

Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power

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I. INTRODUCTION

The estimable Larson treatise is, by tradition, the critical reference to which to turn for analysis of workers' compensation issues. One of the book's many essential declarations is addressed to adjudication within the system. The late Professor Larson's book perceptively declares, as it always has, "in the spectrum of administrative agencies . . . the compensation commission . . . while deciding controverted claims . . . is as far towards the judicial end of the spectrum as it is possible to go without being an outright court."¹ This enduring, correct observation is critical to the understanding of the workers' compensation adjudicative process. The hearing officer, in this regard, is adjudicating a dispute between two private parties.² Though interpreting and enforcing a law of public importance, he or she is not implementing agency policy.³

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¹ ARTHUR LARSON, WORKERS' COMPENSATION, § 79:90 (Desk ed. 2000).

² Moore v. Roemer, 567 So. 2d 75, 81 (La. 1990) ("[W]orker's compensation is a matter of great public interest and is subject to extensive governmental regulation as to the nature and extent of the remedy. However, while the Legislature in the field of worker's compensation defined relationships, rights and duties that the parties are not free to derogate by contract, the litigation nevertheless adjudicates a dispute between private parties and results in a money judgment affecting only those parties.").

³ See generally Thomas E. Wing, *Oregon's Hearing Officer Panel*, 23 J. NATL. ASSN. ADMIN. LAW. JUDICIARY 57, 69 (2003) (drawing general distinction between "one party" and "two party" cases entertained by administrative law judges); Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 282 (1994) (describing the role of federal administrative law judges).

The Larson treatise also addresses the issue of the *fact-finding* status of the hearing officer in workers' compensation adjudication as he or she resolves such disputes. The treatise has always identified as the majority and "orthodox" rule one having the commission – not the first-level hearing officer or referee – the arbiter of credibility and final fact-finder. Notably, early courts occasionally analyzed this relationship by analogy to the equity offices of "special master" (a subordinate), and "chancellor" (the trial court and fact-finder).⁴

The treatise, indeed, considers as *aberrant* a system which maintains the hearing officer as final fact-finder. "A small group of states and the Longshore Act," Larson complains, "have deliberately separated themselves from the majority on this point."⁵ The December 2007 version of the text identifies nine states as subscribing to this purported aberration, setting forth in discrete subsections the "minority rule" as maintained by Florida, Arizona,⁶

⁴ United States Cas. Co. v. Maryland Cas. Co., 55 So. 2d 741, 744 (Fla. 1951) ("The chancellor ... should give due consideration to the findings of facts made by a special master and should consider the many advantages which the master had in personally hearing and observing the witnesses. . . . However, although the Chancellor may use the services of a special master. . . and receive from him his advisory findings and recommendations, the fact remains that it is the Chancellor who under the law is charged with the duty and responsibility of making findings of facts and entering the final decree."); Rodriguez v. Indus. Comm'n, 21 N.E.2d 741,743 (Ill. 1939) ("[t]he arbitrator in his consideration of the case is but the agent of the commission, similar in character to that of a master in chancery. . ."). Compare Hamby v. Everett, 627 S.W.2d 266, 268 (Ark. Ct. App. 1982) ("Most any law school graduate is aware that our Court reviews chancery cases *de novo*. However, where credibility issues arise, we will not reverse the findings of the chancellor unless they are clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses."). This approach is familiar to administrative law specialists as the standard that prevails under the federal Administrative Procedure Act (APA). See 5 U.S.C. § 557(b) (2006) ("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). See generally WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 8.09 (Lexis Pub., 4th ed. 2000).

⁵ LARSON, *supra* note 1, § 130.03[4].

⁶ The Larson treatise states that this rule was created in 1967 with the decision in *Powell v. Indus. Comm'n*, 418 P.2d 602 (Ariz. Ct. App. 1966). LARSON, *supra* note 1, § 130.03[4]. That decision, however, was unambiguously reversed

Pennsylvania, Oklahoma, Michigan, Colorado, Kentucky, Nebraska, and the Longshore Act.⁷

This Author's research has not, however, found this analysis to be particularly convincing in the present day. The survey of states upon which he reports in this article does not, in this regard, support the proposition that having the hearing officer as final fact-finder currently reflects an aberration. The "typical compensation system" of the 1950's, when Larson first penned his book, is not the overwhelming contemporary model. (This article will hereafter use the title Workers' Compensation Judge or WCJ to refer to this office.)

Indeed, this Author's research demonstrates that a sizeable minority of states now maintains systems where the WCJ is statutorily the final fact-finder. The tendency over the years is for legislatures to prefer the first level hearing officer in such role. Of course, this preference echoes the common law, which generally calls for deference to the fact-findings of the individual who saw and heard the witnesses and assessed their demeanor.⁸ This policy may be seen at work in the trend to make the first-level hearing officer the final fact-finder. Still, this legislative preference, manifested during a

by the Arizona Supreme Court. *Powell v. Indus. Comm'n*, 423 P.2d 348 (Ariz. 1967) ("The Commission of course was not bound by the finding of its referee."). A subsequent decision, *Ohlmaier v. Indus. Comm'n*, 776 P.2d 791 (Ariz. 1989), explains that the legislature changed the law in 1973 to have it comport with the holding of the appeals court. *See infra* Section V(C).

⁷ LARSON, *supra* note 1, § 130.03[4]. The book also recognizes that this rule is followed in the District of Columbia. *Id.*; § 130.03[4], n.8.1 (citing *Potomac Elec. Power Co., v. Dep't of Emp't Serv.*, 835 A.2d 527 (D.C. 2003)). At another section, the treatise recognizes a change to the Minnesota Act to make the ALJ the fact-finder. *Id.* at § 130.03[8] (citing *Even v. Kraft, Inc.*, 445 N.W.2d 831 (Minn. 1984)).

⁸ *Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949) ("Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor – absent, of course, when trial is by affidavit or deposition – is recognized as an important clue to witness' credibility."). *See* James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000). *See also* *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (U.S. 1951) (indicating that an agency, though not bound by ALJ decision, should not ignore the findings of fact and credibility determinations contained in initial federal ALJ order).

long period of reform, exists mainly because finality at the first level of adjudication is thought to enhance efficiency in the litigation of contested cases.⁹ In a number of jurisdictions, meanwhile, including Pennsylvania and the Longshore Act, establishing the judge as fact-finder was part of a general restructuring of the administrative agency responsible for enforcing the law.¹⁰ In still others, the change was effected as part of the most fundamental institutional reform: changing the forum for contested cases from civil court to an administrative forum.¹¹

The appended tables show that, of fifty-two critical jurisdictions – fifty states, the Longshore Act (LHWCA), and the District of Columbia (D.C.) – twenty-six state programs hew to the majority rule. A full twenty-two states, plus the LHWCA and D.C., subscribe to the minority rule. This Author places Alabama and Tennessee, which entertain the litigation of contested cases in civil court, in their own category.¹² Even here, however, a plain distinction exists. In Alabama, the trial judge is the final fact-finder, whereas in Tennessee the appellate courts reserve the right to reassess credibility and change the facts.¹³

The contents of the tables are distilled below. The Author sets forth this distillation with a caveat: a great deal of variety and nuance attends the issue of WCJ adjudicative finality. An ironclad taxonomy is thus impossible. This phenomenon has been noted from the very earliest days of the program. The early treatise writer Bradbury declared, “The administration and procedure under no two of the compensation acts of the American states are exactly alike. The revolution wrought by the adoption of the compensation principle is nowhere more strongly emphasized than in the manner in which controversies growing out of claims for compensation are

⁹ See, e.g., ORIN KRAMER & RICHARD BRIFFAULT, WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 40 (1991) (critics complaining that “. . . costs are likely to be greater and the role of attorneys enhanced when appellate review, whether administrative or judicial, is not limited to questions of law but rather can include reconsideration of the questions of fact determined at the initial hearing.”). See also Section V (B).

¹⁰ See *infra* Section V(D).

¹¹ See *infra* Section V(F).

¹² See *infra* Section III.

¹³ See *infra* Section III.

determined.”¹⁴ This Author nevertheless offers the following general delineation:¹⁵

Majority and “Orthodox” Rule: Board, Commission, or judicial branch is final fact-finder	AR, CA, GA, HI, ID, IL, IN, IO, KS, MD, MS, MO, NV, NH, NY, ND, NC, OH, OR, SC, SD, UT, VT, VA, WA, WI
Minority Rule: WCJ is final fact-finder; Board, Commission, or judicial branch exercises appellate review or the like	AK, AZ, CO, CN, DE, FL, KY, LO, ME, MA, MI, MN, MT, NE, NJ, NM, OK, PA, RI, TX, WV, WY, DC, LHWCA
States where workers’ compensation cases are litigated in civil court	AL, TN
States where appeal from agency adjudication may involve jury trial	MD, OH, TX, VT, WA
States where appellate court reserves right to reassess credibility	SD, TN
States where workers’ compensation disputes are addressed in a judicial branch workers’ compensation court	NE, RI, OK

The issue of WCJ adjudicative finality is not, of course, unique to workers’ compensation. The issue has been current, indeed, in the debate over “central panels” of ALJs. Some states have created central panels that feature the ALJ as the final fact-finder, a development that has been described as a dramatic shift away from the model provided by the federal Administrative Procedure Act.¹⁶ Virtually all of the literature that addresses finality in the administrative law context is found in discussions of central

¹⁴ HARRY F. BRADBURY, BRADBURY’S WORKMEN’S COMPENSATION AND STATE INSURANCE LAW OF THE UNITED STATES 960 (3rd ed. 1917).

¹⁵ More nuanced characterizations of most state systems are provided throughout the text of this article, and also in footnotes to the tables.

¹⁶ James F. Flanagan, *Redefining the Role of the State ALJ: Central Panels and their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1356-60 (2002) (referring to an “emerging trend of restricting or eliminating agency review of state administrative law judges’ (ALJ) decisions, thereby making them actually or effectively final and subject only to judicial review,” and positing that such change “represents a fundamental change in state administrative adjudication.”).

panels.¹⁷ This Author has *not* encountered the issue discussed in the discrete realm of workers' compensation.

This article, addressing this issue in the workers' compensation field, reports in detail on the basic findings summarized above. This article explains the nature of WCJ and commission adjudication, and seeks to determine why the original commission-as-fact-finder model, though it endures as the majority rule, has seemingly eroded. This article also provides an introduction to the manner in which workers' compensation adjudication is organized among the states.

This article then seeks to ascertain the current state of the law – and the practice as well – among the states on the issue of WCJ adjudicative finality. This article also treats the related issue of whether an appeal or request for review of the WCJ's adjudication operates as an automatic stay on the award. It seems impossible to ponder the practical import of fact-finding finality without taking into account this crucial procedural issue. The tables at the conclusion of this article set forth an accounting of the laws of the various jurisdictions on these issues of WCJ finality and stays of adjudication. They also identify the procedural schemes of each state and the precise standard of review that applies once a compensation case, however finalized, is ready for true judicial review.

It may be noted that to speak of WCJ adjudicative finality on the facts is to at once speak of the *standard of review* that is employed by the Board, commission, or court to which the appeal has been taken.¹⁸ Indeed, in many state laws the final fact-finding

¹⁷ Wing, *supra* note 3, at 57 n.2 (collecting multiple citations to articles treating the history of and issues surrounding central hearing panels). *But see* Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1 (2009) (author expressing disapproval of mandatory arbitration clauses, and positing that empirical evidence shows that district court judges are reversed 12% of the time – much more than mandated arbitrators).

