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Daniel E. Buchanan

EVIDENCE IN WORKMEN'S COMPENSATION CASES

DANIEL E. BUCHANAN*

I. INTRODUCTION

The question is often asked whether administrative agencies should be governed in their proceedings by the usual rules of evidence said to be applicable to judicial proceedings. If we think of the application of rules of evidence to administrative agencies in the same way we think of them as applicable to jury trials, then the rules should be observed. If we are persuaded, however, that an administrative agency is more nearly analogous to a court sitting without a jury, then the answer may be different.

The North Dakota Rules of Evidence declare that agency proceedings conducted in accordance with North Dakota Century Code chapter 28-32, the Administrative Agencies Practices Act, are exempt from their standards and guidelines.[1] To the extent, then, that the administrative agencies of the state do not have to follow the North Dakota Rules of Evidence in receiving evidence in their proceedings, whether formal or informal, the rules of evidence do not apply to those bodies. The courts, however, often speak of the *admissibility* of evidence in agency proceedings. What is probably meant by the use of this word is that there has been a reliance on evidence which does not possess sufficient credibility and reliability to be made the basis of essential findings of fact.

In this article the statutes and cases relating to the North Dakota Workmen's Compensation Bureau, an administrative agency of the state, will be discussed. It will be seen that there is a constant reference to the law of evidence in the decisions of courts reviewing bureau cases. In fact, the courts often apply evidentiary concepts in those decisions. This article will also show how the North Dakota Rules of Evidence provide standards and guidelines for the ultimate

* Attorney and Municipal Judge, Jamestown, N.D.; B.A., 1959, Jamestown College; J.D., 1968, University of North Dakota; Assistant Counsel, North Dakota Workmen's Compensation Bureau, 1968-1969.

1. N.D.R. Ev. 1101(d)(3) (Supp. 1977). The rules are not abrogated with respect to the evidentiary privileges, however. *Id.*

use by the bureau of the evidence received, even though the bureau is not required to apply the rules in most situations.

II. BURDEN OF PROOF

The Workmen's Compensation Act (the Act) declares that any claimant for workmen's compensation has the burden of proving that he is entitled to it.[2] Very often the term *burden of proof* is used to describe both what is called the burden of producing evidence, and what is known as the burden of persuasion. Morgan has suggested as follows:

> If the terminology of burden is to be used, the definitions of Rule 1 (2), (3) of the Model Code of Evidence of The American Law Institute should be accepted: "Burden of producing evidence of a fact means the burden which is discharged when sufficient evidence is introduced to support a finding that the fact exists. Burden of persuasion of a fact means the burden which is discharged when the tribunal which is to determine the existence or non-existence of the fact is persuaded by sufficient evidence to find that the claim exists."[3]

A claimant in a compensation case in this state must prove the existence of facts concerning the elements of his claim, and also persuade the bureau that the claim should be accepted and an award made. It appears that the words "burden of proof" in our statute and cases clearly includes the Model Code of Evidence definition. In carrying that burden, it has long been held that the claimant must do so by a preponderence of the evidence.[4]

A. THE ELEMENTS OF A WORKMEN'S COMPENSATION CASE

Assuming that a claim is filed within the prescribed time,[5] thus giving the bureau jurisdiction[6] to determine it, the elements of a claimant's case, concerning which he must meet his burden of proof, are as follows: (1) that he is an employee under a contract of hire;[7] (2) that he has received an injury by accident;[8] (3) that the injury

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2. N.D. CENT. CODE § 65-01-11 (1960 & Supp. 1977). If, however, the employer or the bureau contends that the employee is not entitled to benefits because the injuries were self-inflicted, were sustained while willfully injuring another, or were caused by the voluntary intoxication of the employee, the burden of proving non-entitlement is on the bureau or employer. *Id.*

3. E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 14 (5th ed. 1976).

4. Sandlie v. North Dakota Workmen's Compensation Bureau, 70 N.D. 449, 452, 295 N.W. 497, 498 (1940). The phrase, "preponderance of the evidence," has been defined as follows: "Greater weight of evidence, or evidence which is more credible and convincing to the mind." BLACK'S LAW DICTIONARY 1344 (4th ed. 1968).

