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Workmen's Compensation

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WORKMEN'S COMPENSATION

Workmen's Compensation — Hearsay Evidence — Doctor's Opinion. The Washington court, in *Liljeblom v. Department of Labor & Indust.*,[1] strictly applied rules of evidence to defeat a widow's pension suit. The court held, in a five-four decision that admission of a physician's written report in a superior court review of the board of industrial insurance appeals' order was prejudicial error since the report was hearsay. The admission sought was part of an examination report jointly filed by two doctors. The other half had been submitted at the board hearing by the department.

The court had the following record before it. The claimant's husband alleged to the department of labor and industries[2] that he had been injured in an industrial accident on March 2, 1955. On June 28, 1955, at the request of the department[3] Liljeblom was examined by Doctors Ralph H. Huff and John M. Steele. Their joint report was filed with the department. A further examination of Liljeblom was requested by the department and conducted by two other physicians.

Only the report by Dr. Steele was favorable to Liljeblom's claim, and the supervisor[4] entered an order rejecting his claim on October 11, 1955. Timely appeal was made to the board of industrial insurance appeals. Joel A. Liljeblom died on November 4, 1955. On March 25, 1957, the board entered an order dismissing the appeal[5] without prejudice to his widow's right to file her claim under the Workmen's Compensation Act.[6]

The widow filed a claim with the supervisor, which was rejected, and appeal was made to the board. At the hearing, claimant presented her own testimony, the testimony her husband had given at the hearing during his lifetime, and the testimony of Dr. F. W. Hennings. Dr. Steele was not called as a witness, nor was his former testimony offered. On cross-examination of Dr. Huff, claimant attempted to introduce the entire report, including Dr. Steele's portion. This was rejected as

[1] 157 Wash. Dec. 30, 356 P.2d 307 (1960).

[2] RCW 51.28.020 provides that a workman shall file application for compensation in order to receive it under Title 51, the Workmen's Compensation Act.

[3] RCW 51.32.110: "Any workman entitled to receive compensation under this title shall, if requested by the department, submit himself for medical examination.... If the workman refuses to submit to any such examination, or obstructs the same, his rights to monthly payments shall be suspended until such examination has taken place...."

[4] RCW 51.04.020: "The director shall:... (3) Regulate the proof of accident and extent thereof...."

[5] *In re* Liljeblom, Wash. State Bd. of Indus. Ins. Appeals (1957).

[6] RCW 51.32.050 (2): "If the workman leaves a widow...a monthly payment of one hundred dollars shall be made throughout the life of the surviving spouse...."

hearsay. The board entered an order denying the claim and sustaining the supervisor's order.[7]

The claimant appealed[8] the decision to superior court for review.[9] The trial court admitted as evidence both parts of the joint report of Drs. Huff and Steele and overruled the objection to their admissibility.[10]

The department appealed.[11] Error was assigned to the admission of the report and the overruling of objections to certain portions of Dr. Huff's testimony.[12]

The supreme court summarily disposed of claimant's contention that the exhibit should be admitted for impeachment purposes on the ground that impeachment cannot be accomplished by showing that another doctor had a different opinion.[13]

The court then faced claimant's contention that the report was admissible as an exception to the hearsay rule under the Uniform Business Records as Evidence Act.[14] The act provides that "A record of an act, condition or event shall . . . be competent . . . if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."[15] The court relied on *Young v. Liddington*,[16] for the proposition that an opinion does not fall within the scope of "act, condition or event."[17] The rationale in *Young* was that the act was adopted to avoid the necessity of calling numerous witnesses who may have had a part in creating such records. The

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[7] Liljeblom v. Department of Labor & Indus., Wash. State Bd. of Indus. Ins. Appeals (1957).

[8] Under RCW 51.52.110 both the claimant and the employer have standing to appeal the Board's order to a superior court.

[9] RCW 51.52.115: "Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board. . . ."

[10] 157 Wash. Dec. 30, 33-34, 356 P.2d 307, 309-10 (1960).