¹⁸ Some studies, when addressing standards of review, divide states into those where review is for “law and fact” and those that review for “law” only. *See, e.g.*, DUNCAN S. BALLANTYNE, *DISPUTE PREVENTION AND RESOLUTION IN WORKERS' COMPENSATION: A NATIONAL INVENTORY, 1997-1998* (Workers Compensation Research Institute ed., 1998). This use of terms may also be found on occasion in statutes.

power of the WCJ is defined not by some bold declaration of the same, but by a proviso that defines the review power of the appellate entity. An example of the former can be found in the Kentucky statute, which states, in part, “(1) An award . . . of the [ALJ] . . . shall be conclusive and binding as to all questions of fact”¹⁹ An example of the latter, meanwhile, is that of Pennsylvania, where the statute provides, “The board shall hear the appeal on the record certified by the [WCJ] office. The board shall affirm the [WCJ] adjudication, unless it shall find that the adjudication is not in compliance with section 422(a) and the other provisions of this act.”²⁰ The lawyer or other analyst, to derive the Pennsylvania WCJ’s power, must resort to statutory cross-reference and the precedents before he or she may discover that such finality is precisely the same as in Kentucky.²¹

In this writer’s view, this analysis and ascertainment of the current law of WCJ finality is important because of two policy questions. First, in an environment where we seek to ensure the efficiency of litigating disputed claims, is making the WCJ the ultimate fact-finder the superior approach? A critical issue here is whether the parties are more or less likely to appeal, hence extending

In this article, the Author will not use this terminology. Generally, those that apply these terms mean that a commission or court that reviews for “law and fact” will reassess credibility and potentially substitute new fact-findings. In contrast, a commission or court that reviews only for law will not do so. Nothing is offensive about this language, but lawyers and judges simply do not speak in this fashion. An appellate law clerk who tells his boss that, in a workers’ compensation appeal, the standard of review is “law only” would be taken as a poseur. The legal formulation would likely be, instead, something like (1) “error of law,” and (2) a determination of “whether essential findings of fact are based on substantial evidence.” It may well be that a judge or commission that has issued a finding of fact based on legally insufficient evidence has committed an error of law. *See generally* *Revello v. Acme Mkts, Inc.*, 1986 Del. LEXIS 1064, at *9 (Del. Jan. 31, 1986). This does not, however, change the reality that appellate review in a “law only” state always takes into account review of facts. No system tolerates an arbitrary and capricious WCJ.

¹⁹ KY. REV. STAT. ANN. § 342.285 (West 2011).

²⁰ 77 PA. STAT. ANN. § 854.2 (West 2011).

²¹ The landmark case in Pennsylvania that defines the WCJ as the final fact finder is *Universal Cyclops Steel Corp. v. Workmen’s Comp. Appeal Bd.*, 305 A.2d 757 (Pa. Commw. Ct. 1973). Most Pennsylvania lawyers, even specialists, could not identify the statute which by inference defines the WCJ as final fact-finder, but all know and hold close to their heart the case name, “*Cyclops*.”

the litigation, when a “second bite of the apple” may be obtained at the commission level.²² This has been an issue talked about for over a half-century.²³ Second, in an environment where we seek to afford due process to the parties, is making the WCJ the ultimate fact-finder the superior approach? A critical issue here is whether the parties perceive such a system to be affording them an equitable process before a competent, impartial, and accountable judge.²⁴

This article concludes with the assertion that the WCJ as ultimate fact-finder constitutes the superior method of administrative adjudication. In submitting that this is so, this article evaluates the issue, as foreshadowed above, in the context of the familiar administrative adjudication values of efficiency, impartiality, and accountability.

II. THE UTILITY OF COMPARISONS

The trend towards making the WCJ the final fact-finder in the system has not been widely noted or commented upon. While the Larson treatise, as suggested above, identifies the trend,²⁵ it does not try to identify its source (though it does note miscellaneously that an “increasing remoteness of the reviewing administrative body from the real fact-finding process” exists.)²⁶ The Workers’ Compensation

²² See, e.g., PETER S. BARTH, WORKERS’ COMPENSATION IN CONNECTICUT: ADMINISTRATIVE INVENTORY 24 (1987) (“Few appeals are successful . . . Many denials of appeals have been based on the CRD’s [*viz.*, Compensation Review Division’s] consistent position that a commissioner’s conclusion cannot be reviewed when it rests on the weight of the evidence and the credibility of the witnesses. This view, perhaps in conjunction with the low rate of success, largely explains the small number of appeals to the CRD.”).

²³ HERMAN M. SOMERS & ANNE RAMSAY SOMERS, WORKMEN’S COMPENSATION 158 (1954).

²⁴ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 88-97 (1983) (identifying and discussing the importance of “process values”).

²⁵ See LARSON, *supra* note 1, § 130.03[8] (“The issue of extent of administrative review is closely related to the question of to whose findings the presumption of finality attaches, and there is discernible here also some beginnings of a trend to limit the scope of administrative review.”).

²⁶ LARSON, *supra* note 1, § 130.03[6]. For an Arkansas opinion in which a concurring judge recognized the trend and suggested modification of the Arkansas

Research Institute (WCRI), meanwhile, in 1999 published an authoritative catalog inventorying the adjudicatory approaches of the various states.²⁷ This notable text raises the important policy questions as to which arrangement might be best, but it does not remark on the genesis of the trend or hazard any analysis.

It is submitted that the trend, and the issues implicated, merit a critical analysis. As WCRI points out, policymakers can benefit from understanding how the adjudication systems of other states operate as they endeavor to update and improve their own jurisdictions' laws and processes. When it comes to coverage and benefits, comparative analyses can be found in a number of excellent resources.²⁸ However, for more nuanced, "back-end" issues²⁹ such as adjudication, resources are scarce.

Leading researchers notably posited in 1998 that "[v]ery little is known about the optimal design of dispute procedures."³⁰ The

system, see *Webb v. Workers' Compensation Commission*, 733 S.W.2d 726, 728 (Ark. 1987) (Newbern, J., concurring).

²⁷ See BALLANTYNE, *supra* note 18. See also UNITED STATES CHAMBER OF COMMERCE ANALYSIS OF WORKERS' COMPENSATION LAWS, Chart XV – Appeal Provisions (2011).

²⁸ For many years, the U.S. Department of Labor undertook a survey of all fifty state workers' compensation systems, comparing laws and benefit levels. This effort ended in 2006 because of budget cuts, but two entities have now taken up the task: the International Association of Industrial Accident Boards and Commissions (IAIABC) and the Workers' Compensation Research Institute (WCRI). The result is the book WCRI, *Workers' Compensation Laws as of January 2010* (Ramona P. Tanabe, ed., 2010). Much of the text is devoted to comparing the issue of benefits and their delivery. The editor, Ms. Ramona Tanabe of WCRI, includes an accurate caveat in her introduction: "It is easy to misunderstand subtle differences between jurisdictional laws and regulations. The differences in law are magnified by agency interpretive bulletins and traditional practices. Additionally, case law is continually redefining interpretations and application and the laws are riddled with exceptions to the general rules . . ." *Id.* at 5.

²⁹ This term the Author borrows from Richard Victor, Director of WCRI. See RICHARD A. VICTOR ET AL., *COST DRIVERS IN SIX STATES*, 102 (1992) (stating that the "back end of the claim . . . is a major friction point in the system, one that is quite complex and involves the interaction of a large number of factors. Historically, it has been difficult for policymakers and study commissions to untangle the nature of the beast.").

³⁰ Terry Thomason, Douglass E. Hyatt, & Karen Roberts, *Disputes and Dispute Resolution*, in *NEW APPROACHES TO DISABILITY IN THE WORKPLACE* 291 (1998). WCRI researchers, writing in 1999, also despaired at the lack of studies on

Author is unsure that this is really true, as many analyses of dispute resolution systems exist. This writer hopes to contribute some knowledge and opinion on the issue in the workers' compensation context.

Legislatures and administrators do, in fact, analyze other state practices as they undertake reform. The Author, for example, addressed the issue of the fact-finding power of the WCJ in Pennsylvania in 1996 at the request of the Department of Labor & Industry.³¹ At that time, an early version of proposed reforms featured a provision that would have given enhanced review power to the Appeal Board (intra-agency review) over the credibility determinations of the WCJ (since 1972 the final fact-finder).³² The proposed reform would do so by requiring more highly-refined "reasoned decisions," and obligating the Board on appeal to afford "whole record" review, as undertaken by federal and other courts.³³

The Department asked the Author for a report on how other states approached the fact-finding function. Which states, the Department asked, maintained a system like Pennsylvania, with WCJ as fact-finder; and which maintained a system where the commission could more broadly reassess credibility? This Author concluded then, as he does now, that the Larson treatise position that WCJ as final fact-finder is an aberration is misleading and that the WCJ as final fact-finder is now fairly common.³⁴

workers' compensation adjudication systems. See DUNCAN S. BALLANTYNE & CHRISTOPHER J. MAZINGO, MEASURING DISPUTE RESOLUTION OUTCOMES: A LITERATURE REVIEW WITH IMPLICATIONS FOR WORKERS' COMPENSATION 83 (Workers Compensation Research Institute ed., 1999).

³¹ See David B. Torrey, *Matters Regarding Proposed Amendment (H.B. 2216) to Section 422(a) of the Act (Reasoned Decisions), with Comparative Analysis Among Jurisdictions*, in PAPERS OF THE WORKERS' COMPENSATION ADJUDICATION TASKFORCE (First Revision, Mar. 12, 1996) (on file with Author).

³² *Id.*

³³ *Id.*

³⁴ *Id.* In the end, as discussed below, the legislature required the WCJ to issue a more refined, reasoned decision, but actually truncated further the Appeal Board's powers. See Section IX(C)(2).

III. ADMINISTRATIVE ORGANIZATION OF THE ADJUDICATION PROCESS

The focus of this article is on the fact-finding power of the WCJ as opposed to the administration of systems per se. The outlines of the systems within which WCJs undertake their work is, however, important to appreciate the more detailed analysis that follows.

By far the most predominate organizational model in the present day is the WCJ serving as an employee of the department of state government responsible for overall administration of the workers' compensation program. For example, this Author is an employee of the State Department of Labor & Industry, in its Workers' Compensation Adjudication Office. Table 1 details the precise title of all WCJs and their various administrative affiliations.

This is not, however, the universal model. Of note is that four states — Colorado, Minnesota, Wyoming, and Michigan³⁵ — organize WCJs under the auspices of a “central hearing panel.”³⁶ In Colorado, Minnesota, and Michigan, the ALJ, Compensation Judge, and Magistrate, respectively, is a specialist in the field, while in Wyoming, the hearing officer is a skilled generalist.³⁷ In all jurisdictions, notably, he or she is the final fact-finder. Florida, meanwhile, maintains a central panel, the Division of Administrative Hearings (DOAH),³⁸ to which the Judges of Compensation Claims (JCCs) belong. This is so, however, only for purposes of financing and internal administration and JCCs are not “subject to the control, supervision, or direction by any party or any department or

³⁵ The Michigan development occurred in 2011. See Mich. Exec. Order No. 2011-4, available at http://www.michigan.gov/documents/snyder/2011-4_346311_7.pdf (Feb. 23, 2011).

³⁶ *Id.*

³⁷ Memorandum from Hon. Deborah Baumer to Mark Cowger, Esq. (Jan. 9, 2012) (on file with the Author) (stating, *inter alia*, “We hear all types of administrative cases in which we are the final decision makers, including but not limited to, driver’s license suspensions and revocations for DUI’s, workers’ compensation, Department of Family Services child/adult abuse and neglect for purposes of the central registry, and all state personnel hearings . . .”).

