

JUDICIAL REVIEW OF FINDINGS AND AWARDS OF THE MISSOURI WORKMEN'S COMPENSATION COMMISSION

After a referendum election in 1926, Missouri became the forty-third state to adopt a Workmen's Compensation Act.¹ The purpose of the act was to establish standardized economic benefits for workers injured in industry, without reference to the common-law rules of liability for negligence.² The fundamental theory is that an injury to an employee, like damage to a machine, is a burden that should be borne by industry and ultimately paid by those who consume the product of such industry.³

In order to minimize the problems of continued supervision required by the administration of the act and to secure promptness of recovery with reduced expense for the injured workman,⁴ a commission of three was created⁵ to hear and determine all disputes arising under the act.⁶ Missouri, after watching the experiments in other states, undoubtedly felt that an independent administrative agency could better effectuate the aims of the legislators than could slower court administration of the act.⁷ The Missouri Workmen's Compensation Commission, although not invested with the judicial power of Article 3 of the Missouri Constitution, is essentially a statutory board of arbitrators authorized to hear and determine controversies between employers and employees.⁸ In hearing and determining the facts, it performs a quasi-judicial function and is less formal than a court of general jurisdiction.⁹ An award made by the commission acting within the scope of its authority determines the rights of the parties as effectively as a judgment secured by the regular

1. State ex rel. Elsas v. Missouri Workmen's Compensation Commission (1928) 318 Mo. 1004, 2 S. W. (2d) 796; State ex rel. Lickenstein v. Missouri Workmen's Compensation Commission (Mo. 1928) 2 S. W. (2d) 802.

2. R. S. Mo. (1929) sec. 3301; Maltz v. Jackoway-Katz Cap Co. (1934) 336 Mo. 1000, 82 S. W. (2d) 909; 15 Encyclopedia of Social Sciences, Workmen's Compensation (1934) 488; 23 Encyclopedia Britannica, Workmen's Compensation (1937) 744; Hawker, Administration of State Labor Codes, Master of Science Thesis Washington University (1935).

3. Ross, The Applicability of Common Law Rules of Evidence In Proceedings Before Workmen's Compensation Commissions (1923) 36 Harv. L. Rev. 264; Val Blatz Brewing Co. v. Industrial Commission of Wisconsin (1930) 201 Wis. 474, 230 N. W. 622.

4. Dodd, *Administration of Workmen's Compensation* (1936) 99.

5. R. S. Mo. (1929) sec. 3354.

6. R. S. Mo. (1929) sec. 3339.

7. Dodd, *Administration of Workmen's Compensation* (1936) 98-99.

8. Pfitzinger v. Shell Pipe Line Corp. (1932) 226 Mo. App. 861, 46 S. W. (2d) 147.

9. Wyatt v. Kansas City Art Institute (1935) 229 Mo. App. 1166, 88 S. W. (2d) 210.

legal procedure. It is as binding as a judgment until it is regularly reversed or its validity questioned in the proper manner.¹⁰

In those cases in which the parties cannot voluntarily settle the controversy, the commission makes findings of facts and applies the rules of substantive law to the rights and liabilities of the parties in order to reach an award.¹¹ The review to which these awards are subject is defined by statute as follows

The final award of the commission shall be conclusive and binding unless either party to the dispute shall within 30 days from the date of the final award appeal to the circuit court * * * Such appeal may be taken by filing notice of appeal with the commission * * * Upon appeal no additional evidence shall be heard and in the absence of fraud, the findings of fact made by the commission shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for hearing, or set aside the award upon any of the following grounds and no other:

1. That the commission acted without or in excess of its powers.
2. That the award was procured by fraud.
3. That the facts found by the commission do not support the award.
4. That there was not sufficient competent evidence in the record to warrant the making of the award.¹²

The query naturally arising out of the practical application of this statute is as to the nature of the judicial attitude of the courts when reviewing an award of the commission. The appended chart shows the 55 ultimate reversals which have been made in the 249 cases appealed from the commission.¹³

Those cases ultimately reversed, together with others of a similar nature, will be analyzed to determine whether the courts follow the intention of the Legislature to establish a simple and effective means of compensating the injured workman. The analysis, moreover, will attempt to determine whether the court uniformly applies the theory and interpretation which it expounds.

10. *Pfitzinger v. Shell Pipe Corp.* (1932) 226 Mo. App. 861, 46 S. W. (2d) 147.

11. R. S. Mo. (1929) sec. 3339.

12. R. S. Mo. (1929) sec. 3342.

13. This does not include the cases in which extraordinary legal remedies were sought.

ISSUE	BASIS OF ULTIMATE REVERSAL				Number of Cases Ultimately Reversed
	Evidence Insufficient to Support Findings	Findings Insufficient to Support the Award	Findings of Commission Not Clear	Error by Commission As a Matter of Law	
Change of Condition since Earlier Award	2			2	4
Existence of Employment Relationship	1			3	4
Injury within Scope of Employment	3	2		3	8
Cause of Disability	6			3	9
Amount of Award	10	2		2	14
Necessity of Filing Claim within Six Months				5	5
Existence of a Missouri Contract of Employment			1		1
Existence of Dependency of Claimant	2			4	6
Propriety of Procedure Taken				4	4
TOTAL	24	4	1	26	55

I. ADMINISTRATIVE PROCEDURAL STEPS PREREQUISITE TO AN AWARD¹⁴

In the event an injury results from an accident within the scope of the Workmen's Compensation Act, either the employer or employee may apply to the commission for a hearing upon the