5. One year from the date of injury or death. N.D. CENT. CODE § 65-05-01 (Supp. 1977).

6. Pearce v. North Dakota Workmen's Compensation Bureau, 67 N.D. 512, 274 N.W. 587 (1937).

7. N.D. CENT. CODE § 65-01-02(5) (1960 & Supp. 1977); Kipp v. Jalbert, 110 N.W.2d 825 (N.D. 1961).

8. N.D. CENT. CODE § 65-01-02(8) (1960 & Supp. 1977). Unexpectedness is the basic

arise out of[9] and in the course of employment; or (4) that he has contracted a disease which can be shown to be fairly traceable to the employment.[10]

The third element stated above, that the injury arise out of and in the course of employment, is new to North Dakota law. Before 1977, there was no requirement that an injury "arise out of" employment. All that was required was a showing that the injuries be received "in the course of" employment.[11] The law regarding the latter phrase was settled, the North Dakota Supreme Court stating as follows: "An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform."[12] Thus, there had to be a showing of a causal connection between the injury and the employment.[13]

In discussing the coverage formula, "arising out of and in the course of employment," Professor Larson states as follows:

> Few groups of statutory words in the history of law have had to bear the weight of such a mountain of interpretation as has been heaped upon this slender foundation. It is not surprising, then, that to make the task of construction easier, the phrase was broken in half with the "arising out of" portion construed to refer to causal origin, and the "course of employment" portion to the time, place, and circumstances of the accident in relation to the employment.[14]

It will be interesting to see how the courts in North Dakota deal with the new language in our Act. From an examination of the cases and from what Larson has written, it appears that the words, "arising out of," are merely the legislative affirmation that there be a causal connection shown in compensation cases,[15] a requirement that the courts have enforced without the language being in the Act. North Dakota has certainly joined the majority of the states with

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and indispensable ingredient of "accident." 1A A. LARSON, WORKMEN'S COMPENSATION LAW § 37.20 (1973).

9. N.D. CENT. CODE § 65-01-02(8) (Supp. 1977).

10. N.D. CENT. CODE § 65-01-02(8)(a) (1960 & Supp. 1977); Tweten v. North Dakota Workmen's Compensation Bureau, 69 N.D. 369, 287 N.W. 304 (1939).

11. N.D. CENT. CODE § 65-01-02(8) (1960), *amended by* N.D. CENT. CODE § 65-01-02(8) (Supp. 1977).

12. O'Leary v. North Dakota Workmen's Compensation Bureau, 62 N.D. 457, 462, 243 N.W. 805, 807 (1932), *quoting In re* Employers' Liability Assur. Corp., 215 Mass. 497, 102 N.E. 697 (1913); *accord*, Lippmann v. North Dakota Workmen's Compensation Bureau, 79 N.D. 248, 256-57, 55 N.W.2d 453, 459 (1952).

13. *E.g.*, Wobbe v. Workmen's Compensation Bureau of the State of North Dakota, 73 N.D. 256, 13 N.W.2d 712 (1944); Booke v. The Workmen's Compensation Bureau of the State of North Dakota, 70 N.D. 714, 297 N.W. 779 (1941).

14. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 6.10 (1973).

15. The drafter's notes to Senate Bill No. 2158 [1977 N.D. Sess. Laws ch. 579 (codified in N.D. CENT. CODE tit. 65)], say as follows:

> Presently the law only requires that an injury arise in the course of employment. Our courts have interpreted that to mean that if an employee is at the *place* he is supposed to be at the *time* he is supposed to be there, and engaged in an *activity* whose purpose is related to employment, any injury he receives is compensable.

the "arising out of" requirement, leaving states such as Pennsylvania and Wisconsin, along with the Federal Employees' Compensation Act, in the minority of jurisdictions which have omitted the "arising out of" idea altogether.[16]

B. SPECIAL SITUATIONS CONCERNING THE BURDEN OF PROOF

1. *The Surviving Spouse*

Basically, the widow or widower's burden of proof is the same as any other claimant.[17] In addition, the existence of a husband-wife relationship must be proven.[18] The statute allows the spouse-claimant to be either the husband or wife of the decedent "who *was living with* the decedent *or was dependent upon* the decedent for support at the time of injury."[19] The law of marriage and divorce may be looked to for help in determining who are spouses,[20] but the phrases "living with" and "dependent upon . . . for support" may one day soon cause administrative and judicial headaches.

2. *Children*

In matters of disability, death, and the like, the amount of compensation allowable will be affected by whether there are children of the claimant.[21] The Act defines "child" as a stepchild, adopted child, posthumous child, foster child, and acknowledged illegitimate child.[22] A married child is not included, unless that child is actually dependent upon that claimant. In a proper case, proof would be required by appropriate documentation of the existence of the relationship of the child to the claimant.