[11] RCW 51.52.140 provides for appeal from the judgment of the superior court as in other civil cases.

[12] Brief for Appellant, p. 14, Liljeblom v. Department of Labor & Indus., 157 Wash. Dec. 30, 356 P.2d 307 (1960).

[13] 157 Wash. Dec. 30, 35, 356 P.2d 307, 310 (1960).

[14] RCW 5.45.

[15] RCW 5.45.020.

[16] 50 Wn.2d 78, 309 P.2d 761 (1957), noted, 33 WASH. L. REV. 158 (1958). Plaintiff in a malpractice suit offered, and trial court received in evidence, a record stating the doctor's opinion as to the cause of the patient's condition. Held, a medical opinion as to causation not the result of an observed act, condition or event, cannot be established by a business record. The court used the same reasoning in Trompeter v. United Ins. Co., 51 Wn.2d 133, 316 P.2d 455 (1957) to preclude the admission of plaintiff's employer's discharge slip as evidence of lack of disability.

[17] See note 15 *supra* and accompanying text.

records are permitted for the truth and accuracy of accounts then present and contemporaneously recorded. They must be the routine product of a clerical system and while hospital records may be admissible under the act, they must meet the standards required of other business records. Therefore, the rule permitting admission of opinion evidence, the nature of which other persons qualified to make the same record might have differed, was not adopted. The court in *Young* then discussed the physician's opinion therein considered as being based on speculation and conjecture.

Judge Foster, dissenting, analyzed *Young* differently:

> The physician's opinion appearing in the hospital chart in *Young v. Liddington,* . . . was held incompetent because it was not sufficiently probative to be admissible. Such was the sole reason for exclusion. It was not held that records containing opinions must be excluded. Had that been the decision, [*sic*] I would not have signed it. The question here was completely absent in *Young v. Liddington,* . . . which the court cites as support for its position.[18]

The law pertaining to admission of written reports of doctors in accident cases is still in a state of evolution. The earlier development of the doctrine of the admissibility of business records stemmed from a recognition of the procedures of persons using shop-books. The concept of "regular entries" developed, tending to cause rigidity when the doctrine was first applied to matters of irregular occurrence such as doctor's reports. More recently the courts have recognized that the rising standards of the medical profession indicate the special reliability upon which the rule is based. For example, in *Korte v. New York, N.H. & H.R.R.,*[19] the Court of Appeals for the Second Circuit held admissible a doctor's letter to the railroad which had retained him, as a business record made in the course of the *doctor's* business. Judge Clark there stated that the Federal Business Records Act[20] was not to be "interpreted in a dryly technical way, contrary to ordinary habits and customs, to reduce sharply its obvious usefulness."[21] However, some courts limit by their definition of "regular course of business" the application of business records acts.[22] The trend of the decisions has been analyzed by Professor McCormick as follows:

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[18] 157 Wash. Dec. 30, 41, 356 P.2d 307, 314 (1960).

[19] 191 F.2d 86 (2d Cir. 1951), noted, 37 CORNELL L.Q. 290 (1952); 5 VAND. L. REV. 651 (1952). See White v. Zutell, 263 F.2d 613 (2d Cir. 1959).

[20] 28 U.S.C. § 1732 (1958).

[21] Korte v. New York, N.H. & H.R.R., 191 F.2d 86, 91 (2d Cir. 1951).

[22] *E.g.,* Baltimore & O.R.R. v. Zapt, 192 Md. 403, 64 A.2d 139 (1949). (The Maryland court excluded the X-ray report of a physician specializing in radiography

Accordingly, well-reasoned modern decisions have admitted in accident cases the written reports of doctors of their findings from an examination of the injured party, when it appears that it is the doctor's professional routine or duty to make such report.[23]

The Washington court in the instant case was faced with the problem of balancing the importance of the report to the claimant against the probability of its bias and lack of probative value. The balance when struck by the court swung to inadmissibility. This practically requires proffer of the physician's testimony so as to make it subject to cross examination. A substitute for this safeguard is found in *Liljeblom*. The department itself retained the physicians and was the force creating the report which the claimant desired to introduce.[24] Thus, it would seem that these circumstances attest to the report's veracity and lack of bias. Further, this same information could have been introduced by other means.[25]