14. This becomes necessary if the parties fail to reach a voluntary agreement. R. S. Mo. (1929) sec. 3338.

matters at issue and for a ruling thereon. Upon receiving such application, the commission is required "to immediately set" a date for a hearing and to notify the parties of the time and place of such hearing.¹⁵ The determination of the suit is by a summary proceeding conducted either by a referee,¹⁶ an individual member of the commission or the full commission,¹⁷ dependent upon the volume of business before the commission. If the first hearing was not held before the full commission, upon an application for review made within ten days from the date of the award, the full commission is required to review the initial award. Review by the full commission is a condition precedent to further appellate review.¹⁸ On this rehearing the full commission has the discretion either to review only evidence already taken, and to make a final award thereon, or to hear further evidence.¹⁹ This discretion to hear or exclude new evidence in reviewing awards cannot be controlled by the courts, except for unreasonable or arbitrary action.²⁰ Failure to give notice of rehearing is held not to be an arbitrary action nor an abuse of discretion because the parties are charged with knowledge that the claim became subject to such procedural steps as were prescribed by statute upon the commission's acquisition of jurisdiction of the claim.²¹

II. PROCEDURE ON REVIEW OF THE AWARD

The final awards of the commission are conclusive and binding unless either party appeals to the circuit court within thirty days of the final award.²² If, there is no appeal from the award of the commission, the circuit court upon request of an interested party renders and notifies the parties of judgment in accordance with the award. Such judgment has the same effect, and all the proceedings in relation thereto are the same, as though the judg-

15. R. S. Mo. (1929) sec. 3338.

16. R. S. Mo. (1929) sec. 3357.

17. R. S. Mo. (1929) sec. 3339.

18. *Hohlstein v. St. Louis Roofing Co.* (Mo. 1932). 49 S. W. (2d) 226; cf. *State ex rel. Randall v. Shain* (Mo. 1937) 108 S. W. (2d) 122.

19. *Idem*; R. S. Mo. (1929) sec. 3341.

20. *Supra*, note 16; *Waterman v. Chicago Bridge & Iron Works Company* (1931) 323 Mo. 688, 41 S. W. (2d) 575.

21. *Hohlstein v. St. Louis Roofing Company* (Mo. 1932) 49 S. W. (2d) 226. "They (parties) had been warned when given notice of the first hearing that they should introduce all their evidence at such hearing. Moreover it is not contended that they requested a hearing before the full commission, nor did they suggest or call attention to any additional testimony they might have offered."

22. R. S. Mo. (1929) sec. 3342.

ment were a final one rendered in a suit duly heard and determined by the circuit court.²³

An appeal, therefore, lies only from a final award of the commission, and any attempt to review a temporary award is premature. Where a temporary award is made for an indefinite time, however, a writ of prohibition will lie to test the validity of the action so that the losing party will not be unduly prejudiced.²⁴

The provision for appeal to the circuit court is the same as in the appeal of civil actions to the appellate courts. The circuit court has the status of an intermediate court. Appeals to the circuit and appellate courts have precedence over all other cases except election contests. The appeal is taken by filing notice of an appeal from the final award with the commission. The commission then under its certificate returns to the circuit court all documents and papers on file in the matter, together with a transcript of the evidence and the findings and award, which thereupon become the record of the cause.²⁵ Neither a bill of exceptions²⁶ nor a motion for a new trial in the circuit court is necessary in order to preserve for appellate review the proceedings and evidence had before the commission.²⁷ A motion for a new trial is, therefore, ineffective to postpone or extend the finality of the circuit court decision beyond the term of court in which it is entered.²⁸ The judgment becomes final at the expiration of the term and cannot be modified or set aside.²⁹ This, however, is not true of proceedings in the circuit court on the issue as to whether the award was procured by fraud. The nature of these proceedings is an equitable one to set aside a judgment, and the usual rules as to bills of exceptions and motions for a new trial apply in such a case.³⁰

Since appeal is the same as in civil actions, the courts of appeals have jurisdiction only in those cases in which the amount

23. R. S. Mo. (1929) sec. 3343; *Brashear v. Brand-Dunwoody Milling Co.* (Mo. 1929) 21 S. W. (2d) 191.

24. *State ex rel. Brewen-Clark Syrup Co. v. Missouri Workmen's Compensation Commission* (Mo. 1928) 8 S. W. (2d) 897.

25. R. S. Mo. (1929) sec. 3342; *Brocco v. May Department Stores* (1932) 227 Mo. App. 395, 55 S. W. (2d) 322.

26. *Urban v. S. P. Boggess & Son* (Mo. 1933) 66 S. W. (2d) 157.

27. *State ex rel. May Department Stores v. Haid* (1931) 327 Mo. 567, 38 S. W. (2d) 44 overruling *Lilly v. Moberly Grocery Co.* (Mo. 1930) 32 S. W. (2d) 109, where it was held that bills of exceptions and motions for a new trial were necessary for appellate review.

28. *Supra*, notes 24 and 25.

29. *Supra*, note 26.

30. *Phillips v. Air Reduction Sales Company* (1935) 337 Mo. 587, 85 S. W. (2d) 551.

in controversy is less than \$7,500³¹ and no constitutional issue is directly involved.³² If the amount in dispute is more than \$7,500³³ or a constitutional issue is raised,³⁴ then the supreme court takes jurisdiction. The supreme court, however, will examine the record to determine the question of its jurisdiction,³⁵ even though its jurisdiction is not expressly questioned by either party.³⁶

III. THE REVIEW

All documents and papers on file in a particular dispute, together with a transcript of the evidence and the findings and award of the commission constitute the record of the cause for purposes of review.³⁷ This record as certified by the commission imports absolute verity and cannot be collaterally attacked on review.³⁸ In order to impeach the proceedings of the commission, the ground for impeachment must appear affirmatively in the record. It is not to be presumed that there was any irregularity by which the jurisdiction of the commission to proceed was interrupted or divested.³⁹

Upon appeal no evidence other than that in the record can be heard, and in the absence of fraud the findings of fact made by the commission within its powers are conclusive and binding.⁴⁰

31. *Robinson v. Union Electric Light & Power Company* (Mo. 1931) 43 S. W. (2d) 912; *Sleyster v. Donzelot & Sons* (1929) 323 Mo. 822, 20 S. W. (2d) 69; *Guilod v. Kansas City Power & Light Company* (1929) 224 Mo. App. 382, 18 S. W. (2d) 97.

32. *Lentz v. Asphalt Paving Company* (Mo. 1932) 50 S. W. (2d) 1063.