³⁸ See *State of Florida Division of Administrative Hearings*, DIVISION OF ADMINISTRATIVE HEARINGS, <http://www.floridagovernmentonline.com/topic/5> (last visited Feb. 2, 2012).

commission of state government.”³⁹ To the contrary, a separate Office of Judges of Compensation Claims (OJCC) exists.⁴⁰

Other states have considered including WCJs in their central panels, but concerns over the complexity of the field, and its significant political aspect have often precluded such action.⁴¹ When, in the 1990’s, a push was made for a central panel in Pennsylvania, a number of lobbies, including Public Utility Commission judges, the WCJs, and the state bar association workers’ compensation section, raised these concerns. (Certainly the inherent tendency of organizations to resist change was also at work in this episode.) Ultimately, this advocacy was unsuccessful.⁴²

In three states — Rhode Island, Nebraska, and Oklahoma — WCJs currently sit in a judicial branch workers’ compensation court. In these states the WCJ is the final fact-finder as well. The 1990 creation of the Rhode Island court, notably, occurred in the wake of the litigation crisis spawned by 1970’s liberalization of workers’ compensation laws discussed below.⁴³ The heritage of compensation

³⁹ Hon. Diane Beck, JCC, Nat’l Ass’n of Workers’ Comp. Judiciary Coll., Remarks at the Comparative Law Panel (Aug. 22, 2011) (on file with the Author).

⁴⁰ *Id.* As is common among states, assessments on the workers’ compensation industry via the workers’ compensation Administrative Trust Fund funds this agency.

⁴¹ *See, e.g.,* Wing, *supra* note 3, at 69 n.63 (2003) (noting that “[a]gencies [like workers’ compensation] . . . whose subject matter was regarded as . . . too political . . . were exempted” from Oregon Hearing Officer Panel).

⁴² With regard to attempts to establish a central panel in Pennsylvania, *see generally* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229 (1999); Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase “Judicialization” in Pennsylvania*, 5 WIDENER J. PUB. L. 297 (1996).

⁴³ Rhode Island established the Workers’ Compensation Court in 1990, after apparent inefficiencies and delays plagued the predecessor Commission. As a result of the Rhode Island reform, according to one commentator, “consistency has been brought to decisions, and appeals have been reduced.” Matthew Carey, *Workers’ Compensation in Rhode Island: Reform Through Business/Labor Cooperation*, in WORKPLACE INJURIES AND DISEASE: PREVENTION AND COMPENSATION 277 (K. Roberts, J. Burton, M. Bodah, eds., 2005). *See generally* Rhode Island Judiciary, *Jurisdiction and Overview*, WORKERS’ COMPENSATION COURT, <http://www.courts.ri.gov/Courts/workerscompensationcourt/PDF/JurisdictionandOverview.pdf> (last visited Feb. 2, 2012).

courts in Nebraska (1935)⁴⁴ and Oklahoma (1959),⁴⁵ on the other hand, is quite ancient.

Two states, meanwhile, adhere to their initial approach of facilitating dispute resolution in the county civil courts. These states are Alabama⁴⁶ and Tennessee.⁴⁷ Adjudication in each state is effected by a bench trial, that is, with the judge as fact-finder, as opposed to a jury trial.⁴⁸

⁴⁴ For an account of the court's history, see Nebraska Government, *History, Mission & Organization*, NEBRASKA WORKERS' COMPENSATION COURT, http://www.wcc.ne.gov/about/history_mission_organization.aspx (last visited March 19, 2012). From 1913-1917, the courts administered the program. From 1917 until creation of the workers' compensation court, the Department of Labor administered the law.

⁴⁵ For an account of the court's history, see *History of the Workers' Compensation Court*, OKLAHOMA WORKERS' COMPENSATION COURT, <http://www.owcc.state.ok.us/history.htm> (last visited Feb. 2, 2012). From 1915 until creation of the court, the State Industrial Commission administered the law.

⁴⁶ With regard to the genesis of this arrangement, one historian states as follows:

As elsewhere in the Deep South, Alabama reformers and even labor leaders avoided labor legislation that might discourage regional economic growth, leaving worker protection to paternalistic industrialists. Hence, Alabama enacted a weak workers' compensation law in 1919 in which the courts, rather than a commission, adjudicated claims, and in which the state regulated insurance only to prevent rate discrimination.

DONALD W. ROGERS, *MAKING CAPITALISM SAFE: WORK SAFETY & HEALTH REGULATIONS IN AMERICA, 1880-1940* 88 (2009).

⁴⁷ A National Commission consultant explained the origin of court administration in Tennessee as follows: "The original statute, passed in 1919, provided for court administration partially because of the erroneous belief that the program would be primarily self-administering, and in part because of the over-reaction of the bar association who feared that the advent of workmen's compensation would eliminate litigation." Bruce R. Boals, *Administration of Workmen's Compensation in Tennessee*, in *SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS III* 67 (1973). A thorough review of the Tennessee dispute resolution process is found in DUNCAN S. BALLANTYNE, *WORKERS' COMPENSATION IN TENNESSEE: ADMINISTRATIVE INVENTORY*, 43-53 (Workers Compensation Research Institute ed., 2003).

⁴⁸ ALA. CODE § 25-5-81(1) (2011); TENN. CODE ANN. § 50-6-203 (1999).

In Alabama, the trial judge is the ultimate arbiter of credibility, and the appellate court undertakes substantial evidence review.⁴⁹ In Tennessee, however, the appellate court's "standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise."⁵⁰ Tennessee appeals courts generally would not presume to change a trial judge's credibility judgment about a live witness, but review *de novo*, without hesitation, expert testimony given by deposition.⁵¹

This approach, though at this point a living artifact, is not as remarkable as it may seem. The workers' compensation system in England, which served as the initial U.S. model, entertained disputes in civil court. Many jurisdictions emulated this model. In fact, according to mid-century analysts, "[a]s many as 14 States attempted court administration before 1920, but the results were uniformly bad, and the majority soon switched to the commission form."⁵² Critics over the decades have disparaged this approach,⁵³ and it was

⁴⁹ See *Chadwick Timber Company v. Charles Philon*, 10 So. 3d 1022 (Ala. 2008). Under the Alabama practice, the trial judge may or may not be well-versed in the compensation law. Expertise will depend on the venue: "Judges have different responsibilities depending on the county. In many counties, judges handle a little bit of everything. The larger counties divide the judges up between civil and criminal. Some counties even assign all or most of the workers' compensation cases to a single judge." Memorandum from Mike Fish, Esq., to the Author (Nov. 10, 2011) (on file with Author).

⁵⁰ *Griffin v. Walker Die Casting, Inc.*, No. M2009-01773-WC-R3-WC, 2010 Tenn. LEXIS 1020 (Tenn., Special Workers' Comp. App. Panel Sept. 15, 2010).

⁵¹ Memorandum from Cully Ward, Esq., to Mark D. Cowger, Esq. (Jan. 6, 2012) (on file with Author). See also *infra* Section IX.

⁵² SOMERS, *supra* note 23, at 149 (1954).

⁵³ See *id.* at 148-50. See also WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, 62-99 (1936) (declaring that court administration of workers' compensation programs had been a failure). The Somers & Somers text features a subchapter entitled, "The Anachronism of Court Administration." SOMERS, *supra* note 23, at 148. As of 1954, Alabama, Louisiana, New Mexico, Tennessee and Wyoming facilitated adjudication of contested cases in the civil court system. SOMERS, *supra* note 23, at 148-49. The National Commission still counted five as of 1972. NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 23 (1972), available at http://www.workerscompresources.com/National_Commission_Report/national_co

disfavored by the National Commission. The Commission, at Recommendation 6.1, admonished that “each State utilize a workmen’s compensation agency to fulfill the administrative obligations of a modern workmen’s compensation program.”⁵⁴ It is critical to note that, presently, the Alabama and Tennessee systems are characterized by extensive pre-trial administrative structures that undertake oversight and seek to achieve the resolution of cases *without* the need for a trial.⁵⁵ No evidence seems to exist that Alabama is interested in moving jurisdiction of disputed cases to an agency,⁵⁶ but some in Tennessee advocate for such a move.⁵⁷

The adjudications of WCJs are, in most systems, subject to intra-agency review – a major theme of this article – typically by a Board or Commission of several members. Meanwhile, all jurisdictions allow for appellate review of WCJ decisions by the judicial branch. These arrangements can also be gleaned from Table 1.

A number of unusual arrangements, however, exist. In smaller states like Montana, there may be only one WCJ, and any appeal is prosecuted directly to the state supreme court.⁵⁸ In several states with multiple WCJs, such as Florida, no intra-agency review exists, and an appeal is taken directly to the courts.⁵⁹ In Iowa, no multiple-member board or commission exists. Instead the intra-

mmission_report.htm (“claims in five States are assigned immediately to the general courts. Adjudicators who handle workmen’s compensation cases exclusively have the primary duty to resolve disputes in 45 States”).

⁵⁴ NAT’L COMM’N ON STATE WORKMEN’S COMP. LAWS, *supra* note 53, at 101.

⁵⁵ For a description of the functions of the Alabama Department of Industrial Relations Workers’ Compensation Division, see *Workers’ Compensation*, ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS (Feb. 2, 2012), <http://dir.alabama.gov/wc/>. For a description of the functions of the Tennessee Department of Labor and Workforce Development, Workers’ Compensation Division, see *Worker’s Compensation*, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT (Feb. 2, 2012), <http://www.state.tn.us/labor-wfd/wcomp.html>.

⁵⁶ Memorandum from Mike Fish, Esq. to the Author (Nov. 10, 2011) (on file with Author).

⁵⁷ Michael Adams, *Tennessee to Study Workers’ Compensation System*, INSURANCE JOURNAL (Jan. 13, 2012), <http://www.insurancejournal.com/news/southeast/2012/01/13/230979.htm>.

⁵⁸ See *infra* Section V.

⁵⁹ See *infra* Section V.

agency review is handled by the Commissioner,⁶⁰ who may, in practice, delegate to a Deputy Commissioner the task of recommending a decision.⁶¹

There are five states wherein a jury trial is still possible after the completion of administrative adjudication, including; Maryland, Ohio, Texas, Vermont, and Washington.⁶² In no state is the trial completely *de novo*.⁶³ In the present day, it is an exception for a jury to be empanelled and a verdict rendered in a workers' compensation case.⁶⁴ The existence of this potential right in any state can, however, have material repercussions for both administration and lawyerly strategizing.

It is worth mentioning another aspect of the fact-finding process. There is an effort underway to make the resolution of contested cases turn more on objective findings, as opposed to subjective factors. In several systems, the WCJ may have the option or obligation of according significant weight to a special medical examiner or other expert when making an adjudication.⁶⁵ The ultimate form of such a provision appears in the Wyoming Act. There, if a dispute develops over the degree of physical impairment suffered by a claimant, the issue is adjudicated by a "medical hearing panel acting as hearing examiner" ⁶⁶ Ultimately, this is an issue

⁶⁰ IOWA CODE § 86.24 (addressing appeals within the agency).

⁶¹ *See, e.g., Beef Products, Inc. v. Rizvic*, 806 N.W.2d 294 (Iowa Ct. App. 2011).

⁶² *See infra* Section VI.

⁶³ *See infra* Section VI.

⁶⁴ Washington is the exception to the exception and regularly empanels a jury to render a verdict in a workers' compensation case.