3. *Disability Cases*

In a case where total disability,[23] whether temporary or permanent, is sought to be proven, the North Dakota Supreme Court has said as follows concerning the meaning of the phrase, "total disability":

> The words "total disability" as used in the workmen's compensation acts should be taken in their plain or ordinary

16. A. LARSON, *supra* note 14.
17. *See supra* note 2. Fancher v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 105 (N.D. 1963).
18. Fancher v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 105 (N.D. 1963).
19. N.D. CENT. CODE § 65-01-02(17) (Supp. 1977) (emphasis added).
20. *Supra* note 18. The *Fancher* case is also a good place to start looking for a list of the types of evidence held sufficient to create the presumption of a spousal relationship.
21. N.D. CENT. CODE §§ 65-05-05, -09, -17 (1960 & Supp. 1977).
22. *Id.* § 65-01-02(13) (1960).
23. *Id.* § 65-05-09 (1960 & Supp 1977).

> and usual sense. In order to determine total disability under the statutes both the type of work being done at the time of the accident and the nature and extent of the injury must be considered; and regard must be had to age, experience, training, and capabilities of the employee.
>
> Generally, an employee is totally incapacitated and entitled to the compensation provided therefor where by reason of the injury he is so disqualified from performing the usual tasks of a workman that he is unable to procure and retain employment.[24]

The above factors announced by the court should serve not only as guidelines to counsel in handling this type of a case, but also for the bureau in deciding if total disability exists, whether temporary or permanent.

4. *Heart Attack Cases*

A 1975 decision of the North Dakota Supreme Court, *Stout v. North Dakota Workmen's Compensation Bureau*,[25] held that a heart attack caused by work-connected exertion was an accident, and hence qualified as a compensable injury under our Act. The Court also held that where an employee is engaged in work requiring exertion which is usual for him in that employment, and where the exertion precipitates injury or death, there may be recovery even though the injury or death was also contributed to by a pre-existing defect or disability.[26] It thus rejected as arbitrary the distinction which the bureau had been applying between "usual exertion," which was not compensable in the heart attack cases, and "unusual exertion," which was.

When the legislature met in 1977, the bureau sought to have *Stout* overruled. The bureau testified as follows:

> [That] the bill [Senate Bill No. 2158] provides that if an injury is due to heart attack or stroke, the injury must be causally related to the employee's job, with reasonable medical certainty, and must have been brought on by "unusual stress." Senator Lodoen asked if this interpretation is being carried in other states. Mr. Gross [General Counsel for the North Dakota Workmen's Compensation Bureau] replied North Dakota would be in a group of 1/3 of the states who require "unusual" exertion, but that the bureau has always interpreted it that way. He added that in 1975 [in *Stout v. North Dakota Workmen's Compensation Bureau*] the North Dakota Supreme Court held a heart attack was to be classi-

24. Lyson v. North Dakota Workmen's Compensation Bureau, 129 N.W.2d 351, 355 (N.D. 1964), *quoting* 99 C.J.S. *Workmen's Compensation* § 299 (1958).
25. 236 N.W.2d 889 (N.D. 1975).
26. *Id.* at 892.

> fied as an accident and even if precipitated by "usual" exertion, it was compensable. He said this court decision has raised the number of heart attack claims five times since the decision, and there has been an estimated increase in premium of 6 - 10%. . . . [A]nd if they have to pay on a 100% basis on the heart attack and stroke claims, the increase in premium will double from the 6 - 10% increase they already have. . . . [T]he bill would cost an additional $800,000.00, but there would be a $500,000.00 savings in the section dealing with heart attack claimants. . . .[27]

As a result of the above testimony, and testimony like it, the legislature added language to the Act specifically dealing with injuries due to heart attacks or strokes.[28] Any heart attack or stroke, to be compensable, must be causally related to the employment with reasonable medical certainty and must be brought on by *unusual stress.*[29]

A problem which is bound to recur in heart attack cases concerns the death certificate as evidence. Causal connection is an integral part of workmen's compensation cases. It is sometimes difficult to get physicians to talk in terms of causation, so a claimant may seek to rely solely upon the death certificate without any other medical proof of causation. In *Foss v. North Dakota Workmen's Compensation Bureau,*[30] the court stated that the entrance into evidence of the death certificate without any medical testimony whatsoever to support the claimant's position was insufficient to prove a causal connection between her husband's employment and his death.[31]

5. *Aggravation Cases*

North Dakota, along with a small number of other states, has a unique statutory provision in its Workmen's Compensation Act which allows the proration or apportionment of benefits ordinarily payable if a prior condition is aggravated by the compensable injury.[32] The bureau, for at least ten years, has paid claims on a fifty percent basis when it believed that there was a pre-existing condition which was worsened by or made into a compensable injury by an accident or disease which was work-connected.