33. *Edwards v. Al Fresco Advertising Company* (Mo. 1937) 100 S. W. (2d) 513; *Maddux v. Kansas City Public Service Company* (Mo. 1937) 100 S. W. (2d) 535.

34. *Kristanik v. Chevrolet Motor Company* (1934) 335 Mo. 60, 70 S. W. (2d) 890.

35. *Sleyster v. Donzelot & Sons* (1929) 323 Mo. 822, 20 S. W. (2d) 69.

36. *Casebolt v. International Life Insurance Company* (Mo. 1931) 38 S. W. (2d) 1044; *Hardt v. City Ice & Fuel Co.* (Mo. 1937) 102 S. W. (2d) 592, the Supreme Court said that it would no longer use "life expectancy" in order to determine whether the award exceeded \$7500.00 and so gave it jurisdiction.

37. *R. S. Mo.* (1929) sec. 3342; *Higgins v. Heine Boiler Company* (1931) 328 Mo. 493, 41 S. W. (2d) 565; *Brocco v. May Department Stores* (1932) 227 Mo. App. 395, 55 S. W. (2d) 322; *Waterman v. Chicago Bridge & Iron Works Company* (1931) 328 Mo. 688, 41 S. W. (2d) 575.

38. *Higgins v. Heine Boiler Company* (1931) 328 Mo. 493, 41 S. W. (2d) 575; *Weiler v. Peerless White Lime Company* (Mo. 1933) 64 S. W. (2d) 125; *Brocco v. May Department Stores* (1932) 227 Mo. App. 395, 55 S. W. (2d) 322.

39. *Wright v. Penrod, Jurden & Clark Company* (1935) 229 Mo. App. 1147, 88 S. W. (2d) 411; *Waterman v. Chicago Bridge & Iron Works Company* (1931) 328 Mo. 688, 41 S. W. (2d) 575.

40. *R. S. Mo.* (1929) sec. 3342; *Elsas v. Montgomery Elevator* (1932) 330 Mo. 596, 50 S. W. (2d) 130.

The court, on appeal, can review only questions of law⁴¹ and can reverse, modify, remand for rehearing, or set aside the award upon certain specific grounds and none else.⁴² The Missouri courts, consequently, have uniformly held that they cannot try the case *de novo* nor pass judgment on the weight of the evidence.⁴³ Thus on appeal to the circuit court, that court does not have the right to set aside a finding of the commission which is against the weight of the evidence.⁴⁴

Before the commission can take jurisdiction of a case (1) an accident must have occurred in Missouri⁴⁵ or the parties must have been operating under a Missouri contract;⁴⁶ (2) an employer-employee relationship must have been established;⁴⁷ (3) the accident must have arisen out of and in the course of employment;⁴⁸ (4) the employee must have notified his employer of the injury within thirty days after the accident;⁴⁹ and (5) the employee must have filed his claim for compensation within six months after the accident.⁵⁰ This question of jurisdictional

41. *Ibid.*

42. R. S. Mo. (1929) sec. 3342. "1. That the commission acted without or in excess of its powers. 2. That the award was procured by fraud. 3. That the facts found by the commission do not support the award. 4. That there was not sufficient competent evidence in the record to warrant the making of the award."

43. *Hammack v. West Plains Lumber Company* (1930) 224 Mo. App. 570, 30 S. W. (2d) 650; *Jackson v. General Metals Refining Company* (Mo. 1931) 43 S. W. (2d) 865; *Simmons v. Mississippi River Fuel Corporation* (Mo. 1931) 43 S. W. (2d) 868.

44. *Hammack v. West Plains Lumber Company* (1930) 224 Mo. App. 570, 30 S. W. (2d) 650; Cf. *Adams v. Lilbourn Grain Company* (1932) 226 Mo. App. 1030, 48 S. W. (2d) 147, l. c. 150. "If the verdict of jury—the finding of the commission—is incomprehensible on any theory consistent with a proper regard for their duty to determine the issues accordingly to law and evidence; then it was the duty of the circuit court to set aside the finding."

45. R. S. Mo. (1929) sec. 3310.

46. *Idem*; *Wadley v. Employers Liability Assur. Corporation* (1931) 225 Mo. App. 631, 37 S. W. (2d) 665; Cf. *Weiderhoff v. Neal* (D. C. W. D. Mo. 1934) 6 F. Supp. 798.

47. *Barlow v. Shawnee Investment Company* (1932) 229 Mo. App. 1, 48 S. W. (2d) 35.

48. *Rinehart v. Stamper Company* (1932) 229 Mo. App. 653, 55 S. W. (2d) 729.

49. *Newman v. Rice Stix Dry Goods Company* (1934) 335 Mo. 572, 73 S. W. (2d) 264, 94 A. L. R. 751; *Schrabauer v. Schneider Engraving Products* (1930) 224 Mo. App. 304, 25 S. W. (2d) 529.

50. *Wheeler v. Missouri Pacific R. R.* (Mo. 1930) 33 S. W. (2d) 179; *Murphy v. Burlington Overall Company* (1931) 225 Mo. App. 866, 34 S. W. (2d) 1035; *Konstron v. American Packing Company* (1931) 227 Mo. App. 34, 45 S. W. (2d) 871; *Helle v. Eyerman Contracting Company* (Mo. 1931) 44 S. W. (2d) 234; *Schrabauer v. Schneider Engraving Products* (1930) 224 Mo. App. 304, 25 S. W. (2d) 529; *Cunliff, The Missouri Workmen's Compensation Law* (1937) 5 Kansas City L. Rev. 240, l. c. 245.

fact, like any other question of fact, must be determined by the commission. If the evidence as to the jurisdictional fact is disputed or in conflict, the findings of fact by the commission are binding and conclusive, provided they are supported by any substantial evidence.⁵¹ The court on review, however, can determine for itself whether as a matter of law the assumption of jurisdiction by the commission was justified by the facts so found.