⁶⁵ *See generally* LESLIE I. BODEN, DANIEL E. KERN & JOHN A. GARDNER, REDUCING LITIGATION: USING DISABILITY GUIDELINES AND STATE EVALUATORS IN OREGON (1991); Sean T. Carnathan, *Due Process and the Independent Medical Examiner in the Maine Workers' Compensation Act*, 45 ME. L. REV. 123 (1993). *See also* RICHARD A. VICTOR, CHALLENGES FOR THE 1990S 20 (1990). The author in this book posits, among other things, "Another design issue facing policymakers is whether or not to make the findings of independent experts binding on the adjudicator . . ." *Id.* He further posits, correctly, that were a legislature to experiment with such an innovation, the experts employed should be of the highest caliber. *Id.*

⁶⁶ WYO. STAT. ANN. § 27-14-405(m) (2012). *See Lyles v. State ex rel Div. of Workers' Comp.*, 957 P.2d 843 (Wyo. 1998).

beyond the scope of this article, but it can be critical in the understanding of workers' compensation adjudication.

IV. NATURE AND HISTORY OF ADJUDICATION AND OF THE ORTHODOX RULE

As submitted above, the orthodox adjudication rule, with commission as final fact-finder and original hearing officer as a conspicuously subordinate officer, is still dominant. For example, under the Illinois system, the "Commission exercises original jurisdiction" upon request for review by a party "and is not bound by an arbitrator's findings."⁶⁷ Likewise, under the Mississippi Act, "the Commission is the fact-finder and the judge of the credibility of witnesses."⁶⁸ The Mississippi ALJ's determination is reviewed *de novo*.⁶⁹

Despite this state of affairs, it is rare for any commission to take further evidence,⁷⁰ and, in most instances, the reassessment of the facts is undertaken by review of the record made before the WCJ. It is also extremely rare for a trial or appellate court to reassess the facts on appeal from the final adjudication of the administrative agency. Though formulas vary, most states currently establish that review of the facts by the appellate judiciary is limited to a determination of whether substantial evidence supports the fact-finder's adjudication, whoever that may be.⁷¹ Also displaced in most states is the intermediate appeal – between the agency and the

⁶⁷ R&D Thiel v. Illinois Workers' Comp. Comm'n, 923 N.E.2d 870, 877 (Ill. App. Ct. 2010).

⁶⁸ Short v. Wilson Meat House, 36 So. 3d 1247, 1251 (Miss. 2010).

⁶⁹ *Id.*

⁷⁰ Illinois, for example, abolished the practice in 1989. *See infra* Part VI. The ability of the Pennsylvania Board to do so (never exercised) was abolished in the 1996 amendments. *See* DAVID B. TORREY & ANDREW E. GREENBERG, 6 WEST'S PA. PRAC., WORKERS' COMPENSATION § 14:176 (3d ed. 2008 & Supp. 2011). The Indiana statute nominally allows the process. 631 IND. ADMIN. CODE § 1-1-15 (entitled "Facts upon review; additional evidence; oral arguments," and providing, *inter alia*, "The facts upon review by the full board will be determined upon the evidence introduced in the original hearing, without hearing new or additional evidence, at the discretion of the industrial board . . .").

⁷¹ *See* Table 1.

appellate court – to the county court. Many of these intermediate appeals were *de novo*, just like the review by the commission.

The law and practice encountered among these orthodox rule jurisdictions and that of the states that maintain the WCJ as fact-finder is treated below.⁷² As a predicate to those analyses, an acknowledgement of the nature and history of workers' compensation adjudication is valuable.

A. *No Right (Most States) to a Jury Trial*

Critical to analyzing WCJ fact-finding power is the importance of the tradition of trial by jury. The U.S. Supreme Court declared in the second decade of the last century that parties do not have a right, under the Constitution, to a trial by jury in a contested workers' compensation case because trial by jury is not a right protected by the Fourteenth Amendment.⁷³ The Seventh Amendment, meanwhile, only provides for jury trials in cases brought in federal court.⁷⁴

⁷² See *infra* Sections V, VI.

⁷³ *Hawkins v. Bleakly*, 243 U.S. 255 (1917) (“Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment.”); *New York Central R.R. v. White*, 37 S. Ct. 247 (1917) (ruling on case where employer was trying to have the New York Act declared unconstitutional for depriving the employer of property in violation of employer’s Fourteenth Amendment right to due process).

⁷⁴ See, e.g., *Bio-Tech Pharmacal, Inc. v. Blouin*, 2010 Ark. App. 714, 762 (Ark. Ct. App. 2010).

The only constitutional argument Bio-Tech made to the Commission, and upon which the Commission ruled, was that [the Act] . . . violates its Seventh Amendment right to a jury trial. This argument . . . is easily decided. “[T]he 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.”

Id. (citation omitted). The Seventh Amendment provides as follows: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII.

The question remained, however, with regard to whether state constitutions guaranteed – and may continue to guarantee – such a right. Some legislatures, like that of Pennsylvania, sought to avoid the problem altogether by codifying the fiction that the law was elective, so that the parties were perceived as having waived the right to any jury trial.⁷⁵ Other states, like California, addressed the problem via constitutional amendment by providing “[t]he legislature may provide for the settlement of any disputes arising under the legislation . . . by arbitration, or by an industrial accident board, by the courts, or by either any or all of these agencies, anything in this constitution to the contrary notwithstanding.”⁷⁶ The Montana Supreme Court, meanwhile, dismissed the argument by conceptualizing “adjustment of claims” as “an administrative function and not a judicial proceeding, and it is only in certain cases falling under the latter designation that trial by jury is guaranteed by the Constitution. ‘Due process of law’ does not necessarily require a jury trial.”⁷⁷

Notably, the current day reasoning of Pennsylvania courts is that, while the state constitution preserves “[t]rial by jury as heretofore,” such guarantee “does not . . . prevent the legislature from creating and providing modes or tribunals other than the jury trial for the determination or adjustment of rights and liabilities which were not in existence prior to the adoption of the state constitution”⁷⁸

Still, an early version of the Maryland Act was declared unconstitutional, seemingly because it failed to provide for a jury trial.⁷⁹ As an apparent result, the legislature was sure to allow for

⁷⁵ Anderson v. Carnegie Steel Co., 99 A. 215 (Pa. 1916).

⁷⁶ Western Indemnity Co. v. A.J. Pillsbury, 151 P. 398, 400 (Cal. 1915)(internal quotation marks omitted).

⁷⁷ Cunningham v. Nw. Improvement Co., 119 P. 554 (Mont. 1911).

⁷⁸ Grant v. GAF, 608 A.2d 1047 (Pa. Super. Ct. 1992) (“The legislature may withhold trial by jury from new judicial proceedings created by statute and clothed with no common law jurisdiction.”).

⁷⁹ In 1902, Maryland was the first state to pass a workers’ compensation law, although it was later (1904) declared unconstitutional. According to one source, “Baltimore City Judge Henry Stockbridge based this judgment on the hurt employee’s inability to follow a jury trial.” Brianne Zarkan, *The development of workers compensation laws and how you are defended from injury on the job*, ABOUTCAREERS.NET (Oct. 11, 2011), <http://www.aboutcareers.net/index.php/archives/2005>. See also JOHN FABIAN

jury trials in its subsequent enactment.⁸⁰ Consequently, under current Maryland law and practice, the potential for a jury trial still exists, though the findings of the Commissioner are entitled to a “presumption of correctness.”⁸¹ Likewise, a right to a jury trial under the Texas Act (now “modified”), has always existed, because of constitutional concerns.⁸² The same concerns led the Ohio⁸³ and

WITT, CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 137 (2004) (citing contemporary accounts).

⁸⁰ An expansive discussion of trial by jury under the Maryland Act is found in *Branch v. Indemnity Ins. Co.*, 144 A. 696 (Md. 1929). The court’s ultimate conclusion on the issue is rather ironic. In the court’s view, inclusion of trial by jury was not required to support the law’s constitutionality:

It having been determined . . . that the abrogation by the act of common law causes of action . . . [and substitution of workers’ compensation rights and remedies] was a competent exercise of legislative authority, there would be apparent inconsistency in holding, nevertheless, that a right of jury trial according to the course of the common law must in such cases be recognized and unqualifiedly enforced. The valid use of the police power for the remedial objects of the act placed it beyond the purview of the due process clause of the Federal Constitution and the equivalent provision of the organic law of Maryland.

Id. at 697.

⁸¹ MD. CODE ANN., LAB. & EMPL. § 9-745(b), (c) (“Conduct of appeal proceedings”).

⁸² *Texas Workers’ Compensation Comm’n v. Garcia*, 893 S.W.2d 504, 527 (Tex. 1991):

The Act provides for a trial by jury on the principal compensation issues: compensability of the injury; eligibility for income and death benefits; and, within limits, the amount of those benefits.... The question presented, therefore, is whether the Legislature has so restricted the jury’s role in deciding these issues that it has transgressed the inviolate right to jury trial The Act does specify certain limiting procedures not found in a pure trial de novo. First, the jury is informed of the Commission’s decision. Because the jury is not required to accord that decision any particular weight, however, this procedure does not impinge on the jury’s discretion in deciding the relevant factual issues. We hold that this procedure does not violate a claimant’s right to trial by jury.

Vermont⁸⁴ legislatures, among others, to allow for a jury trial after the adjudications of the workers' compensation commission. It is in these states, along with Washington, that eventual right to a jury trial endures today. Importantly, in all instances, such a right attaches only after consideration of the dispute by the administrative agency.⁸⁵

B. The Decision: Judicial, Not "Institutional"

An objection that may be lodged against the WCJ as final fact-finder is that it defeats the administrative law idea that the agency adjudication should be "institutional." At first glance, this objection may seem to have weight, because granting a single WCJ fact-finding authority means depriving the multiple-member commission of presumed experts of the fact-finding power. Scholars of administrative law, in their treatise, remark:

Id.

⁸³ See *State v. Creamer*, 97 N.E. 602 (Ohio 1912). In response to argument that the Ohio Act was unconstitutional because it deprived parties of right to trial by jury, the court reminded the parties that "if the board denies the claimant's right to participate in the fund on any ground going to the basis of his claim, he may by filing an appeal and petition in the ordinary form be entitled to trial by jury, the case proceeding as any other suit." *State*, 97 N.E. at 608. But see *Arrington v. DaimlerChrysler Corp.*, 849 N.E.2d 1004, 1011 (Ohio 2006) ("We have never held that a worker seeking to participate in the fund is entitled to a trial by jury because of . . . any . . . constitutional provision. Rather, we consistently have held that the rights associated with the act are solely those conferred by the General Assembly.").

⁸⁴ An expansive discussion of trial by jury under the Vermont Act (regarding procedure) is found in *Pitts v. Howe Scale Co.*, 1 A.2d 695 (Vt. 1938). It seems likely that provision for jury trial in the Vermont Act was influenced by the state constitution's still-extant proviso "that when any issue of fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." *Plimpton v. Somerset*, 33 Vt. 283, 5 (Vt. 1860). It may be that jury trial for a work-related injury is still obligatory under the Vermont Constitution. See generally *Hodgdon v. Mt. Mansfield Co., Inc.*, 624 A.2d 1122 (Vt. 1992) (explaining *Plimpton* and state constitution and holding that claimant had right to trial by jury in her state Fair Employment Practices Act case).

⁸⁵ Critics have long argued that the persistence of revisitation of the case via jury trial is redundant and wasteful. See, e.g., *DODD*, *supra* note 53, at 358 (1936) ("Most of what we now have of trial by jury . . . is a relic of the earlier days when the constitutional issue as to jury trial was regarded as one of serious consequence . . .").