Many of the reported cases dealing with heart attacks, blood vessel conditions, or pulmonary conditions have spoken in terms

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27. Minutes, Senate Comm. on Industry, Business & Labor, 45th Leg. Sess. of N.D. (Jan. 19, 1977).
28. N.D. CENT. CODE § 65-01-02(8) (Supp. 1977).
29. *Id.*
30. 214 N.W.2d 519 (N.D. 1974).
31. *Id.* at 525.
32. N.D. CENT. CODE § 65-05-15 (1960 & Supp. 1977).

of aggravation.[33] The aggravation statute, however, has been applied in the case of backs, hernias, knees, and almost every other condition with which the human body can be afflicted. It was not until very recently, however, that the North Dakota Supreme Court made it clear that the bureau may not invoke the aggravation statute, and hence prorate benefits, without receiving "sufficient medical testimony during a properly conducted evidentiary hearing."[34] A concurring opinion in *Stout* said as follows:

> The extent of the aggravation is basically a medical fact question to be resolved by the agency under appropriate rules of law. Even though it may be difficult in some instances to determine with exact precision the extent of the aggravation and the resulting proportionate benefits, nevertheless the statute contemplates that a reasonable effort be made.[35]

A concurring opinion in the second *Stout* case was less willing to conclude that the aggravation statute could be as easily invoked as his brethren suggested, and stated as follows:

> The few other States which have similar laws have had great difficulty in construing them and seldom have applied them as generally as the majority opinion would lead one to believe. . . .
>
> Other courts have held that the apportionment statute does not apply to conditions which were unknown prior to the injury and which had not affected the ability of the employee to do his work.
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> . . . .
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> In view of the many uncertainties and possible ramifications in the eventual development of case law, I would not indicate now what effect, if any, the apportionment statute might have on cases like this one or any other type of case in which the issue is appropriately raised.[36]

The 1977 legislature changed the law to provide that the bureau may pay a flat fifty percent of the benefits in aggravation cases if the percent or degree of aggravation cannot be determined by the medical evidence.[37] The bureau knows, and counsel who work in this area soon find out, that doctors have an extremely difficult time making a percentage apportionment of the condition for which they treated the claimant which relates to a pre-existing condition, and the amount which is related to the injury in the course of the

33. *See* cases collected and discussed in Stout v. North Dakota Workmen's Compensation Bureau, 236 N.W.2d 889 (N.D. 1975).
34. Stout v. North Dakota Workmen's Compensation Bureau, 253 N.W.2d 429, 432 (N.D. 1977).
35. 236 N.W.2d at 895 (Sand, J., concurring).
36. 253 N.W.2d at 432-33 (Vogel, J., concurring).
37. N.D. CENT. CODE § 65-05-15 (Supp. 1977).

employment. The bureau's testimony to the legislature concerning the matter is as follows:

> Section 14 of the bill [Senate Bill No. 2158] deals with the Aggravation Statute which is being amended to specify that pre-existing conditions are not covered under the Act. This specifies that if the condition existed prior to the happening of any injury, compensation shall not be paid. If, however, a pre-existing condition was aggravated by a compensable injury, benefits would apply in accordance with the degree of aggravation to be determined by a medical authority. If the degree of aggravation cannot be determined, there would be a 50% compensation award or aggravation basis awarded. He said the bureau is aware that in some cases the 50% award is too low, and in some cases it would be too high, but sometimes there is no way they can get a doctor's opinion on the degree of aggravation. This section only states that if they can't get a doctor's opinion, the bureau will pay on a 50% basis. *He said this section also states that in case of death due to an employment aggravated condition, the bureau will pay funeral expenses in full.*[38]

These so-called aggravation cases, like the heart attack and stroke cases, will require extremely careful preparation by counsel, and will necessitate education of physicians to respond to questions that call for testimony on causation. Of the two types of cases, the apparent quantum of proof required to escape a fifty percent award will probably prove to be the more difficult. It remains to be seen how the courts will receive these innovations in compensation law accomplished in 1977.

III. OFFICIAL NOTICE

Administrative agencies such as the bureau have long been permitted to take official notice of facts which are judically noticed by the courts of this state.[39] Facts subject to judicial notice were formerly enumerated by statute.[40] Today, under Rule 201 of the North Dakota Rules of Evidence, courts in North Dakota may take judicial notice of adjudicative facts only; that is, evidentiary facts.[41] A fact judicially noticed must not be subject to reasonable dispute. It must be either: "(1) generally known within the territorial jurisdiction of the court; or (2) capable of accurate and ready determination. . . ."[42]

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38. Minutes, *supra* note 27 (emphasis added).
39. The last sentence of N.D. CENT. CODE § 28-32-07 (1974) reads, in material part, as follows: "Nothing . . . shall prevent any administrative agency from taking notice of . . any facts which are judicially noticed by the courts of this state."
40. N.D. CENT. CODE § 31-10-02 (1976) contained 92 subsections. It has been superseded by N.D.R. Ev. 201 (Supp. 1977).
41. N.D.R. Ev. 201(a) (Supp. 1977).
42. *Id.* 201(b).