Since the Missouri courts accept the record of the commission as presented⁵² and have no jurisdiction to make their own findings of fact,⁵³ their attitude towards the Workmen's Compensation Commission as a quasi-judicial administrative agency⁵⁴ can be said to be contrary to that of the federal courts. The United States Supreme Court in *Crowell v. Benson*⁵⁵ held that the courts have a right to review both questions of law and of fact where a jurisdictional fact is involved, and that the determination of such fact by an administrative tribunal, whether or not the evidence is in conflict, is not conclusive upon the courts.

The St. Louis Court of Appeals has held that it is unnecessary for the commission to make an express finding in every award that there was compliance with its jurisdictional limitations.⁵⁶ Under somewhat analogous circumstances in the "Hot Oil" case,⁵⁷ the Supreme Court of the United States has held that in every administrative order (award) issued by an administrative officer (agency) the specific fact or primary standard which gives him the power to make such order must be expressly stated. Had they imposed this requirement, the Missouri courts would have been forced to reverse every compensation case ever appealed, because the commission has never observed this requirement. There

51. *Wadley v. Employers Liability Assur. Corporation* (1931) 225 Mo. App. 631, 37 S. W. (2d) 665.

52. *Ritchie v. Rayville Coal Company* (1930) 224 Mo. App. 1128, 33 S. W. (2d) 154.

53. *Glaze v. Hart* (1931) 225 Mo. App. 1205, 36 S. W. (2d) 684; *Teague v. Laclede Christy Clay Products Company* (1932) 331 Mo. 147, 52 S. W. (2d) 880, reversing circuit court for making its own findings of facts and directing the commission to make an award in accordance with such findings.

54. *Pfzinger v. Shell Pipe Line Corp.* (1932) 226 Mo. App. 861, 46 S. W. (2d) 955; *Wyatt v. Kansas City Art Institute* (1935) 229 Mo. App. 1166, 88 S. W. (2d) 210.

55. (1932) 285 U. S. 22, 52 S. Ct. 285, 76 L. ed. 598.

56. *Schrabauer v. Schneider Engraving Products Co.* (1930) 224 Mo. App. 304, 25 S. W. (2d) 529. While this case has been partially disapproved by *Wheeler v. Mo. Pac. R. R.* (1931) 328 Mo. 88, 42 S. W. (2d) 579, this particular statement is still good law.

57. *Panama Refining Co. v. Ryan* (1935) 293 U. S. 389, 55 S. Ct. 241, 79 L. ed. 446.

is, however, a *prima facie* presumption in favor of the commission's jurisdiction.⁵⁸ In practice, therefore, the commission's failure to make an express finding with reference to jurisdictional facts does not serve to invalidate the award. An affirmative contention that the commission has acted outside its jurisdiction is necessary.⁵⁹

The award of the commission has been held to have the force and effect of a special verdict⁶⁰ or of the verdict of a jury.⁶¹ The findings in the award are conclusive if supported by substantial competent evidence.⁶² In order to determine whether the evidence sustains the finding the evidence must be viewed in its most favorable light,⁶³ even though a contrary conclusion would be supported by the evidence.⁶⁴ Thus, where the facts are in dispute, the findings of the commission are conclusive and binding; they are subject to attack only on the ground that there was no substantial evidence to support them.⁶⁵ The question, what is substantial evidence, will be discussed in a later portion of this note.

The Supreme Court of Missouri in seeking to determine whether the facts found by the commission support its award⁶⁶ said in *State ex rel. Buttiger v. Haid*⁶⁷

58. *Schrabauer v. Schneider Engraving Products* (1930) 224 Mo. App. 304, 25 S. W. (2d) 529; *Brown v. Chicago R. I. & P. Ry. Co.* (Mo. 1936) 98 S. W. (2d) 129.

59. *Schrabauer v. Schneider Engraving Products* (1930) 224 Mo. App. 304, 25 S. W. (2d) 529.

60. *Decker v. Raymond Concrete Pile Company* (1935) 336 Mo. 1116, 82 S. W. (2d) 267; *Noto v. Hemp & Company* (Mo. 1935) 83 S. W. (2d) 136; *Wetter v. Mechanics Iron Works* (Mo. 1932) 49 S. W. (2d) 236; *Murphy v. St. Louis County Water Company* (Mo. 1932) 54 S. W. (2d) 69.

61. *Phillips v. Air Reduction Sales Company* (1935) 337 Mo. 587, 85 S. W. (2d) 551; *Maltz v. Jackoway-Katz Cap Company* (1934) 336 Mo. 1000; 82 S. W. (2d) 909; *King v. Mark Twain Hotel Company* (Mo. 1933) 60 S. W. (2d) 675; *Seebers v. O'Dell* (Mo. 1933) 60 S. W. (2d) 678; *Morris v. Dexter Mfg. Company* (1931) 225 Mo. App. 449, 40 S. W. (2d) 750.

62. *Noto v. Hemp & Co.* (Mo. 1935) 83 S. W. (2d) 136; *Hoffman v. Mo. Pac. R. R. Co.* (Mo. 1933) 63 S. W. (2d) 427; *Darghe v. Blackburn Const. Co.* (Mo. 1932) 53 S. W. (2d) 1088; *Huffstutler v. Oklahoma Contracting Co.* (Mo. 1932) 54 S. W. (2d) 738; *Thomas v. Kaysing Iron Works* (Mo. 1932) 54 S. W. (2d) 763.

63. *Jackson v. General Metals Refining Corp.* (Mo. 1931) 43 S. W. (2d) 865; *Brewen v. Ash Grove Lime & Portland Cement Co.* (1930) 223 Mo. App. 983, 25 S. W. (2d) 1086; *Lanahan v. Hydraulic-Press Brick Company* (Mo. 1932) 55 S. W. (2d) 327; *Herndon v. Robertson Const. Co.* (1933) 227 Mo. App. 694, 59 S. W. (2d) 75.

64. *Yancey v. Egyptian Tie & Timber Co.* (Mo. 1936) 95 S. W. (2d) 1230.

65. *Cottingham v. General Materials Company* (Mo. 1934) 70 S. W. (2d) 101; *Simmons v. Mississippi River Fuel Corp.* (Mo. 1931) 43 S. W. (2d) 868.