The decisionmaking process in an administrative agency resembles the function of the judiciary in that facts and law are examined to reach the appropriate resolution of issues. Unlike the courts, however, which limit the cast of characters in the process to a judge and his law clerk(s), an agency decision reflects the thought processes of numerous persons. The decision becomes one of the institution, rather than a particular individual.⁸⁶

This “institutional decision-making” is a process whereby “no one person, but a collection of skilled persons, would be involved in the ultimate determination of the case.”⁸⁷

This is all unassailable, of course, but it does not describe the workers’ compensation process. When workers’ compensation systems were created in the second decade of the twentieth century, the fact-finding in contested cases was undertaken in a fashion which suggests the institutional decision-making described above. In this regard, most legislatures enacting workers’ compensation laws were influenced by the example of early entities like the Interstate Commerce Commission (ICC). So influenced, they eliminated court jurisdiction over contested cases and vested them in a similar multi-person board or commission.⁸⁸ One of the earliest writers stated, “[i]nasmuch as the functions of the compensation authority are judicial as well as administrative, the board or commission type of

⁸⁶ JACOB A. STEIN, GLENN A. MITCHELL, & BASIL J. MEZINES, ADMINISTRATIVE LAW § 38.01 (Lexis Nexis 2011).

⁸⁷ Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT’L ASS’N ADMIN. L. JUDICIARY 119, 145 (2005).

⁸⁸ See generally Michael Asimow, *The Administrative Judiciary: ALJ’s in Historical Perspective*, 19 J. NAT’L ASS’N ADMIN. L. JUDICIARY 25 (1999). As discussed above, however, many jurisdictions (said to be fourteen) followed the example of England, and vested jurisdiction over contested cases in *civil court*. See *supra* Part III. Indeed, Alabama and Tennessee still entertain the litigation of such cases in court. *Id.*

organization, already familiar in American practice, would seem to be most appropriate.”⁸⁹

Given the nascency of the workers’ compensation program, and its supposedly scientific principles, this is not surprising. Administration by commission had, after all, traditionally “been championed by those who believe that administrative regulation requires a high degree of expert[ise], a master[ing] of technical detail[s], and continuity and stability of policy.”⁹⁰ “Doubtless,” an early critic noted, “it is necessary, or at least advisable, that any compensation law should be supervised by some public body.”⁹¹ A historian of the pioneer Wisconsin Commission further explains that the intellectuals of the Progressive Era who were behind the creation of compensation programs “sanctioned administrative labor law on the grounds of *representativeness*.” They endorsed, for example, such things as “safety code advisory committees that gave ‘due weight’ to [both] employer and worker viewpoints.”⁹²

Thus, the multiple-person commissions, entities often comprised of politically-appointed representatives of labor and

⁸⁹ E.H. DOWNEY, WORKMEN’S COMPENSATION 72 (1924).

⁹⁰ M.H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 4 (1955).

⁹¹ BRADBURY, *supra* note 14, at 960.

⁹² ROGERS, *supra* note 46, at 48. Rogers, notably, identifies a subtle distinction between the early (and enduring) workers’ compensation boards and those created two decades later, in the 1930’s, by the New Deal. According to Rogers, the New Dealers contended “that administrators needed relief from three-branch American government to apply independent technical judgment to modern problems.” *Id.* This thinking had nothing to do with the origins of workers’ compensation. This distinction is important, as it contrasts workers’ compensation adjudication from other aspects of the “administrative law state.” Contested workers’ compensation cases in most states find their forum in an administrative law setting, but the system, as noted in the accompanying text, finds its genesis in a reform occurring well before the New Deal and the “rise” of administrative law agencies. Remembering the distinction is helpful, as on occasion, critics of the growth of agency power uncritically include workers’ compensation adjudication. *See, e.g.,* Daniel R. Schuckers & Kyle Applegate, *The Rise of Pennsylvania’s Administrative Agencies and Legislative and Judicial Attempts to Constrain Them*, 81 PA. BAR ASS’N QUARTERLY 124 (July 2010). While room for criticism of workers’ compensation adjudication may exist, the system is not part of the agency growth that some consider a menace to separation of powers principles.

employer groups,⁹³ and/or others presumed to have some special expertise or insight into issues surrounding the program, were the original workers' compensation fact-finders.

This did not mean, however, that this multiple member group was producing the type of "institutional decision" characterized above. Compensation commissions well understood – or learned – from the very beginning that when adjudicating disputes between two parties (*i.e.*, employer/insurance carrier and employee) over compensability, they were undertaking what had theretofore been handled as a *judicial* function in civil court.⁹⁴ While commissions had many other responsibilities in terms of executing and enforcing policy (many still do), when adjudicating contested cases, they were not dealing with issues of regulation, but were instead sitting as *impartial* adjudicators, just as trial judges had in the displaced industrial accident tort cases.⁹⁵ Workers' compensation cases have *always* been recognized as adversarial.⁹⁶

This was certainly made clear in Pennsylvania, where the Supreme Court, immediately upon enactment of the law, reversed a referee decision and held that in disputed cases objected-to hearsay was legally incompetent evidence, just as it was in civil court, and could not support an agency adjudication on workers' compensation

⁹³ See, *e.g.*, *Davis v. Research Medical Center*, 903 S.W.2d 557 (Mo. Ct. App.1995) (court explaining original formation, and evolution of, Missouri commission). A discussion of the early commissions and boards may be found in Stefan A. Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV.119, 131 (1951-1952).

⁹⁴ See David B. Torrey, *The Rules of Evidence Under the Pennsylvania Workmen's Compensation Act: Sources and Theoretical Considerations*, 29 DUQ. L. REV. 447, 451-53 (1991).

⁹⁵ See DODD, *supra* note 53, at 101 ("We may classify as quasi-judicial the action of administrative bodies in passing upon contested claims, . . ."); *id.* at 320 ("Such a Board has the dignity and the form of many of our courts, the only distinction being that of name."). See also DOUGLAS ARGYLE CAMPBELL, *WORKMEN'S COMPENSATION: INSURANCE, PRINCIPLES, AND PRACTICE* (1935). This early California treatise author drew a distinction between "judicial fact-findings," such as those generated by the Industrial Accident Commission (IAC), and "administrative findings" such as those produced by the Interstate Commerce Commission. Campbell also noted that California courts had immediately held that the findings of fact of the IAC were final and had the same import as those of a jury in a civil case. *Id.*

⁹⁶ DODD, *supra* note 53, at 53.

entitlement.⁹⁷ Cross-examination, another early court decision admonished, constituted “a fundamental right, without which the prime essentials of a fair trial, according to Anglo-American standards of justice, are not preserved. The [B]oard [and referees], not less than the courts, must obey the indispensable basic mandates of our jurisprudence.”⁹⁸ The experience in Connecticut was the same. “Our courts have,” declared one of the state’s original commissioners, “by their own actions, made it clear that, however informal the methods, the real essentials of justice inherent in any proper effort to determine property rights, must be found.” The “Commissioner is not a judge,” he admonished, but “proceedings . . . have the same practical results as ordinary judicial actions.” He is “to act in the enforcement of contract rights and not to be an almoner of bounty”⁹⁹ This universal understanding led to Larson’s assertion quoted above: “[T]he compensation commission[,] while deciding controverted claims[,] is as far towards the judicial end of the spectrum as it is possible to go without being an outright court.”¹⁰⁰

The upshot of all this is that, while the final fact-finding was undertaken collectively, as if the “institutional model” of adjudication was being undertaken, in effect the commission adhered to what has been termed the “judicial” model of administrative adjudication. In contrast to the institutional model, this model dictates that “the administrative process should resemble judicial process as closely as possible. The administrative judge should personally listen to the evidence and argument, have no preconceptions about the case, receive no information about the case except through on-the-record submissions, and be completely independent of investigators and prosecutors.”¹⁰¹

⁹⁷ *McCauley v. Imperial Woolen Co.*, 104 A. 617 (Pa. 1918).

⁹⁸ *Cowan v. Bunting Glider Co.*, 49 A.2d 270, 271 (Pa. Super. Ct. 1946).

⁹⁹ Remarks of Commissioner George H. Beers, in BRADBURY, *supra* note 14, at 965-67.

¹⁰⁰ LARSON, *supra* note 1, § 79:90.

¹⁰¹ See Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 500 (2001) (quoting Michael Asimow et al., *State and Federal Administrative Law* § 2.0 (2d ed. 1998)). For another discussion of the basic difference between agency rulemaking and agency adjudication, see Toni M.

This is the model that has prevailed from the outset and exists today. Still, on occasion, the distinction can escape a court. In a Longshore case, for example, the ALJ (the final fact-finder), had credited the claimant's expert and found that claimant's stroke was caused by work conditions. On appeal, the Benefits Review Board (BRB), undertaking substantial evidence "whole record" review, criticized the claimant's expert opinion, reassessed credibility, and reversed. The Court of Appeals for the District of Columbia, however, reversed, concluding that substantial evidence supported the ALJ's decision, and reinstated his award. The dissent, however, complained as follows:

Under [our precedents], reviewing courts have looked independently at the record before the ALJ to determine if *the ALJ's findings* were supported by substantial evidence on the record as a whole. This scope of review effectively removes the BRB from the hierarchy established to administer the workman's[sic] compensation programs.

Yet the BRB, a body with significant accumulated experience, competence and memory with the run of workman's [sic] compensation cases, found [the ALJ's] theory of causation of Burns' stroke not plausible. For us to be obliged to dismiss this judgment – essentially the product of superior institutional competence – out of hand appears anomalous. I am, however, uncertain whether any other course, any different scope or review, is even theoretically available to a court of appeals under this statute; review of *the BRB's finding* for substantial evidence is apparently foreclosed by the statutorily-dictated relationship between BRB and ALJ. . . . If no other scope of review of the BRB than the present one

Fine, *Appellate Practice on Review of Agency Action: A Guide for Practitioners*, 28 U. TOL. L. REV. 1, 32 (1990).

is feasible, though, the statutory structure makes little sense to me.¹⁰²

These complaints miss the point, however, that neither the ALJ nor the BRB were supposed to be employing institutional skills. Both were, instead, charged with being unbiased and impartial.

Having said all this, an arguable irony exists. In practice, *aspects* of the institutional model existed, and endure, in most workers' compensation jurisdictions, regardless of whether the WCJ or commission is ultimate fact-finder. The judge (or commission), for example, may well have considerable powers of investigation to advance an inquiry into issues beyond those presented by the parties, and may enlist the power and resources of the agency to assist him.¹⁰³ He may, further, have the option, or even obligation, of seeking the opinion of a staff or contract physician to provide an impartial medical opinion as to causation, disability, and impairment.¹⁰⁴ In the end, however, the commission or judge, despite these investigatory powers, has always been an independent decision-maker, not an advocate for any side, and he or she was not and is not conceptualized as implementing agency policy via institutional decision.

C. The Orthodox Rule: Commission and Subordinate Officer

The orthodox model, which still predominates,¹⁰⁵ originated in the first place because of the need for commissions to delegate the

¹⁰² *Burns v. Dir., OWCP Programs*, 41 F.3d 1555 (D.C. Cir.1994) (Silberman, J., concurring).

¹⁰³ *See, e.g.*, 77 PA. STAT. ANN. § 831 (West 2011) (WCJ may "appoint one or more impartial physicians or surgeons to examine the injuries of the plaintiff and report thereon.").

¹⁰⁴ *See generally* Alex Swedlow, *Social Policies of Disability Evaluation*, in *WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING?* (Richard A. Victor & Linda Carrubba, eds., 2010) (noting that "[i]n many states, industrial accident boards create rating bureaus to interpret the disability schedule and to make recommendations to judges and administrators as to the extent of disability based on medical evidence.").