The procedure for the taking of judical notice is spelled out in the rule.[43] It may be taken at any stage of the proceeding.[44]

IV. PRESUMPTIONS

The Act provides that certain facts give rise to presumptions. Thus, a person shown to be performing services for another for pay is presumed to be an employee.[45] Any disability or death of a full time paid fireman or law enforcement officer caused by lung or respiratory disease, hypertension or heart disease is presumed to have been suffered in the line of duty; that is, to have arisen out of and in the course of employment.[46] The classification of industries and rates of premium fixed by the Bureau are presumed to have been fixed validly.[47] Finally, most courts, in dealing with unexplained deaths in workmen's compensation cases, have adopted the rule that when an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, there is a presumphion that death arose out of the employment.[48]

These presumptions are rebuttable, but their effect is said to be as follows:

> A presumption takes the place of evidence unless, and until, evidence appears to overcome or rebut it, but when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter determination of issues depends upon evidence with the requirement that the party having the affirmative of the issue involved sustain his position by the preponderance of the evidence.
>
> The effect of a presumption is to place upon the person against whom it is employed the burden of going forward with proof to rebut it.[49]

With the adoption of the North Dakota Rules of Evidence,[50] the effect of presumptions, once arising, has been changed. Under Rule 301, the party against whom the presumption operates now must prove that it is more probable that the presumed fact does not exist than that it does. Only when that burden is carried, and the trier of fact finds that the presumed fact does not exist, does the presump-

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43. *Id.* 201(c),(d),(e).
44. *Id.* 201(f).
45. N.D. CENT. CODE § 65-01-03 (1960 & Supp. 1977).
46. N.D. CENT. CODE § 65-01-02(9)(d) (1960 & Supp. 1977). *But see id.* §§ 65-01-02(8), (8)(a), 65-05-15 (1960 & Supp. 1977).
47. State *ex rel.* Johnson v. Hughes Elec. Co., 51 N.D. 45, 199 N.W. 128 (1924). The relevant statute is N.D. CENT. CODE § 65-04-01 (1960).
48. *E.g.*, King v. Johnson Bros. Constr. Co., 83 S.D. 69, 155 N.W.2d 183 (1967), *citing* 1 A. LARSON, *supra* note 14, § 10.32.
49. Fancher v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 105, 109 (N.D. 1963).
50. N.D. SUP. CT., ORDER OF ADOPTION (Jan. 18, 1977, effective Feb. 15, 1977).

tion cease to operate. The commentary to Rule 301 acknowledges that "a stronger effect" is being given to presumptions in this jurisdiction, "in light of the important social considerations which give rise to presumptions."

V. PRIVILEGE AND PRIVILEGED COMMUNICATIONS

Information concerning a person's medical treatment may often be of concern in compensation cases. The legislature has addressed the matter of privileged communications as follows:

> The filing of a claim with the bureau shall constitute a consent to the use by the bureau, in any proceeding by it or to which it is a party in any court, of any information which was received by any doctor, hospital, or clinic in the course of any examination or treatment of the claimant. The filing of such claim shall authorize a doctor, hospital, or clinic to disclose any such information to the bureau or to its representative.[51]

Prior to the 1977 legislature, the statute did not address, in express terms, hospital or clinic records. It still does not refer to dental records, chiropractic records, or records of osteopathic physicians. However, the legislature may have believed that the term "doctor" embraced all of those callings. It appears that since 1941 the filing of a claim for workmen's compensation has been a waiver of the physician-patient privilege.[52] Putting one's condition in issue is a waiver of the privilege, both in our case law[53] construing the statutory physician-patient privilege and in the North Dakota Rules of Evidence.[54]

The legislature must have been persuaded that hospital and clinic records should be made releasable to and usable by the bureau, not only for the efficient administration of the Workmen's Compensation Act, but also to avoid liability on the part of the hospitals and the clinics for possible wrongful disclosure of records. Neither hospital nor clinic records have enjoyed the status of being privileged as such under the former statutes.[55] Most clinics and hospitals, however, are reluctant to release information on a patient without his or her express release and waiver. Those records have even been refused to counsel for the bureau when the hospital or clinic was shown