66. R. S. Mo. (1929) sec. 3342.

67. (1932) 330 Mo. 1930, 51 S. W. (2d) 1008.

The general finding of the commission necessarily implies the finding of every fact necessary to support the general finding. It is the finding of facts, not the failure to find facts which would defeat the award. Laws 1925, p. 375, section 44 [Section 3342] * * * a court may set aside an award, not because the commission failed to find facts which would support it. It must be an affirmative finding of facts which would make the award improper; facts inconsistent with the award * * *. That the commission must make an affirmative specific finding of every fact necessary to authorize the award in order to make the award valid is an interpretation contrary to ground 3 [of present section 3342] * * *.

The *Buttiger* case was modified by later cases which held that there must be a finding of the ultimate constitutive facts upon which the award can be predicated as a matter of law. In theory, evidentiary facts are excluded.⁶⁸ Although the finding may be general, it must nevertheless be unequivocal and definite.⁶⁹

If there is a conflict in the evidence, the commission has the duty to determine which evidence will prevail, and its determination thereof is conclusive on appeal.⁷⁰ But if the issues or the facts are undisputed, the situation merely calls for a determination of the legal effects of the facts in evidence.⁷¹ It is often difficult to draw a distinction between a finding of an ultimate fact and a conclusion of law. The Supreme Court of Missouri has said that the distinction depends upon whether the finding is reached by natural reasoning or by the application of fixed rules of law.⁷² Thus, if an ultimate conclusion can be reached only by applying a rule of law, the result so reached is a conclusion of law and not a finding of fact.⁷³ The commission cannot be reversed for error, as a matter of law, merely because it may have had in mind the wrong section of the Act in reaching an award, provided, however, that the award is otherwise proper,

68. *Leilich v. Chevrolet Motor Co.* (1931) 328 Mo. 112, 40 S. W. (2d) 601. *State ex rel. Probst v. Haid* (1933) 333 Mo. 390, 62 S. W. (2d) 869.

69. *Buesing v. Moon Motor Car Co.* (1932) 227 Mo. App. 372, 54 S. W. (2d) 734, when the court held that a definite award for a definite period is not supported by a finding and statement that the future disability is unknown and cannot be determined.

70. *Renick v. Mo. Pac. R. Co.* (Mo. 1936) 95 S. W. (2d) 872. *Lumpkin v. Sheidley Realty Co.* (1932) 227 Mo. App. 306, 53 S. W. (2d) 386.

71. *Sawtell v. Stern Bros. & Co.* (1931) 226 Mo. App. 485, 44 S. W. (2d) 264; *Keithley v. Stone & Webster Engineering Corp.* (1932) 226 Mo. App. 1112, 49 S. W. (2d) 296; *Maltz v. Jackoway-Katz Cap Co.* (1934) 336 Mo. 1000, 82 S. W. (2d) 909.

72. *Maltz v. Jackoway-Katz Cap Co.* (1934) 336 Mo. 1000, 82 S. W. (2d) 909.

73. *Ibid.*

within the power of the commission, and that there is no collusion, fraud, or advantage taken of the defendants.⁷⁴

The fourth ground of reversal of an award of the commission is that the award was procured by "fraud." This does not mean that the losing party may, on allegations of false testimony or misrepresentation of the facts by witnesses before the commission, produce further evidence on the issues tried before the commission and thus obtain another trial in the circuit court.⁷⁵ It is not "fraud" for the full commission, on reviewing the award of a single commissioner, to fail to give notice to the parties or to fail to hear additional testimony, because that is in the discretion of the commission.⁷⁶ It is for the commission to determine all material issues and to pass upon the credibility of witnesses. When the commission's final award is made, all such questions of fact are finally settled and cannot be retried.⁷⁷ The basis of a reversal on the ground of fraud is that the fraud is of such a nature as is required to set aside a judgment in a suit in equity on the ground that it was obtained by fraud, namely: that there was fraud which was practiced in the very act of procuring the award; that there was fraud which operated not upon matters relating to the judgment itself, but to the manner in which it was obtained; that there was fraud which prevented the losing party from presenting his defense or case; or that there was fraud as to the extrinsic, collateral acts or matters, not examined and determined in the hearing before the commission.⁷⁸ The three grounds for the reversal of an award other than for fraud⁷⁹ call for court rulings purely of law and apply to matters necessarily appearing upon the face of the record made before the commission. As to fraud, the situation obviously is different, for it can hardly be expected that matters fraudulent in their nature, and going to the procurement of the award, would show in the record of the cause certified by the commission to the circuit court. Consequently if that particular ground of appellate review is to serve any beneficial purpose in the administration of the law, the court must be permitted to hear new evidence of its own accord and not be confined to the record. This seems to be

74. *Cobb v. Standard Accident Ins. Co.* (Mo. 1931) 31 S. W. (2d) 573.

75. *Phillips v. Air Reduction Sales Co.* (1935) 337 Mo. 587, 85 S. W. (2d) 551.

76. *Hohlstein v. St. Louis Roofing Co.* (Mo. 1931) 49 S. W. (2d) 226.

77. *Phillips v. Air Reduction Sales Co.* (1935) 337 Mo. 587, 85 S. W. (2d) 551; *State ex rel. Sei v. Haid* (1933) 332 Mo. 1061, 61 S. W. (2d) 950.

78. *Phillips v. Air Reduction Sales Co.* (1935) 337 Mo. 587, 85 S. W. (2d) 551.

