There are situations in which a judge by virtue of his experience in conducting trials, may have superior fact finding capacities." Id. at 413.

[40] See Sada v. Industrial Acc. Comm'n, 11 Cal. 2d 263, 78 P.2d 1127 (1938); cases cited in 2 Larson, supra note 34, § 79.21 n.13 and accompanying text.

[41] 2 Larson, supra note 34, § 79.22.

can be made.[42] Under a third rule admission of hearsay is nonreversible error, but the award must be reversed where it appears that it would not have been made if such evidence had not been considered.[43] Such a rule fully negates the liberalizing purpose behind the workmen's compensation legislation.

The "residuum" doctrine has been under attack by legal scholars, who claim that hearsay alone should be able to support a compensation award if the evidence would satisfy a reasonable mind.[44] The commissioner, because of his expertise, has the ability to separate hearsay which is worthless rumor or gossip from "persuasive hearsay."[45] Sometimes the courts which follow this majority rule have even "seized at straws to find that all-important 'residuum.' "[46] Certainly, then, when the medical book is used only to support the opinions of an expert witness in a workmen's compensation proceeding, it seems that the opinion of the expert would constitute enough evidence to sustain or deny an award. Therefore, even under the majority or residuum rule, since the opinion of the expert himself would provide the residuum of legal evidence capable of sustaining the grant or denial of an award, reading from a treatise should not constitute error.

CONCLUSION

While the rule against hearsay evidence may have a valid application to the reading of medical treatises, there are some situations in which such reading is justifiable. Two factors—the method of presentation and the nature of the proceeding in which the introduction is attempted—will affect the need for

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[42] See Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916); cases cited in 2 Larson, supra note 34, § 79.21 n.14 and accompanying text.

[43] See Southwestern Bell Tel. Co. v. Nelson, 384 P.2d 914 (Okla. 1963); Sligh v. Newberry Elec. Co-op., Inc., 216 S.C. 401, 58 S.E.2d 675 (1950); Frier v. South Carolina Penitentiary, 216 S.C. 84, 56 S.E.2d 752 (1949); Mason & Dixon Lines, Inc. v. Gregory, 206 Tenn. 525, 334 S.W.2d 939 (1960); 2 Larson, supra note 34, § 79.21 n.15 and accompanying text. No state expressly holds that admission of hearsay evidence in a workmen's compensation proceeding is in itself reversible error. 2 Larson, supra note 34, § 79.21 n.16 and accompanying text. In Davis v. Arkansas Best Freight Sys., Inc., 393 S.W.2d 237 (Ark. 1965), the opinion of the high court of Arkansas did not consider the "residuum" question or the question of whether or not there had been any reliance by the referee or full commission on the hearsay evidence. The court may have assumed such reliance, but it is also possible it considered the question irrelevant. If the latter is the case, Arkansas may be the only state holding the mere introduction of hearsay into a workmen's compensation proceeding reversible error.

[44] See 1 Wigmore, supra note 2, § 4(b), at 39; Horovitz, supra note 35, at 241; 2 Larson, supra note 34, § 79.22. Compare Administrative Procedure Act § 7(c), 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1964), which permits a finding to be based solely on hearsay, with Model State Administrative Procedure Act § 12(7)(e), which permits reversal if administrative findings are "unsupported by competent, material, and substantial evidence in view of the entire record as submitted." See 2 Larson, supra note 34, § 79.22 nn.18-19.

In Davis, "Hearsay in Administrative Hearings," 32 Geo. Wash. L. Rev. 689, 697 (1964), it is stated:

> The hearsay rule is designed to govern *admission or exclusion* of evidence in a *jury* case. The residuum rule, as applied by the state courts that tend to follow it, governs *evaluation* of evidence in a *non-jury* case. . . . [T]he alternative to the residuum rule is not to make findings on the basis of unreliable evidence. The alternative is to use discretion about whether or not the particular evidence is reliable and then, if circumstances warrant, to rely upon it.

[45] See 2 Larson, supra note 34, § 79.23; cf. Phelps Dodge Ref. Corp. v. FTC, 139 F.2d 393, 397 (2d Cir. 1943).

[46] Horovitz, supra note 35, at 241. See Altschuler v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943).