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51. N.D. CENT. CODE § 65-05-30 (Supp. 1977).
52. *See* N.D. REV. CODE of 1943 § 65-0530 (1944) (presently codified in N.D. CENT. CODE § 65-05-30 (Supp. 1977)).
53. *See* Sagmiller v. Carlsen, 219 N.W.2d 885, 894 (N.D. 1974) (malpractice action).
54. N.D.R. Ev. 501(d)(3) (Supp. 1977).
55 There is authority that privileged matter does not lose that status by being contained in a hospital record. *See* cases collected in Annot., 120 A.L.R. 1124, 1140 (1939). *See also* N.D. CENT. CODE § 31-08-01 (1976) (hospital records as business records); Jahner v. Jacob, 233 N.W.2d 791, 800 (N.D. 1975).

their patient's application to the Workmen's Compensation Bureau for benefits, and when the statute was shown to them. The refusal to divulge those records is perhaps more a matter of clinic and hospital law than one of the law of evidence. Certainly the records are not privileged when a claim for compensation is made, and when they are relevant. It is hoped that the 1977 enactment on the subject has settled the matter, at least for the bureau.

The lawyer-client privilege has been recognized as being as applicable to administrative proceedings as to judicial ones.[56]

Somewhat closely related to the matter of privilege and privileged communications is a new statute enacted by the legislature in 1977. It reads as follows:

> The bureau shall keep the medical files of claimants closed to the public and may, at the request of a claimant, close the medical portion of the hearing to the public. However, an employer of a claimant shall have access to the file of the claimant. In the event that a source from outside the bureau requests in writing that information submitted by such source be kept confidential, such information may be released only upon court order.[57]

Claimants' medical files are an exception to the North Dakota open records statute.[58] The closing of the medical portion of a hearing to the public may have as its object what the North Dakota Supreme Court stated was the purpose of the statute forbidding disclosure by a physician of a patient's condition.

> [T]o inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing physicians from making known to the curious the ailments of their patients, particularly when afflicted with diseases which might bring reproach, criticism, unfriendly comment, or disgrace upon the patient if known to exist.[59]

The statute also grants a blanket confidentiality to information submitted by third parties to the bureau which they request be kept confidential.[60] The language used in the statute raises a number of questions.

Certainly one of the questions raised by the last sentence of the statute, "In the event that a source from outside the bureau re-

56. McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937).
57. N.D. CENT. CODE § 65-05-32 (Supp. 1977).
58. *Id.* § 44-04-18 (Supp. 1977). Similar exceptions are discussed in Guy & McDonald, *Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota*, 53 N.D.L. REV. 51, 68-72 (1976).
59. Booren v. McWilliams, 26 N.D. 558, 575, 145 N.W. 410, 414 (1914).
60. N.D. CENT. CODE § 65-05-32 (Supp. 1977).

quests in writing that information submitted by such source be kept confidential, such information may be released only upon court order,"[61] is whether the statute attempts to allow what the North Dakota Supreme Court has previously held may not be done by the bureau. In a 1939 case, *Wallace v. North Dakota Workmen's Compensation Bureau*,[62] the claimant asked the bureau to allow him to examine and inspect all the files and records relating to his claim, including the doctor's reports and recommendations, in order that he might prepare properly before a rehearing of his claim. Certain evidence in the possession of the bureau was withheld from the claimant because, according to the bureau, "by the terms of an express contract between the bureau and certain correspondents, 'the bureau is not permitted to reveal the contents of such reports to any person.' "[63] The bureau also argued that a report made to it by its own doctor was confidential, and that various doctors practicing in the state had allegedly demanded that when they were examining claimants, their reports be held in strictest confidence by the bureau.[64]

The claimant, in successfully seeking a writ of mandamus to compel the bureau to release the reports, was held to be entitled to examine "all of the records and papers pertaining to or used in the claimant's case whether confidential or otherwise."[65] The court, in recognizing that there might be some confidential reports, held, nevertheless, "[that] if any such confidential report was used in the case at bar, the petitioner [claimant] is entitled to examine it."[66] It remains now to be seen how the last sentence of that statute will be applied in practice.

VI. COMPETENCY

Before a person is allowed to testify in a proceeding, the court has a duty to satisfy itself that the witness is competent.[67] The classic test of the competency of a witness is whether: (1) he recognizes the obligation of the oath he has taken to tell the truth; (2) he has apparently perceived some event about which he is going to testify; (3) he has memory of what was perceived; and (4) he has the ability to communicate that in an understandable way to the tribunal, either by himself, or through an interpreter.[68] Certainly an administrative tribunal such as the bureau has the same obligation in the conduct of its hearings.