79. R. S. Mo. (1929) sec. 3342.

the only exception to the general rule which denies the power to introduce new evidence in a reviewing court.⁸⁰ In such a case the usual rules as to bills of exceptions and motions for a new trial must prevail in order to have appellate review of the circuit court action relating to the issue of fraud.⁸¹

IV. RECEPTION OF EVIDENCE

Of the total number of cases ultimately reversed, 44% are reversed because of insufficient evidence to support the findings of the commission. This makes the question of the reception of evidence by the commission an important one. The technical rules governing the introduction of evidence in an ordinary court trial do not prevail in the informal and summary proceedings before the commission.⁸² The admission of incompetent evidence does not necessarily make an award reversible if there is other competent evidence upon which to base the award. The commission cannot reject competent material evidence offered by either party.⁸³ The award must be based upon competent evidence, not upon mere speculation, conjecture, or opinion of the commission.⁸⁴

If there is a conflict in evidence, it is the duty of the commission to determine which evidence shall prevail.⁸⁵ So long as there is any substantial evidence to support the findings of the commission, the courts are without power to interfere.⁸⁶ In the last analysis, the scope of the power of the courts in reviewing awards hinges upon the interpretation of the word "substantial." To determine whether there is "substantial" evidence in any case is merely a matter of judicial opinion. In *Kenser v. Ely Walker Dry Goods Co.*⁸⁷ the Springfield Court of Appeals affirmed the circuit court's reversal of an award of the commission denying compensation because the award was not supported by the testimony of one physician who saw the employee only once while she was in a hospital and of another physician who examined her about forty days after her alleged injury. This testimony

80. *Schmelze v. Ste. Genevieve Lime & Quarry Co.* (Mo. 1931) 37 S. W. (2d) 432, 1. c. 484.

81. *Phillips v. Air Reduction Sales Co.* (1935) 337 Mo. 587, 85 S. W. (2d) 551.

82. 2 *Schneider*, *Workmen's Compensation* (2 ed. 1932) 1755, secs. 507, and 551; *Willis v. Berberich's Delivery Co.* (Mo. 1937) 98 S. W. (2d) 569; *Nordhaus v. Lichtman Printing Co.* (Mo. 1935) 84 S. W. (2d) 422.

83. *Willis v. Berberich's Delivery Co.* (Mo. 1937) 98 S. W. (2d) 569.

84. *Allison v. Eyermann Const. Co.* (Mo. 1931) 43 S. W. (2d) 1063; *Jackson v. Aetna Bricklaying Co.* (Mo. 1933) 59 S. W. (2d) 705.

85. *Burgstrand v. Crowe Coal Co.* (1934) 336 Mo. 119, 77 S. W. (2d) 97.

86. *Duckworth v. City of Macon* (Mo. 1933) 63 S. W. (2d) 206.

87. (1932) 226 Mo. App. 1016, 48 S. W. (2d) 167.

was controverted by strong testimony of the claimant's co-employees and two attending physicians who substantiated the claimant's contention that the disability had resulted from an injury received in the course of her employment. The court decided that "there was no evidence of probative force that it [the injury] was due to causes independent of said employment."

In another case⁸⁸ the evidence in the record seemed to show that the deceased employee had died of carbon monoxide poisoning after unloading tractors from freight cars in the course of employment. The only conflicting testimony was that of a physician who stated, as an "expert," that in his opinion the evidence did not prove carbon monoxide poisoning. The award of the commission denying compensation was reversed, even though there was some evidence to support it. The reason for the reversal was that it was rationally impossible to contend that anything other than carbon monoxide had caused the death. The two cases are rather extreme in their results. They seem to show that disputed facts are being weighed by the reviewing courts, even though such a practice is theoretically impossible under the Act.

Hearsay and self-serving declarations not a part of the *res gestae* are, when standing alone, incompetent and insufficient to warrant the making of an award.⁸⁹ Hearsay evidence, however, is not objectionable, where the commission did not consider it in its findings,⁹⁰ or where it is corroborated by other significant facts in the case,⁹¹ or where there is sufficient competent evidence to support the finding.⁹² If the hearsay is not objected to at the proper time in the proceeding, it can be considered and given its natural probative value.⁹³ This flexibility in the introduction of hearsay does not necessarily mean that the commission will recklessly permit any and all hearsay evidence to be introduced.⁹⁴

88. *Adams v. Lilbourn Grain Co.* (1932) 226 Mo. App. 1030, 48 S. W. (2d) 147.

89. *Huelsman v. Stute & Co.* (Mo. 1930) 28 S. W. (2d) 387.

90. *Lamkins v. Copper Malleable Range Corp.* (Mo. 1931) 42 S. W. 941.

91. *Supra*, note 86.

92. *Supra*, note 87.

93. *Supra*, note 86; *Tralle v. Chevrolet Motor Car Co.* (Mo. 1936) 92 S. W. (2d) 966, Employer who elicited hearsay evidence from witness on hearing is held to have waived objection to testimony as hearsay; *Munton v. A. Driemeier Storage & Moving Co.* (1930) 223 Mo. App. 1124, 22 S. W. (2d) 61. Hearsay statements by employee that he injured his neck while moving piano were preserved in a certified copy of testimony taken before a coroner. Such testimony admitted without objection, was held to be sufficient to support the award of the commission.

94. *DeMoss v. Evens & Howard Fire Brick* (Mo. 1933) 57 S. W. (2d) 720, where the commission rejected the testimony of a fellow employee of

The determination of the credibility of witnesses has always been held to be the function of the commission.⁹⁵ The power of the commission to disregard the judgments of experts and skilled witnesses, nevertheless, is limited when the subject is one for experts or skilled witnesses alone and the commission cannot be presumed to have properly formed correct opinions of its own.⁹⁶

In determining whether substantial evidence sustains the award of the commission, the reviewing courts will consider only the evidence favorable to support the award⁹⁷ or the claim of the injured employee.⁹⁸ Other presumptions indulged in by the courts are that the commission acted properly and regularly in making its review,⁹⁹ and that there was no irregularity in the proceedings.¹⁰⁰ It follows that the commission found every fact necessary to support its award which was substantiated by other competent evidence.¹ If the award was signed by only two members of the commission, a presumption arises that the commissioners acted in accordance with the statute which requires review by three members unless there is a vacancy on the commission.²

DeMoss who some time during the same morning of the alleged accident saw and spoke with DeMoss about it. The appellate court in ultimately affirming the commission held that there was lack of proof that any conversation between DeMoss and his fellow employee was spontaneous, made under the influence of the accident, and within its immediate surroundings so as to have brought it within the rule of *res gestae*; *Hatfield v. Southwestern Grocer Co.* (Mo. 1937) 104 S. W. (2d) 717, where a statement made by employee to his wife concerning his alleged disability when he returned from work was held inadmissible as *res gestae* because it was merely a narrative of past events; *Freese v. St. Louis Public Service Co.* (Mo. 1933) 58 S. W. (2d) 758.

