

# Review of Decisions of Administrative Tribunals--Industrial Accident Commission

THE RECENT decision of the District Court of Appeal in *Singer v. California Industrial Accident Commission*<sup>1</sup> illustrates a fundamental problem in administrative law and procedure. In that case the applicant, a woodsman, was engaged in prying certain logs apart with a large pole in the course of his employment. While performing his work, but with no evidence of any unusual exertion or adventitious strain, he experienced a pain in his groin which felt "like someone sticking him with a needle." He proceeded with his work, but about a week later consulted the company's physician, and was found to be suffering from a slight inguinal hernia. The examining physician testified that he could not say from the examination he had made whether the hernia was a new or an old one. Upon a claim for compensation benefits being filed, the Industrial Accident Commission denied compensation. Its decision was reversed by the District Court of Appeal.

To the professional reader who is without special experience in this type of case, the decision of the court would appear to be correct. The record discloses some evidence of distress at the time of the supposed injury, with no contradictory evidence and no expert medical testimony to oppose the claimant's contention. To one who has had experience in trying cases of this type, however, the foregoing statement of facts presents a different picture. After such a person has taken expert medical testimony in a series of hernia cases he finds the situation to be roughly as follows: A large percentage of the population are suffering from incipient, undiscovered or known herniae or ruptures, which may be precipitated into a disabling condition upon slight occurrences, either inside or outside of the course of employment. A sneeze, a cough, stepping suddenly from a curb, may bring the latent condition to light, as well as an act of overstraining or accident at work. Malingering and fraud sometimes play a part, as where a hernia is discovered and subsequently falsely reported under such circumstances as to lay a foundation for relief at the hand of an employer. Workmen's compensation benefits are not health insurance and are due only where real injury in the course of the employment is a substantial cause of disability, either as the whole cause or as a

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<sup>1</sup> (1930) 62 Cal. App. Dec. 25, 287 Pac. 567 (hearing denied by Supreme Court).

substantial contributing factor. Of course many herniae are also justly due to injury in the course of employment, and are compensable.

The differentiating features which serve to determine whether a supposedly recently discovered hernia was substantially a result of an injury while at work are therefore:

- (1) Degree of pain noted at the time of the supposed injury, a substantial injury causing a considerable degree of pain;
- (2) Prompt complaint or other indicia of recent injury;
- (3) Medical findings at first examination relative to pain, tenderness, etc., suggestive of recent injury.

In the light of these tests the decision of the Industrial Accident Commission would appear to have been correct in the instant case. The record, however, did not present to the court any of the information described above.

The fundamental question suggested is whether an administrative tribunal specializing in a particular type of controversy and becoming familiar with all of its features can apply its own knowledge gained from its past experience and studies in the decision of its cases, without reproducing and incorporating such knowledge and experience specially in each case as evidence for the sake of a record to be sent up to the appellate courts in case review be applied for from its decision.

Our principles of review of judicial decisions are historically derived from the jury system. The jury is assumed to have no knowledge other than such matters within the common knowledge of the community as are within the field of judicial notice. Being dispersed after each trial and verdict, it has no opportunity to cumulate experience in the determination of particular types of controversies. It is therefore necessary that all information necessary to the decision of the case be presented to it and incorporated in the record, and review of its verdicts in the higher courts is predicated upon the assumption that this has been done.

From force of judicial habit the same understanding is applied in appeals from decisions of the court sitting without a jury. While review of decisions of the Railroad Commission and the Industrial Accident Commission and similar bodies is by certiorari, which was originally intended and supposed to be limited to questions of jurisdiction and not to the correctness of determinations within the Commission's jurisdiction, the courts by judicial construction have gradually extended the scope of the writ, in compensation cases at any rate, so that it is now substantially as broad as that of appeal. The only exception is that errors in admission and rejection of evidence and purely procedural matters are not reviewable.

Administrative or semi-judicial tribunals of the type discussed are permanent bodies specializing in particular fields and necessarily constantly gaining experience in their work. The Industrial Accident Commission can and does learn about medical problems arising in the course of its work and carries over experience and conclusions from one case to another. Its medical department may conduct researches and investigations for the Commission's information, not associated with any particular case pending before it. It may consider the problem of hernia as a social and economic one, and prepare, from its accumulated experience, tests and standards for determining compensability.

It is not feasible, as a practical administrative proposition, to incorporate the Commission's experience and knowledge into the record of each hernia case. In the first place, its conclusions and opinions are not technically evidence. If presented in this form for inclusion in the record, the Commission would be exposed to the criticism of "packing" or "framing" the record to fit its own views and of being unreceptive to expert medical testimony where such testimony is actually offered by the parties, as is done in a few cases, and differs from the Commission experience. If presented in the form of testimony or of a report of an investigator or attache of the Commission with right of cross examination, which is a frequent practice of the Railroad Commission, these objections disappear but others arise. The lengthening of the record, the increase of the time consumed in a hernia case from fifteen minutes to an hour or more (the Commission's daily calendars are crowded as it is) and the additional expense, are nearly prohibitive; also, the advantages of simplified procedure which the legislature contemplated in shifting workmen's compensation cases from the courts to an administrative body, would be seriously impaired if the viewpoint of the referee changes from one of prompt, just and inexpensive decision for the litigants to one of primarily perfecting a longer record for appeal. The Commission does not exist primarily for the convenience of the appellate courts, but rather for the convenience of the litigants coming before it.