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61. *Id.*
62. 69 N.D. 165, 284 N.W. 420 (1939).
63. *Id.* at 169, 284 N.W. at 422.
64. *Id.*
65. *Id.* at 170, 284 N.W. at 423.
66. *Id.*
67. N.D.R. Ev. 601-604 (Supp. 1977).
68. *See generally id.*; E. MORGAN, *supra* note 3.

A tendency persists, however, to speak about evidence, not merely the witness, as being competent or not. For example, in a death case,[69] the evidence concerning the blood alcohol content of the claimant's decedent was described as incompetent (and inadmissible) because it had not been shown that there was a proper chain of custody, and that the blood sample was free from tampering. It has also been held that "if *competent* evidence traces a causal connection between an affliction from which a workman was suffering and the accident, or shows that the accident either caused or accelerated the effect of such affliction, that is sufficient to establish a claim against the Fund."[70]

The legislature has been just as free with the use of the term "competent." For example, in stating that firemen and law enforcement officers are entitled to a presumption that they had no disease existing prior to the disabling diseases enumerated, the statute reads as follows: Unless the contrary be shown by competent evidence. . . . "[71]

One may conclude that the use by the courts, the legislature, and lawyers of the term "competent" to describe evidence and testimony is in part based on old habits of thinking.[72] Further, competency is probably meant in that context as a substitute for, or synonym of, the word relevancy. It probably embraces the concepts of credibility and reliability too. The modern trend of judicial thinking, adopted in North Dakota,[73] is away from the use of the word "incompetent," and by implication, the word "competent," in describing testimony or evidence.

VII. OPINION AND EXPERT TESTIMONY

Rule 702 of the North Dakota Rules of Evidence states a principle that has been a part of workmen's compensation proceedings since the Act became effective. The rule states as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The usual expert witness in a compensation case is a person who attended the claimant's personal injuries, or who conducted scientific tests in connection with that treatment or subsequent to the

69. Erickson v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 292 (N.D. 1963).

70. Kuntz v. North Dakota Workmen's Compensation Bureau, 139 N.W.2d 525, 527 (N.D. 1966) (emphasis added).

71. N.D. CENT. CODE § 65-01-02(9)(d) (Supp. 1977).

72. A good example is the objection of "irrelevant, immaterial and incompetent;" that is, the objection raises the entire law of evidence.

73. Dehn v. Otter Tail Power Co., 251 N.W.2d 404, 413 (N.D. 1977).

claimant's decedent's death. In any event, the rules are the same, regardless of the type of expertise possessed by the witness.

A leading North Dakota case holds, that as a minimum, "a showing must be made that the subject matter is one where expert testimony is accepted by the scientific community and the courts and that the proferred expert has sufficient expertise in the area of his competence."[74]

In almost every workmen's compensation case, expert testimony, in the form of findings, and frequently as opinions, will be submitted to the bureau. Because the bureau deals with the health providers on an everyday basis, it acquires a certain expertise in dealing with expert, specialized evidence. At hearings, there is seldom any disagreement concerning the qualifications of the witness as an expert. Nor do the cases examined here discuss whether witnesses were qualified as experts; they do, however, deal with the matter of what the bureau may do with the expert testimony it receives.

A 1958 case, *Mickelson v. North Dakota Workmen's Compensation Bureau*,[75] is illustrative. There, the claimant's decedent's attending doctor testified that, in his opinion, the death of the claimant's husband was related to his employment.[76] The pathologist who did the post mortem studies, however, testified that he did not believe the death in question was caused by anything connected with the employment.[77] The bureau chose to rely on the testimony of the pathologist, rather than on that of the attending physician,[78] and the North Dakota Supreme Court upheld the bureau on appeal.[79]

In *Ambroson v. North Dakota Workmen's Compensation Bureau*,[80] the attending physician gave a lower percentage of disability to the claimant than the consulting physician did. Both orthopedic surgeons, the doctors were selected by the claimant, and were paid for by the bureau. The bureau, however, selected the lower percentage of disability in making its award, and was upheld by the court on appeal.[81] The court, in its opinion, referred to a statute[82] which permits the selection of a third physician when there is disagreement between the claimant's physician and the one selected by the bureau. The court emphasized, however, that Mrs. Ambroson had selected both physicians, so conflict with a bureau-selected phy-

74. Stein v. Olhauser, 211 N.W.2d 737 (N.D. 1973).
75. 89 N.W.2d 89 (N.D. 1958).
76. *Id.* at 91.
77. *Id.* at 93.
78. O'Brien v. North Dakota Workmen's Compensation Bureau, 222 N.W.2d 379 (N.D. 1974) is a more recent case holding that the attending physician's testimony is entitled to greater evidentiary weight.
79. 89 N.W.2d at 94.
80. 210 N.W.2d 85.
81. *Id.* at 86.
82. N.D. CENT. CODE § 65-05-28 (1960 & Supp. 1977)

sician did not appear.[83] It appears, then, that the bureau is often allowed, as the finder of the facts, to believe and rely on the expert testimony which it chooses.