95. *Stepanek v. Mark Twain Hotel* (Mo. 1937) 104 S. W. (2d) 761.

96. *Kane v. St. Louis Refrigeration Transit Co.* (Mo. 1935) 83 S. W. (2d) 593, 596. The commission was ultimately reversed because "the question as to whether Kane (employee) was suffering with bilateral lobar pneumonia at the time he met with his accident is not within the knowledge of layman, and the commission had no power to disregard the uncontradicted evidence of three qualified expert witnesses."

97. *Burgstrand v. Crowe Coal Co.* (1934) 336 Mo. 119, 77 S. W. (2d) 97; *Elihinger v. Wolf House Furn. Co.* (Mo. 1934) 72 S. W. (2d) 144.

98. *Griffin v. Anderson Motor Service Co.* (1933) 227 Mo. App. 855, 59 S. W. (2d) 805; *Stapleton v. Gunn* (Mo. 1934) 69 S. W. (2d) 1104; 2 *Schneider Workman's Compensation*, sec. 536a.

99. *Higgins v. Heine Boiler Co.* (1931) 328 Mo. 493, 41 S. W. (2d) 565; *Schrabauer v. Schneider Engraving Products* (1930) 224 Mo. App. 304, 25 S. W. (2d) 529; *Schmelze v. Ste. Genevieve Lime & Quarry Co.* (Mo. 1931) 37 S. W. (2d) 432.

100. *Waterman v. Chicago Boiler & Iron Works* (1931) 328 Mo. 688, 41 S. W. (2d) 575.

1. *Phillips v. Air Reduction Sales Co.* (1935) 337 Mo. 587, 85 S. W. (2d) 551.

2. *Beck v. Kansas City Public Service Co.* (Mo. 1932) 48 S. W. (2d)

213. Cf. *State ex rel. Randall v. Shain* (Mo. 1937) 108 S. W. (2d) 122.

V. FINAL ACTION ON REVIEW

The Workmen's Compensation Act provides that on appeal from an award of the commission, the court shall review only questions of law and may modify, reverse, remand for a rehearing, or set aside the award only upon certain specified grounds.³ The reviewing court may not reduce the compensation period fixed in the award of the commission, because that would be invading the province of the commission in weighing the evidence in making the award.⁴ The Kansas City Court of Appeals has held, however, that if the commission erred as a matter of law in computing the award, a remittitur decision for the excess amount may be granted on review.⁵ A final award reached by the commission may be reversed or set aside on the ground that the commission acted "without or in excess of its powers."⁶ The reviewing court also has the power to remand the case to the commission. A remand for rehearing is required only when there are facts present or prospective that must be determined⁷ or when there is no substantial evidence to support the commission's finding of fact.⁸ Because the rehearing held by the commission is the same as though the case had never been heard before and the judgment of the reviewing court is only the law of the case if the evidence on the rehearing is the same as at the former hearing,⁹ the reviewing court cannot instruct the commission to award compensation in an amount authorized by law.¹⁰ Any judgment issued by the circuit court is not subject to collateral attack by motion to quash execution on the judgment unless want of jurisdiction of the court to render judgment affirmatively appears (on the face of the record).¹¹ In the event that the same case is appealed more than once, the points determined on the first appeal are law for the second hearing and all subsequent proceedings in the case.¹² In the majority of the

3. R. S. Mo. (1929) sec. 3342.

4. *Harbour v. Gardner* (Mo. 1931) 38 S. W. (2d) 295.

5. *Schutz v. Great Amer. Ins. Co.* (Mo. 1937) 103 S. W. (2d) 904. This is the only case of its kind in Mo.

6. *Higgins v. Heine Boiler Co.* (1931) 328 Mo. 493, 41 S. W. (2d) 565.

7. *Kristanik v. Chevrolet Motor Co.* (1934) 335 Mo. 60, 70 S. W. (2d) 890; *Powell v. Ford Motor Co.* (Mo. 1935) 78 S. W. (2d) 572.

8. *Estes v. General Chemical Clay Co.* (Mo. 1936) 93 S. W. (2d) 295.

9. *Brocco v. May Dept. Stores* (1932) 227 Mo. App. 395, 55 S. W. (2d) 322.

10. *Russell v. Ely & Walker Dry Goods Co.* (1933) 332 Mo. 645, 60 S. W. (2d) 44, 87 A. L. R. 953; *Schulz v. Great Atlantic & Pacific Tea Co.* (1932) 331 Mo. 616, 56 S. W. (2d) 126.

11. *Kristanik v. Chevrolet Motor Co.* (1934) 335 Mo. 60, 70 S. W. (2d) 890.

12. *Bomar v. J. A. Kreis & Sons* (Mo. 1934) 72 S. W. (2d) 205.

cases the awards of the commission have been ultimately affirmed by the courts.¹³

VI. EXTRAORDINARY LEGAL REMEDIES

Extraordinary legal remedies have been sought in approximately five percent of those Workmen's Compensation cases reviewed by the courts. In about one-half of these cases, the writ of certiorari was sought. Certiorari may be directed by the supreme court to the courts of appeals to determine whether any conflict in the interpretation of the Missouri Workmen's Compensation law has arisen between the opinions of the courts of appeals and the opinions of the supreme court.¹⁴ In the case of a temporary or partial award of the commission, certiorari may also be directed by a circuit court to the commission proper to determine from the commission's record whether the commission has abused, gone beyond, or exceeded its powers.¹⁵ On certiorari the supreme court cannot merely substitute its own judgment on the facts for that of the court of appeals to determine whether the court of appeals has erred in its application of the rules of law to the facts.¹⁶

Writs of mandamus have been granted where the commission erred in declining to accept jurisdiction of a claim¹⁷ or where the commission failed in its mandatory duty to certify the record to the circuit court without demanding payment of fees when a claimant filed notice of appeal.¹⁸ At one time there was a question whether mandamus proceedings against the commission would lie only in the supreme court or also in the courts of appeals. It was contended that the right of mandamus proceedings against the commission was vested only in the supreme court according to the Missouri constitution, Article 6, Section 12, because the commission was a state officer. Reasoning backwards

13. *Burgstrand v. Crowe Coal* (1934) 336 Mo. 119, 77 S. W. (2d) 97.