¹⁰⁵ While the predominate approach is for the Commission to retain final adjudication powers, most states have abandoned the process of appeal *de novo* from the decision of the Commission to the trial or other courts. For an early

evidence-collection and proposed fact-finding to hearing officers. In a few states, notably, including Connecticut, Maine, and under the Longshore Act, no delegation existed, as volume was apparently such that the commissioner himself could hear and see the witnesses and then make his decision.¹⁰⁶

The preeminent analyst of the day, Walter F. Dodd, studied compensation systems in the early 1930's, and observed: "[I]n the organization for the administration of workmen's compensation, there must be provision for the hearing of contested issues by officers designated for this purpose or by individual members of the board"¹⁰⁷ Indeed, in a jurisdiction with "a large number of contested [cases] and a small compensation board or in which the administration is [trusted] to a single officer, the use of referees, examiners or arbitrators for such hearings thus becomes necessary."¹⁰⁸

One will recall that the original theory was that the Commission was supposed to be a professional body composed of experts.¹⁰⁹ Under this original thinking, the Commission, and not its

recounting of this process, and a critique of the same, see Dodd, *supra* note 53, at 338-407. Dodd criticized this process because of delay in finality and defeat of the idea that a commission could more expertly adjudicate the cases with regard to which they were supposed to be expert. *Id.*

Further, in the present day commissions operating under the original model do not usually hear evidence. *See, e.g.,* Webb v. Workers' Comp. Comm'n, 733 S.W.2d 726, 726 (Ark. 1987) (describing Arkansas system, court remarks, "[t]here may have been a time when the commission actually heard witnesses give live testimony when its members wished to redo the work of the ALJ. Given the numbers of claims today, however, that would be impractical if not impossible.").

¹⁰⁶ All have, notably, evolved over the decades so that intra-agency review exists. In all, the Commissioner, Hearing Officer, and Deputy Commissioner (respectively) are currently the final fact-finders. *See infra* Section V.

¹⁰⁷ DODD, *supra* note 53, at 785.

¹⁰⁸ *Id.*

¹⁰⁹ Whether this goal was always met seems to be in question. Harvard-trained Massachusetts lawyer, Samuel Horovitz, for example, complained in his 1946 treatise:

In the courts, judges are usually limited to lawyers and persons skilled in the law. Commissioners or referees or board members (whatever their local title) are chosen from all walks of life. Though lawyers predominate, a board may consist, as one did, of an "undertaker, a farmer and a printer."

subordinate, was considered to be in the best position to find the facts. Dodd, likely articulating the unanimous view, spoke to this issue in the seminal 1936 study, *Administration of Workmen's Compensation*:

And an efficient administration requires an administrative review of both fact and law by a body or officer whose judgment will not be controlled or primarily influenced by the decision of the referee, examiner, or arbitrator in the original administrative hearing. . . . [T]here should be an opportunity for an administrative review by an impartial body which has not theretofore passed upon the issues, and which may hear evidence in addition to that presented at the original hearing. Such review is desirable, not only for the protection of the parties, but also for the prompt disposition of the cases and in order to relieve the courts of a duty which may be more satisfactorily performed by a body devoting its primary attention to workmen's compensation.¹¹⁰

As foreshadowed above, Dodd actually favored systems where the Commission could take more evidence in the event of a party's appeal or request for review:

For the supervision of administrative work a single officer has been regarded as better than a board, but a board or commission has normally been regarded as more satisfactory than a single officer for purposes of review. The reviewing body under workmen's compensation bears a close analogy to a court of review, and consideration of the merits by several persons has its advantages. But, to obtain this

SAMUEL B. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 384 (1944).

¹¹⁰ DODD, *supra* note 53, at 785. When Dodd was writing this work in 1936, a sizeable number of states allowed *de novo* review in the trial courts.

advantage, the members of a board must hear, consider, and determine the issues.¹¹¹

It was not only organizational theory that led such a skilled observer to favor intra-agency *de novo* review. Importantly, by “protection of the parties,”¹¹² Dodd was *also* referring to the perceived need for correction of the initial decision of a subordinate who could not necessarily be trusted in all cases to make a reliable, or even competent, decision.

Doubtless the quality of such early hearing officers varied markedly among the states in the early decades.¹¹³ Dodd’s examination of the adjudication scene in the early 1930s, however, left him appalled at the quality of referees in many important states. Dodd seemed satisfied with the Wisconsin examiners,¹¹⁴ but he found the New York referees poorly trained and the Pennsylvania referees short-term patronage hires.¹¹⁵ His harshest words, however, were saved for Illinois arbitrators:

With few exceptions the arbitrators in Illinois have been selected and have held their positions because of political connections and by no means because of their fitness for the work. As a result, most of them have no background in the compensation field, are not interested in it, and have no initial comprehension of its importance and difficulty.¹¹⁶

¹¹¹ *Id.* at 795. The early treatise writer, Downey, also took for granted that the commission would be the final fact-finder. “The board,” he declared, “should have plenary power to review the decisions of a referee or a single commissioner both as to the law and facts and in the form either of a hearing *de novo* or of a review of the findings upon the record.” DOWNEY, *supra* note 89, at 73.

¹¹² DODD, *supra* note 53, at 785.

¹¹³ The author of an early California treatise, Campbell, identified himself on the title page of his book as a California Workmen’s Compensation Referee and a teacher of the field at the University of California. *See generally* CAMPBELL, *supra* note 95.

¹¹⁴ DODD, *supra* note 53, at 258 (noting that the commission would ratify the examiner’s decision in 99% of the cases).

¹¹⁵ *See id.* at 269-77.

¹¹⁶ *Id.* at 285.

Indeed, “[s]ome of the arbitrators have been almost illiterate.”¹¹⁷ An individual, he continued, “without experience or capacity who by political influence is able to obtain an appointment as a referee or arbitrator in Illinois, Pennsylvania or New York will provide a handicap rather than an aid”¹¹⁸ The idea that such marginal, subordinate individuals would be the fact-finders in a compensation system would have been absurd to Dodd.¹¹⁹

D. Critique of Trial De Novo and Other Multi-tiered Fact-finding

To read the historical critical analyses of workers’ compensation is to expose oneself to an alarming narrative of a noble idea run amuck at the very outset. There was no Belle Époque for the system.

Many, for example, complained that several states initially refused to create supportive administrative agencies, leaving it to courts – ill-equipped for the task – to preside over the new law.¹²⁰ Others have asserted that common law judges derailed workers’ compensation within the first few decades by imposing excessive legalities on its administrative structures.¹²¹ Starting in the 1940s, and extending until the early 1970s, a frequent complaint heard was

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* A New York workers’ compensation referee was depicted as a hack in the autobiographical novel, *Christ in Concrete*. See PIETRO DI DONATO, *CHRIST IN CONCRETE* (1939). In that case, the worker, an Italian immigrant, suffered a work-related death from a fall into liquid concrete. His widow’s claim was opposed by the insurance company because the employer had allegedly failed to reveal all of its work locations. At a tumultuous hearing, presumably convened in 1923, the aloof “Referee Parker” chums around with the defense lawyer and ignores the *pro se* dependents. The novel was later turned into a movie, *Give Us This Day*.

¹²⁰ DODD, *supra* note 53, at 98-99.

¹²¹ SOMERS, *supra* note 23, at 157 (“[M]ost commissions, under severe pressure from many sources, are being pushed, or are retreating, into an ever-increasing legalistic atmosphere.”).

that coverage and benefits were woefully inadequate.¹²² In the present day, the persistent stance of business is that benefits are now so generous, and procedures so lax, that costs are out of control and many employees mangle or otherwise take advantage of the system.¹²³

These are all macro-level critiques. A micro-level critique, on the other hand, has been that, for those cases that are contested, the adjudicatory scheme set up to handle such disputes is too unwieldy and time-consuming. The complaint is intuitively valid – after all, the entire purpose of displacing negligence liability and contests in court was to provide prompt recovery via the operative principle of no-fault. Granted, all realized at the outset that contested cases would exist (they did, after all, in England), but to construct a dispute resolution system that did not expedite cases was antithetical to the whole purpose of the law.

Yet this is what many states did. As summarized by Dodd, as of the 1930s (and extending well after), the typical compensation program was set up so that the facts of a contested case could be revisited up to three times:

- (1) A hearing by a referee, examiner, arbitrator, or by a member of the administering body;
- (2) A review, with the possibility of introducing new testimony, before a board of several persons, or before an officer superior to the one who held the original hearing;
- (3) An appeal to a trial court or to an intermediate court of review, with the issues in most cases heard by the court on the basis of the record made in the administrative review noted under (2) above[.]¹²⁴

In many instances, the third-level consideration was *de novo* review. This multi-tiered review, particularly *de novo* review in the trial courts, was assailed for decades. As discussed above, Dodd distrusted the referee and favored the commission as fact-finder, but

¹²² See, e.g., Arthur Larson, “Model-T” Compensation Acts in the Atomic Age, 18 NAT’L ASS’N CLAIMANTS COUNS. OF AM. L.J. 39 (1956).

¹²³ See, e.g., KRAMER, *supra* note 9, at 5-6.

¹²⁴ DODD, *supra* note 53, at 114.

he also denounced trial *de novo* (reassessment of the facts) in the courts:

Judicial review by trial *de novo* is open to all the objections that apply to court administration, and if trial *de novo* is with a jury, an even greater lack of uniformity of administration is introduced. Not only this, but a cumbersome and expensive procedure is established if evidence is to be introduced on an administrative hearing, and then is to be introduced again on judicial review, if such review is sought. Another objection to trial *de novo* is that it affords an opportunity to withhold testimony in the administrative hearing and present it in the judicial proceeding, if either party thinks this to his interest. In the language of Mr. Justice Brandeis, the administrative proceeding thus becomes “an inquiry preliminary to a contest in the courts,” rather than a less cumbersome and less expensive means of determining the controversy.¹²⁵

The critics, Somers & Somers, writing in 1954, joined Dodd in decrying this multi-tiered system of adjudication. They counted twenty-two states, as of that year, still allowing the court, upon a party’s appeal, to “pass on questions of fact.”¹²⁶ “There are all degrees of fact review,” they added, “among this group. In most, the review is on the record made by the Commission, but a few permit reopening the entire case from scratch.”¹²⁷

The authors reproduced a portion of a 1951 IAIABC-endorsed report on this issue: “Trial *de novo* in the trial courts, often with trial by jury, is the worst possible mode of judicial review, since it transfers to the courts the Commission’s full power of decision and

¹²⁵ *Id.* at 369-70.

¹²⁶ SOMERS, *supra* note 23, at 157.

¹²⁷ *Id.* See also Stefan A. Riesenfeld, *Basic Problems in the Administration of Workmen’s Compensation*, 36 MINN. L. REV. 119, 132 (1952) (“It is . . . more than doubtful whether such duplication serves any useful purpose.”).

introduces slower and more expensive judicial procedure in the compensation case”¹²⁸ That year, the IAIABC took the position that judicial review “in all cases”¹²⁹ should be on the record developed by the commission, “and upon questions of law alone – including the question of whether there is evidence to support the finding complained of – but without power in the court to redetermine the weight of the evidence.”¹³⁰

The type of havoc that multi-tiered fact-finding could cause in the trenches of litigation is well illustrated by the complaints of a Florida lawyer in the late 1940s.¹³¹ Under the law and practice at that time, the findings of the Florida Deputy Commissioner were said to be upheld routinely by the Industrial Commission.¹³² But, rather oddly, the district court had the power to reassess credibility, with the state supreme court undertaking “clearly erroneous” appellate review.¹³³ The lawyer expressed his frustration in frank terms:

[T]he risk and expense of an appeal make it impossible for the claimant to obtain relief, and . . . many cases . . . are dropped when the Circuit Court has ruled adversely. . . .