In a case involving expert testimony, such as one with conflicting or non-conforming medical opinions, it may still be possible to probe the basis of the expert's opinion.[84] It may also be possible to show that one physician is less well qualified to render an opinion than another, or that a physician, perhaps selected by the bureau, is less well acquainted with the patient's full condition than the treating physician is and hence has a weaker basis for his opinion than the other.[85] Once expert opinions are received, it becomes the duty of the bureau, as trier, to determine their weight and credibility.

It has sometimes been argued at compensation hearings that the expert's opinion must be based upon facts that are in evidence, or that are assumed to be true hypothetically. Rule 705 of the North Dakota Rules of Evidence is said to do away with that requirement,[86] and represents a change in the law of North Dakota. Certainly it is a change for the better, and it should be followed in compensation hearings.

It is also often said that a medical expert may express an opinion to a reasonable medical certainty or reasonable medical probability.[87] Causation is another matter. A medical witness is rarely prepared to discuss causation in the compensation sense, and it has been held that, in determining causation, medical evidence may even be disregarded.[88]

While expert testimony is certainly an important part of compensation cases, it is only evidence to be weighed with all the rest.

VIII. CONCLUSION

This article has been an introduction to the subject of proceedings before the North Dakota Workmen's Compensation Bureau, the courts reviewing their decisions, and some concepts of the law of evidence. A few conclusions may be drawn from this study.

First, the courts sometimes appear careless, or at least imprecise, in their use of evidentiary concepts in reviewing workmen's compensation proceedings. They often speak of evidence being in-

83. 210 N.W.2d at 87.
84. Minot Sand & Gravel Co. v. Hjelle, 231 N.W.2d 716, 728 (N.D. 1975); *accord*, N.D.R. Ev. 703 (Supp. 1977).
85 O'Brien v. North Dakota Workmen's Compensation Bureau, 222 N.W.2d 379 (N.D. 1974).
86. N.D.R. Ev. 705, Committee Commentary (Supp. 1975).
87. Vaux v. Hamilton, 103 N.W.2d 291, 295 (N.D. 1960); *accord*, Dehn v. Otter Tail Power Co., 251 N.W.2d 404, 412-13 (N.D. 1977). The standard is the same for chiropractors, Klein v. Harper, 186 N.W.2d 426, 430 (N.D. 1971).
88. Nash-Kelvinator Corp. v. Industrial Comm., 253 Wis. 618, 34 N.W.2d 821 (1948).

admissible in a court of law, which is of no great moment in an administrative proceeding. What the courts perhaps mean is that the evidence is unreliable, or lacks sufficient trustworthiness to form the basis of essential findings of the bureau.

Second, the legislature also legislates evidentiary concepts. Why this is done is left to the reader to consider. The same carelessness or imprecision with the use of evidentiary language occurs in the statutes as occurs in the court decisions.

Third, the bureau sometimes appears to resolve any doubts in favor of itself, to the detriment of the claimant, when it makes its findings based on the evidence before it. This is particularly true in the cases involving expert testimony, presumptions, the aggravation cases, the heart attack cases, and in cases where the bureau is in the position of carrying the necessary burden of proof.

Fourth, because the bureau is also the agency that administers the state workmen's compensation fund, we find it in the anomalous position of being a party to the proceedings, usually defending the interests of the employer and the fund, and then becoming the tribunal when all the evidence is in. That hybrid and unseemly position assumed by the bureau is not altogether its fault, but is rather inherent because it serves as both insurer and tribunal. Many other agencies in the state government do the same sort of thing. This author is hard put to propose a solution to this problem. The solution perhaps lies with the legislature.[89]

Finally, there is what the writer sees as a disturbing tendency, accelerated recently, of the bureau's going to the legislature to increase the difficulties of claimants in recovering and in overruling supreme court decisions with which they disagree.

89. Legislative attempts to deal with this problem have in the past ended in failure. In 1969, the legislature rejected a bill which would have permitted private insurance and employer self-insurance in addition to the state fund; the workmen's compensation bureau would then have been only the tribunal, not the insurer as well. In 1973 and 1977 the legislature rejected bills which would have provided for independent hearing examiners.