The court disposed of the argument that an agency relationship existed between the department and Dr. Steele, by relying on *Leschner v. Department of Labor & Indus.*[26] It is submitted that the analysis in *Leschner*[27] is not applicable in the instant case. There the issue was whether a physician who failed to file a claim for the workman was an agent of the department. In the present case, as distinguished from *Leschner*, the physician was not retained by the injured workman for treatment, but one selected by the department for the required physical

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as not being a memorandum occurring in the regular course of business, nor was it a mere hospital or nursing record.)

[23] McCORMICK, EVIDENCE § 287 (1954). This analysis was presented by the dissent. 157 Wash. Dec. 30, 43-44, 356 P.2d 307, 315 (1960).

[24] See statute quoted note 3 *supra*.

[25] WASH. RULES, PLEADING, PRACTICE, PROCEDURE, 26-32 pertaining to the use of depositions. Further, in this case claimant did not specifically offer Dr. Steele's evidence to the board of industrial insurance appeals at the hearing. In the future Rule 43.16W would be applicable to this type of situation: "If the judge finds a witness at a former trial or proceeding to be unavailable as a witness within the conditions set forth in Rule 26(d) (3) governing the use of depositions, the testimony of such witness on the former occasion shall be admitted for use as testimony in a trial or proceeding involving substantially the same matter when... (2) the testimony is offered against a party against whom, or against whose predecessor in interest, it was offered on the former occasion." Adopted Nov. 2, 1960, eff. Jan. 2, 1961. This would apply to the Board through its Rule 5.10(d) making applicable the rules of the superior courts of the state.

[26] 27 Wn.2d 911, 185 P.2d 113 (1947).

[27] In Leschner v. Department of Labor & Indus., 27 Wn.2d 911, 922, 185 P.2d 113, 119-20 (1947) the court said: "If the attending physician selected by the injured workman were to be deemed an agent of the department, we would be presented with the anomalous situation wherein one whose claim is *against* the industrial insurance fund appoints an involuntary agent *for* the state,... whose actions bind it with respect to claims upon that fund. In our opinion, the act intends, rather, that the injured workman become the patient of the physician.... Consequently, we hold that Dr. Dodds was not the agent of, and was not representing, the department of labor and industries when he told the respondent that he had already sent in the claim."

examination.[28] The question of an agency relationship for reasons of technical administrative filing provisions is not in question. Here the relationship is one in which Dr. Steele was retained for the specific purpose of rendering the report in question to the department. Thus, it would seem that *Leschner* reasoning would not apply.

Judge Foster contended that:

> The workman submitted because the statute compelled him to do so, and now the court reverses a judgment for his surviving widow because the report of such examination was admitted in evidence when offered by his widow.
>
> Dr. Steele's report to the department was not hearsay, so there is no occasion to consider the exception to the hearsay rule contained in the uniform business records as evidence act. It was made directly to the department by Dr. Steele who had been employed by the department for that specific purpose.[29]

The court in this case construed away the legislative intent of RCW 51.52.115 which provides in part: "The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. . . ." This was accomplished by looking to RCW 51.52.020 granting the board procedural rule-making power and to the board's rule of procedure 5.10(d) applying the rules applicable to the superior courts.[30]

Perhaps the best test to be applied in these cases is this: on which party is it most equitable to place the burden of obtaining the physician's direct testimony? Under the analysis of *Liljeblom* it falls on the claimant if the claimant wishes to use it in his behalf. This allows the department to selectively present only those reports favorable to the department after having forced the injured workman to submit to examination. Would it be unfair to require the department to refute the physician's report, if it desires, by obtaining his direct testimony?

It is submitted that there should be a legislative re-evaluation of the pertinent sections of the Workmen's Compensation Act[31] which the

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[28] See statute quoted, note 3 *supra*.