14. *State ex rel. Sei v. Haid* (1933) 332 Mo. 1061, 61 S. W. (2d) 950; *State ex rel. Probst v. Haid* (1933) 333 Mo. 390, 62 S. W. (2d) 869; *State ex rel. Superior Mineral Co. v. Hostetter* (1935) 337 Mo. 718, 85 S. W. (2d) 743; *State ex rel. Kroger Grocery & Baking Co. v. Hostetter* (Mo. 1937) 98 S. W. (2d) 683.

15. *State ex rel. New Amsterdam Casualty Co. v. Richardson* (1933) 227 Mo. App. 1221, 61 S. W. (2d) 409.

16. *State ex rel. Sei v. Haid* (1933) 332 Mo. 1061, 61 S. W. (2d) 950; *State ex rel. Kroger Grocery & Baking Co. v. Hostetter* (Mo. 1937).

17. *State ex rel. Elsas v. Missouri Workman's Compensation Commission* (Mo. 1928) 2 S. W. (2d) 796; *State ex rel. Licktenstein v. Missouri Workman's Compensation Commission* (Mo. 1928) 2 S. W. (2d) 802; *State ex rel. Weaver v. Missouri Workman's Compensation Commission* (Mo. 1936) 95 S. W. (2d) 641.

18. *State ex rel. Goldman v. Missouri Workman's Compensation Commission* (1932) 225 Mo. App. 59, 32 S. W. (2d) 142.

from the conclusion that the commission, and not its individual members, was the only possible party respondent in a position to comply with its command, the Supreme Court of Missouri held that the commission, being a legal entity and a quasi-corporation, was not a state officer.¹⁹ Since the commission is not a state officer, the courts of appeals has jurisdiction in an original mandamus proceeding against it.²⁰

The only time the writ of prohibition has been granted against the commission is *State ex rel. Bremen-Clark Syrup Co. v. Missouri Workmen's Compensation Commission*²¹ in which the jurisdiction of the commission over a claim arising from an accident outside of the state was reviewed. The supreme court in that case held that, while the commission is not invested with the judicial power in the sense of Article 3, of the Missouri constitution, it is authorized to hear and determine controversies between employer and employee. This determination of facts is clearly a judicial function, and the writ of prohibition is applicable whenever judicial functions are assumed which do not rightfully belong to the person or the court exercising them.

Despite an admission by the court that the relator could have had an adequate judicial review of the finding and rulings of the commission including the question of the usurpation of power, had he followed the procedure outlined in the Act,²² the court granted the writ of prohibition because at the time of that case the Workmen's Compensation Act was new and it was in the public interest to settle some of the questions involved at the earliest possible moment instead of following the procedure established by statute.

Today in view of the inapplicability of the public policy considerations successfully urged in the case just considered coupled with the adequate provisions for judicial review of awards of the commission afforded by the Act²³ it seems improbable that the writ of prohibition will frequently be issued against the Missouri Workmen's Compensation Commission.

CONCLUSION

Analysis discloses that fifty-five cases, or approximately 22% of the compensation awards reviewed by the courts, have ulti-

19. *State ex rel. Goldman v. Missouri Workman's Compensation Commission* (1930) 325 Mo. 153, 27 S. W. (2d) 1026.

20. *State ex rel. Goldman v. Missouri Workman's Compensation Commission* (1930) 225 Mo. App. 59, 32 S. W. (2d) 142.

21. *State ex rel. Brewen-Clark Syrup Co. v. Missouri Workman's Compensation Commission* (Mo. 1928) 8 S. W. (2d) 897.

22. R. S. (1929) sec. 3342.

23. R. S. Mo. (1929) sec. 3342.

mately been reversed.²⁴ This appears to be a rather large percentage. It should be noted, however, that only about one-half of these cases have been reversed for reasons other than error by the commission on a question of law.²⁵ With few exceptions, these reversals are not open to criticism. In fact, in the majority of the reversals the commission, rather than the courts, is to be criticized. Had the commission made itself more clear in its awards, fewer cases would have been reversed.

Determination of what is sufficient or substantial evidence has been the most vexing problem. While the Missouri courts have disavowed repeatedly any desire to consider evidence unfavorable to the commission's findings, one cannot help feeling that in several of the cases reversed that action was influenced by the court's conviction that the preponderance of the evidence was against the award of the commission, and that the courts have not always limited themselves to determination of whether there was substantial evidence in support of the findings.

Generally speaking the Missouri courts have adopted a liberal approach in reviewing the awards of the Workmen's Compensation Commission. Illustrative of this judicial broad-mindedness is the Missouri attitude towards the problem of jurisdictional facts, which is one of the most liberal in the country.²⁶ It has followed from the liberality of court review in Missouri that the objectives of the Workmen's Compensation Act have been better effectuated there than in most states. This is not to say that the degree of finality afforded to commission awards is all that the proponents of administrative adjudication in this field would demand. Missouri has not, of course, lent the absolute practical finality to the commission awards, which has been afforded, for example, in the Canadian provinces.²⁷ But as interpretation makes more definite the general provisions of the Compensation Act, and as the commission perfects its own technique, it is highly probable that increased finality will be afforded. With such a development one may be able to say without qualification that the objectives of prompt, inexpensive, and certain compensation for injured workmen had been attained.

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24. See chart, *supra*.

25. There is a close similarity between these percentages and those in an administrative law paper, *Judicial Review of Findings and Awards of the Missouri Workmen's Compensation Commission*, written by Prof. Robert L. Howard at Harvard Law School in 1933.

26. Haines & Dimock, *Essays on the Law and Practice of Governmental Administration* (1935) 147-151.

27. *Id.* at 169.