If the burden be placed on the parties of incorporating sufficient evidence in the record in each hernia case to permit the appellate courts to adequately review the case upon its record, the cost and loss of time is again prohibitive. An expert medical witness usually insists on a fee of \$50.00 to \$100.00 for each appearance at a hearing. The injured man cannot pay this sum, and insurance companies do not wish to.

The present practice is that in ninety-five per cent of all hernia

cases the insurance company's representative brings the claimant to the Commission's offices for a short, informal hearing, the case being submitted upon the testimony of the claimant, the written report of the examining physician, and an occasional examination by the Commission doctor and written report. In less than five per cent of the cases is a medical witness produced, and when this is done it is either because of some unusual feature in the case, or because an attorney for either side, who is new to such cases, wishes to "rehash" the entire subject. In about one per cent of hernia cases is a review sought in the higher courts. The California Commission decides perhaps a thousand hernia cases annually in the expeditious manner described.

The need is, therefore, for a mode of review which will obviate the delay, expense and inconvenience of preparing a full record for review containing necessary medical opinion evidence, and at the same time will permit the administrative tribunal to employ, in deciding the case, its past knowledge, experience, and policies. A conflict now exists between the mode of review provided and the practical convenience of the litigants and Commission. Some method should be devised by which the Commission's knowledge and experience may be used by it without formal inclusion of its substance in the record in each case.

The doctrine of judicial notice cannot be stretched to meet the situation, as the facts which the Commission comes to know from past medical testimony are not actually known either to the members of the appellate courts or to the average man.

In a few cases, bodies such as the Board of Tax Appeals and the short-lived Commerce Court were specially created with the intent that such appellate tribunals should be as experienced in the specialized field as the bodies whose decisions they reviewed. Because of the multifarious nature of boards and commissions in state work this is impracticable.

Some relief might be gained if the Commission in question were to inform the reviewing court in its briefs of its past knowledge and experience in cases where its decisions are before the courts for a review. This method has been used with success in the briefing of constitutional questions dependent upon questions of economics and public policy, as, for instance, in *Muller v. Oregon*,<sup>2</sup> involving the validity of the eight-hour law for women. It is, however, an extra-legal procedure and might be ruled out if carried to an extent sufficiently to really meet the situation.

While no very obvious remedy is apparent, more assistance would be gained if the appellate courts were to revert to the original scope

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<sup>2</sup> (1908) 208 U. S. 412, 28 Sup. Ct. 324.

of the writ of certiorari as intended by the legislature at the time statutes prescribing this mode of review were adopted, *i.e.*, that the writ would lie only to determine jurisdiction and not to review alleged errors committed in the exercise of jurisdiction. While this might result in inability to correct some errors of decision which ought to be corrected, the original intention of the legislature was clearly to minimize the right of review in order to secure speedier determination by a specialized tribunal and avoid the transfer of ultimate determinations of fact to the appellate courts.

In any event, there is a serious loss in efficiency of administration of statutes of the type under discussion if the trial tribunal is not able to acquire, consolidate and use its past experience in the decisions of problems coming before it without preparing an elaborate and expensive record in every case in order to create a proper record for an appellate court.

In *Meade v. Wisconsin Motor Manufacturing Company*<sup>4</sup> and in *McCarthy v. Industrial Commission*<sup>5</sup> the question here discussed was given consideration. In both cases the Industrial Accident Commission of Wisconsin had denied compensation for hernia and its decision had been reversed by the circuit court. The supreme court, in turn, reversed the circuit court and reinstated the commission's findings. The supreme court pointed out that the commission was entitled to rely upon its own experience, derived from its specialization in this class of cases, even in opposition to expert testimony presented to it in the cases involved. The commission, it held, was not bound to accept opinions of experts contrary to its own experience. Where the conclusion relates to a subject of special or expert knowledge courts should reverse the findings of the commission with more reluctance and hesitation than was there shown.

The supreme court in the later of the two cases mentioned also accepted and quoted extensively from statements of fact relative to the general nature of industrial hernia contained in the commission's brief. One of the justices also concurred in the decision upon the ground that, although he thought the commission had not applied its own tests consistently and had made a mistake of judgment, the Compensation Law had transferred jurisdiction and therefore jurisdiction to err, from the courts to the commission, and the latter had "erred within its jurisdiction to err." Which is substantially the original rule laid

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<sup>3</sup> See *Roberts v. Police Court* (1921) 185 Cal. 65, 195 Pac. 1053 for a statement of the scope of certiorari in general.

<sup>4</sup> (1918) 168 Wis. 250, 169 N. W. 619.

<sup>5</sup> (1927) 194 Wis. 198, 215 N. W. 824.

down in California relative to the scope of the writ of certiorari in *Roberts v. Police Court*,<sup>6</sup> that the writ lies only to test jurisdiction, and not errors committed within the jurisdiction.

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<sup>6</sup> (1921) 185 Cal. 65, 195 Pac. 1053.