[29] 157 Wash. Dec. 30, 40-41, 356 P.2d 307, 314 (1960).

[30] RCW 51.52.020: "The board may make rules and regulations concerning its functions and procedure, which shall have the force and effect of law until altered, repealed, or set aside by the board. . . ." Rules of Procedure 5.10(d) of the board regarding appeals provides: "The officer presiding at the hearing will on objection or on his own motion exclude all irrelevant or unduly repetitious evidence. In ruling upon objections to the competency of evidence and in disposing of appeals from such rulings, due account will be taken of the requirement that hearings be informal, in the application of the rules applicable in the superior courts of this state." RCW 51.52.140: "Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. . . ."

[31] RCW 51, especially RCW 51.52.020.

court applied in retreating from the "informal and summary"[32] proceedings provision of the act. In the alternative the board's present exemption from important provisions of the Administrative Procedure Act[33] should be examined.[34] Until this reevaluation is accomplished the practitioner will need to introduce testimony, in workmen's compensation proceedings, within the narrow confines of a legalistic framework as opposed to the informal framework desired by the legislature.[35]

ROBERT DEBRUYN

UNAUTHORIZED PRACTICE OF LAW

Real Estate Broker Held Liable in Damages for Unauthorized Practice of Law. In Washington the problem[1] presented by individuals engaging in an unauthorized practice of law[2] traditionally has been dealt with by utilizing one of three alternative forms of redress. Those forms are: prosecution for a misdemeanor; bringing an equitable action to enjoin such conduct; and the exercise of the inherent power of the court to punish such conduct as contempt.[3] The recent case of *Mattieligh v. Poe*[4] has added a new weapon to the arsenal which can

[32] RCW 51.52.115.

[33] RCW 34.04.

[34] RCW 34.04.150: "The provisions of RCW 34.04.090 through 34.04.130 shall not apply to the board of industrial insurance appeals...." RCW 34.04.100 provides in part: "Agencies or their authorized agents, may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the coduct of their affairs."

[35] See generally, Wollett, *The Board of Industrial Insurance Appeals after Nine Years: A Partial Evaluation*, 33 WASH. L. REV. 80 (1958).

[1] Although the specific reasons for classifying it a problem may vary with individual writers the general theme is that such unauthorized practice increases the possibility of harm resulting to the public. "Persons who are not licensed to practice law are usually incompetent to practice. Incompetent practice often causes harm to the public. Therefore, practice by unlicensed persons may often cause harm to the public, and should be prevented." Offenbacker, *Unauthorized Practice in Washington*, 30 WASH. L. REV. 249, 250 (1955). A slightly different approach has been taken on the basis of the Canons of Professional Ethics. "It would be useless to establish high standards of morality for members of the profession if those who are not members, and therefore not bound by such canons, could practice the arts of the profession." Adler, *Unauthorized Practice: A Continuing Campaign in the Public Interest*, 44 A.B.A.J. 649 (1958). Another strong motivation on the part of the Bar to eliminate the unauthorized practitioner is seldom discussed, that is the threat that such unauthorized practice presents to the monetary interests of the authorized practitioners.

[2] It is beyond the scope of this Casenote to adequately define those actions which constitute an unauthorized practice of law in Washington. For additional information as to that aspect see, Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wn.2d 697, 251 P.2d 619 (1952), and Offenbacker, *Unauthorized Practice in Washington*, 30 WASH. L. REV. 249 (1955). There are several law review articles relating to the attempts by other jurisdictions to define unauthorized practice, but in the *Washington State Bar Ass'n* case the Washington Supreme Court specifically refused to cite other jurisdictions for their definitions of unauthorized practice because of the great diversity in their respective definitions.

[3] These three forms of redress are referred to in RCW 2.48.180 and in *In re* McCallum, 186 Wash. 312, 315-16, 57 P.2d 1259, 1260 (1936).

[4] 157 Wash. Dec. 95, 356 P.2d 328 (1960).