For one thing, an appeal takes time and money. The attorney represents a client who, as a general rule, can pay him only in the event of final victory. He runs the risk of spending a year in litigation, making two trips to Tallahassee to argue the case, and expending his own monies in railroad fares, hotel bills, stenographic costs, and meals away from home, all on a mere contingency.¹³⁴

¹²⁸ SOMERS, *supra* note 23, at 159.

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting COMM. ON ADMIN. & PROC., REP. OF THE COMMITTEE ON ADMIN. AND PROC. OF 1951 IAIABC CONVENTION, reproduced in U.S. BUREAU OF LABOR STANDARDS, BULLETIN NO. 15696-97).

¹³¹ Lester Harris, *Appeals in Workmen’s Compensation Cases*, 2 MIAMI L. Q. 215 (1948).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 223.

“Nor[,]” he added, “do the burdens of an appeal rest equally on both parties.”¹³⁵ Defense counsel, he posited, would prosper by this multi-tiered process: “[T]he only way [for him] to hold a good retainer is to show a record of constant litigation successfully handled, even at the expense of the poor devil of a workman.”¹³⁶

One of the writer’s solutions was to make the Deputy Commissioner the final fact-finder.¹³⁷ In this recommendation, he was perhaps prophetic, for, as discussed below, this is precisely how the state supreme court ruled three years later, in 1951.

V. THE TREND AWAY FROM THE ORTHODOX MODEL

A. *The National Commission*

The modern history of workers’ compensation commences with the formation of the National Commission on State Workmen’s Compensation Laws. The Commission was established by Congress as part of the landmark passage of the Occupational Safety and Health Act of 1969.¹³⁸ The commission was charged with evaluating state workers’ compensation laws and with making recommendations for improvements of the same.¹³⁹ The Commission, in 1972, promulgated nineteen “essential recommendations” for an adequate state workers’ compensation law.¹⁴⁰ The federal government, meanwhile, communicated to states the idea that failure to improve

¹³⁵ *Id.*

¹³⁶ Harris, *supra* note 131, at 223.

¹³⁷ *Id.* at 224.

¹³⁸ The definitive up-to-date discussions of the National Commission are found in John F. Burton, Jr., *The National Commission on State Workmen’s Compensation Laws: Some Reflections by the Former Chairman*, 40 INT’L ASS’N OF INDUS. ACCIDENT BOARDS & COMMISSIONS J. 15 (Fall 2003); John F. Burton, Jr., *The National Commission 33 Years Later: What Have We Learned? (Part I)*, 42 INT’L ASS’N OF INDUS. ACCIDENT BOARDS & COMMISSIONS J. 21 (Fall 2005); John F. Burton, Jr., *The National Commission 33 Years Later: What Have We Learned? (Part II)*, 43 INT’L ASS’N OF INDUS. ACCIDENT BOARDS & COMMISSIONS J. 21(Spring 2006).

¹³⁹ *See id.*

¹⁴⁰ NAT’L COMM’N ON STATE WORKMEN’S COMP. LAWS, *supra* note 53, at 26.

their systems accordingly could result in federal action.¹⁴¹ The adjudicatory scene described above, with board or commission in most states serving as final fact-finder, still prevailed when the Commission issued its report.¹⁴²

The Commission called for expeditious litigation and adjudication, and, like the critics noted above, disapproved of *de novo* review of compensation awards in the trial court. The Commission, however, found it acceptable that the commission was to be the final fact-finder (it did, however, encourage commissions to presume its hearing officers' decisions were correct on the facts). Recommendation 6.14 provides, "We recommend that where there is an appellate level within the workmen's compensation agency, the decisions of the workmen's compensation agency be reviewed by the courts only on questions of law."¹⁴³ The Report thereupon states: "The decision of the hearing examiner could be appealed to the appeals board, which could overrule the hearing examiner on questions of fact and of law. The decision of the hearing examiner, however, should be presumed correct and the appeal should not stay the examiner's award."¹⁴⁴

A review of the Commission's multi-volume supportive studies (a treasure-trove of information) demonstrates that reforming the adjudicative process of compensation acts was not a priority for the Commission. Indeed, not one of the supportive studies discretely addresses adjudication. One of the Commission's consultants did recommend expediting controverted cases, having noted that "[i]t has been estimated that a period of 15 months to two or three years is occasionally required for a case to run the gamut of hearings, reviews, and court appeals."¹⁴⁵ In the end, however, the consultant ultimately concurred with a like-minded reform advocacy, that of the

¹⁴¹ *Id.* The National Commission did not, however, advocate federalization.

¹⁴² *Id.*

¹⁴³ *Id.* at 108.

¹⁴⁴ *Id.*

¹⁴⁵ See Milton Brooke, *Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York, & Wisconsin*, in 3 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 77, 91 (1973).

Council of State Governments (CSG).¹⁴⁶ The CSG in its recommendations took for granted reassessment of the facts by the commission.¹⁴⁷

Indeed, Section 34 of the Council of State Government's *Model Workmen's Compensation and Rehabilitation Law* ("Appeals to the Board"), provides:

[T]he [Appeals] Board shall have the power to review the findings of fact, conclusions of law and exercise of discretion by the . . . hearing officer in hearing, determining or otherwise handling of any compensation case and may affirm, reverse or modify any compensation case upon review or remand such case to the Director for further proceedings and action.¹⁴⁸

The Commentary to this section clarifies:

From the order of the hearing officer . . . an appeal lies to the . . . AppealBoard, which has the power to review both finding of facts and conclusions of law, but not to take new evidence. If further development of the facts is found necessary, the case may be remanded for appropriate action.¹⁴⁹

The Interdepartmental Workers' Compensation Taskforce that continued the work of the Commission likewise did not have reform of adjudicative process as a priority. Its 1977 Report to the President and Congress makes no reference to the subject. The only item that approaches the subject is the recommendation that "[if] a hearing is requested or necessary, it should be held within [forty-five]

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ The Council of State Governments, *WORKMEN'S COMPENSATION AND REHABILITATION LAW WITH SECTION BY SECTION COMMENTARY* 145-46 (1973). Thanks to John F. Burton, Jr., Esq., for providing the Author with a copy of this commentary.

¹⁴⁹ *Id.*

days from the time of the accident, unless the State agency grants an extension.”¹⁵⁰

This lack of priority given to adjudication reform by both the National Commission and the CSG is not surprising. The leaders of the National Commission desired a system where only a few contested cases would ever *require* litigation. They hoped, specifically, that improved agency responses to workers’ injury reports, incentives on employers to pay claims, and informal dispute resolution procedures would quell disputes before the parties ever got near the judge’s hearing room.

Indeed, these bold reformers declared that a workers’ compensation system that featured significant litigation, and hence adjudication, was *dysfunctional*. The Commission’s report states, “Workmen’s Compensation can be undermined by excessive litigation [A properly functioning] agency must adjudicate claims which cannot be resolved voluntarily. Adjudication, however, should be a secondary task. If the agency is performing well in fulfilling . . . [its pro-active] obligations [like oversight and claims counseling], there will be little need for adjudication.”¹⁵¹ With this type of orientation, it is not surprising that adjudication system design – beyond favoring the abolition of the long-maligned trial *de novo* – was not a priority.¹⁵²

While the National Commission did find acceptable the commission as final fact finder, it advocated that the administrative aspects of a

¹⁵⁰ UNITED STATES INTERDEPARTMENTAL WORKERS’ COMPENSATION TASK FORCE, WORKERS’ COMPENSATION: IS THERE A BETTER WAY? A REPORT ON THE NEED FOR REFORM OF STATE WORKERS’ COMPENSATION, 52 (Commerce Clearing House 1977). The Task Force, notably, mailed a survey to all 50 state workers’ compensation agencies, asking for descriptions of various administrative aspects of state programs. The actual questionnaire that was utilized, addressing “Contested Cases,” is reproduced in a volume of Taskforce studies that reported on the results of the survey. Oddly, no table was created to show the results of the contested cases inquiry. The explanation: “The tabulations on the ‘contested cases’ portion of the survey were omitted because the responses were meager and did not merit publication.” JOHN LEWIS, A SURVEY OF STATE AGENCIES 301 (Interdepartmental Taskforce Studies, 1975).

¹⁵¹ NAT’L COMM’N ON STATE WORKMEN’S COMP. LAWS, *supra* note 53, at 100.

¹⁵² Richard Victor has noted that the “1972 national commission . . . dealt with a wide range of issues, but few recommendations addressed the back end of claims.” Victor, *supra* note 29, at 102.

commission's work should be separate from its adjudicatory functions and that employees of the commission should be professionalized – that is, become entitled to civil service protections. This emphasis influenced Pennsylvania and the Longshore Act to enact organizational reform. In Pennsylvania, notably, the WCJ became the final fact-finder as part of these reforms, and the judge under the Longshore Act maintained this traditional role (though his title was changed from Deputy Commissioner to “hearing examiner.”)¹⁵³

B. Reaction to the National Commission

The force that has, in critical aspect, fueled the trend towards making the WCJ the final fact-finder can also be traced to the National Commission – but in a *different* way. The more recent (1980s-1990s) impetus has been a response to the increase in litigation in workers' compensation systems. That increase unfolded in the wake of National Commission-inspired liberalizations in terms of coverage and benefits and their attendant system costs. Litigation crises in many states prompted *counter*-reforms that have featured both retractions in coverage and benefits¹⁵⁴ and attempts at reducing or streamlining litigation and dispute resolution.¹⁵⁵

The most remarkable developments in the realm of dispute resolution reform have been the surge in mediation programs¹⁵⁶ and the trend of states allowing compromise settlements with full release.¹⁵⁷ However, legislatures have also tried to adjust

¹⁵³ See *infra* Section V(D).

¹⁵⁴ See generally WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING?, *supra* note 104.

¹⁵⁵ See generally Thomason, *supra* note 30, at 291-92.

¹⁵⁶ See generally Howard W. Cummins, *From Conflict to Conflict Resolution: Establishing ALJ Driven Mediation Programs in Workers' Compensation Cases*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 391 (2010); David B. Torrey, *Mediation of Workers' Compensation Cases Under the Pennsylvania Act*, IAIABC Annual Convention, Philadelphia, PA (September 2005) (monograph on file with the Author); Lex Larson, *Mediation of Industrial Commission Cases*, 17 CAMPBELL L. REV. 395 (1995).

¹⁵⁷ David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER L.J. 199 (2007).

adjudication systems so that those cases that *cannot* be mediated and/or settled can proceed to a more prompt and final adjudication. One device to effect such change is to make the adjudication of the WCJ final as to the fact-findings.

The elimination of multiple levels of factual review has been desired by employers and the insurance industry – the proponents of the counter-reform – who find such multiple reviews to be costly. In 1991, writers for the Insurance Information Institute (I.I.I.), a carrier lobby, authored a short, representative book in which they set forth an extensive agenda for change in response to the costs and litigation crises noted above.¹⁵⁸ Among other things, these commentators declared:

The arrangements for reviewing initial determinations in cases involving disputed claims vary significantly among the states, but the nature and scope of appellate review can directly affect system costs [C]osts are likely to be greater and the role of attorneys enhanced when appellate review, whether administrative or judicial, is not limited to questions of law but rather can include reconsideration of the questions of fact determined at the initial hearing.¹⁵⁹

Another reform group, the Blue Ribbon Panel of the National Conference of State Legislatures, was explicit in its call for the WCJ to be the final fact-finder:

In disputed cases the parties are entitled to a full and fair hearing of the factual issues Some jurisdictions have allowed a retrial of factual issues at an administrative or judicial appellate level. Most of the Panel members believe that the system should be designed to limit the resolution of factual issues to the

¹⁵⁸ KRAMER, *supra* note 9, at 40.

¹⁵⁹ *Id.* The authors added, “An extreme case of inefficient dispute resolution was the trial ‘de novo’ procedure employed in Texas prior to the enactment of recent reform legislation, in which information developed during the administrative process could not even be admitted at the jury trial on a workers’ compensation claim.” *Id.*

hearing officer, with review only of legal issues (including the question of whether the hearing officer's findings of fact were supported by the evidence) by the administrative review body and the courts. A variation of this approach is to permit the administrative review body to consider the factual decisions made below, but reverse them only when they are clearly extreme when compared to the findings made by other hearing officers in cases involving similar factual situations.¹⁶⁰

Researcher Terry Thomason, along with his colleagues in their 1998 essay, identified the same concern over cumbersome adjudication procedures. Employers and carriers, they pointed out, have appreciated that contested cases constitute a large portion of workers' compensation administration costs, and they have lobbied policymakers and legislatures to *eliminate* system features that increase such costs. "Streamlining appeal procedures" is one aspect of this lobby.¹⁶¹

C. Jurisdictions Ahead of the Trend

This Author identifies multiple states that have broken with the orthodox rule in response to post-National Commission crisis and counter-reform. This article, however, seeks to identify all

¹⁶⁰ NATIONAL CONFERENCE OF STATE LEGISLATURES, THE STATE OF WORKERS' COMPENSATION 13 (1994). The Report further remarks, "At least one member of the Panel believes that the review body should have the absolute right to make its own findings of fact, to prevent wide variations in the results of cases involving similar facts." Still, "[o]ther Panel members are concerned that this approach encourages the losing party in every case to seek administrative review in order to get 'another bite at the apple.'" *Id.*

¹⁶¹ Thomason, *supra* note 30, at 292 ("Recent reform proposals have sought to lower transaction costs by eliminating adversarial processes – such as substitution of independent medical examiners for "dueling doctors[]" – or by eliminating or streamlining appeal procedures, including alternative dispute resolution procedures like final offer selection arbitration. However, theory and research reviewed in this chapter suggest that a reduction in the quantum of due process could result in a greater probability of judicial error."). For an explanation of the "final offer selection process" in workers' compensation cases, see LESLIE I. BODEN, REDUCING LITIGATION: EVIDENCE FROM WISCONSIN 32 (1988).

jurisdictions in which the WCJ is, or has been, the final fact-finder. Accordingly, it is important to note that some programs have always had the first-level hearing officer as the final fact-finder. These states can be regarded as being ahead of the trend.

Longshore Act. The Longshore Act has long been in this category. In fact, the Deputy Commissioner was the fact-finder at the time the law was enacted in 1927. One early authority ventured that “no doubt because of the great distances sometimes involved[,] no provision was made for any administrative review by the Commission prior to the review . . . by United States district courts on questions of law.”¹⁶²

Appeals went to federal district courts, which exercised substantial evidence review. This process prevailed from 1927 until the reorganization of the law and the creation of the Benefits Review Board in 1972.¹⁶³ The changes of that year left the hearing officer the fact-finder, though the Deputy Commissioner title was changed to “hearing examiner” (and back, notably, to “ALJ” in 1978). Of some note is that this novel status came to the attention of the U.S. Supreme Court, which held that the law definitively established the Deputy Commissioner as the finder of facts (though facts “jurisdictional” in nature could be reviewed).¹⁶⁴ Justice Hughes, authoring the opinion, noted in general that “the obvious purpose of the legislation [is] to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact

¹⁶² DODD, *supra* note 53, at 326-27 (quoting a 1934 report of the United States Employees’ Compensation Commission).

¹⁶³ *See, e.g., Voris v. Eikel*, 346 U.S. 328, 334 (1953) (“findings of the Deputy Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole”). *See also* *Wheeling Corrugating Co. v. McManigal*, 41 F.2d 593, 594 (4th Cir. 1930) (“it is clear that [the statute] does not contemplate a hearing de novo in the District Court or authorize that court to weigh the evidence taken before the Deputy Commissioner or review the facts as found by him. The compensation order may be set aside only if it is found to be ‘not in accordance with law,’ i.e. if it is based upon error of law, or is not supported by any substantial evidence, or is so manifestly arbitrary and unreasonable as to transcend the authority vested in the Deputy Commissioner. His findings of fact, however, if supported by substantial evidence, are conclusive.”).

¹⁶⁴ *See* ARTHUR LARSON, *WORKERS’ COMPENSATION* § 130.07 (2007).

which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.”¹⁶⁵

District of Columbia. Prior to 1980, privately-employed workers of the District of Columbia found their workers’ compensation remedy under the provisions of the Longshore Act. This process dated from 1928, when Congress enacted a workers’ compensation law for the District, “which extended the provisions of the federal statute to cover the private employment sector.”¹⁶⁶ Part of that extension included, accordingly, establishment of the Deputy Commissioner as final fact-finder.¹⁶⁷ Thus, the district court, in a 1966 case declared:

The evidence . . . was far from satisfactory, especially because the claimant’s credibility was seriously impeached. The scope of judicial review, however, in cases such as this is restricted and limited. The Court may not review the evidence and reach an independent conclusion as though the review is a trial *de novo*. So, too, the Court may not review the weight of evidence and set aside the findings of fact of the Deputy Commissioner, if it deems them to be contrary to the weight of evidence.¹⁶⁸

In 1980, the District, having gained limited self-government powers, enacted its own law.¹⁶⁹ Perhaps in respect of the Longshore

¹⁶⁵ *Crowell v. Benson*, 285 U.S. 22, 46 (1942).

¹⁶⁶ The genesis of the law is discussed in *District of Columbia v. Greater Washington Cent. Labor. Council*, 442 A.2d 110 (D.C. 1982).

¹⁶⁷ See *D.C. Transit System v. Massey*, 260 F. Supp. 310, 311-12 (D.D.C. 1966).

¹⁶⁸ *Id.* (deputy commissioner had determined that bus driver’s neurosis arose out of his employment, because coming in the wake of trauma, despite employer’s psychiatrists’ testimony that depression was “involutional” and “related to a ‘change of life.’”), *rev’d, on other grounds*, 388 F.2d 584 (D.C. Cir. 1967). See also *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11, 18 (D.C. Cir. 1940) (deputy commissioner had determined that grocery worker’s injury, fractured jaw from co-employee assault, had arisen in the course of employment, and such determination was “supported by substantial evidence.”).

¹⁶⁹ See *Dell v. Dept. of Emp’t Servs.*, 499 A.2d 102, 105 (D.C. Cir. 1985).

Act's heritage of having the hearing officer as fact-finder, the newly-enacted regime provided for the same. A regulation provided that on administrative appeal, the hearing examiner's decision was to be upheld "if it [was] supported by substantial evidence in the record," and a court in 1985 ratified this standard of review.¹⁷⁰ This rule is now in the statute.¹⁷¹

Maine. Maine is another jurisdiction where the individual commissioner traditionally heard the contested case. Since 1981, intra-agency review has existed,¹⁷² but prior to that time, the commissioner's findings were final and not subject to reassessment by any intra-agency panel. Any appeal went directly to the state supreme court. A 1974 decision, for example, provided that the court's responsibility was to determine whether "competent evidence supports the commission's decision and whether its decree is based either upon a misapprehension of fact or a misapplication of law to the facts."¹⁷³ In that case, a remand was ordered because the commissioner failed to provide findings that would facilitate review.¹⁷⁴

In 1981, the statute was amended to create the Workers' Compensation Commission Appellate Division, which undertook the same review as had the Supreme Court; the division's standard of review was "neither broader nor narrower than appellate review by the Law Court."¹⁷⁵ In 1992, meanwhile, amid a cost and litigation

¹⁷⁰ *Id.*

¹⁷¹ D.C. Code § 32-1521.01 (titled, "Establishment of Compensation Order Review Board" (2004)). See *Washington Metro. Area Transit Auth. v. D.C. Dept. of Emp't Servs.*, 926 A.2d 140 (D.C. Ct. Appeals 2007) (recounting review standards).

¹⁷² See *Kuvaja v. Bethel Savs. Bank*, 495 A.2d 804 (Me. 1985) (discussing amendment to law).

¹⁷³ *Dufault v. Midland-Ross of Canada, Ltd.*, 380 A.2d 200, 203 (Me. 1977).

¹⁷⁴ *Id.*

¹⁷⁵ *Wilner Wood Prods. Co. v. Moyses*, 466 A.2d 1257, 1260 (Me. 1983).

In another case, the court noted that:

The purpose of the amendment was threefold: (1) to relieve the appellate burden on the Law Court; (2) to provide an intermediate appellate body with expertise in workers'

crisis, the system was again altered. According to a commentator, the reform displaced the Commission with “a Workers’ Compensation Board consisting of four labor and four business representatives.” The intent was to “replace what was ‘a quasi-judicial adversarial approach’ to workers’ compensation with ‘a cooperative approach between employers and employees to reduce utilization of the workers’ compensation system and its costs.’”¹⁷⁶

Under this reform, which endures to the present date, the hearing officer’s findings of fact are final,¹⁷⁷ and the Supreme Court takes appeals only in its discretion. The Maine law has a unique proviso, however, in that “[a] hearing officer may request that the full board review a decision of the hearing officer if the decision involves an issue that is of significance to the operation of the workers’ compensation system.”¹⁷⁸ However, this same proviso admonishes, “There may be no such review of findings of fact made by a hearing officer.”¹⁷⁹

Connecticut. Connecticut is another state ahead of the trend. As with Maine, intra-agency review is relatively new to the administrative procedure. Prior to 1979, the findings of the individual commissioner were final. Any appeal was taken directly

compensation; and (3) to have “consistent policy positions announced within the administrative agency itself before the issues are presented in litigated appeals to the Law Court.”

Mathieu v. Bath Iron Works, 667 A.2d 862, 865 (Me. 1995).

¹⁷⁶ Norma Harris & Kathleen Kisner, *Maine Reforms Workers’ Compensation – State Report*, BUSINESSLIBRARY (Nov. 1992), http://findarticles.com/p/articles/mi_m0903/is_n13_v10/ai_13359848/ (noting that “[i]n recent years, the workers’ compensation system in Maine has deteriorated to the extent that insurer after insurer has pulled out of the market and larger businesses have chosen to self-insure.”). The legislative intent behind this reform is also discussed in *Hanover Ins. Co. v. WCB*, 695 A.2d 556 (Me. 1997); *Mathieu*, 667 A.2d at 865 (Me. 1995) (“The record of floor debates suggests that the purposes for the changes in appellate procedure were to reduce litigation and to promote efficiency and cost-savings in the system.”).

¹⁷⁷ ME. REV. STAT. tit. 39-A, § 318 (2012).

¹⁷⁸ *Id.* at § 320.

¹⁷⁹ *Id.*

to the trial court, with review thereafter in the state supreme court.¹⁸⁰ This arrangement was addressed very early in the Connecticut experience, in a case where an employer's argument that the trial court should have exercised *de novo* review was rejected.¹⁸¹ The court's reasoning shows that it was very much ahead of the trend, and for all the right reasons:

The certainty of the receipt of compensation for injury follows the act. Its procedure contemplates a speedy investigation and hearing by a commissioner, without the formalities of a court and without, as a general rule, the employment of an attorney. It attempts to improve the condition of the workman under modern methods of industry by giving him partial recompense for an injury, with a result more certain and speedy and less expensive than under the former method in tort litigation.

If the Act permits each cause to be appealed and tried *de novo* in the superior court, its objects will be defeated, and more delay, less certainty, and more expense will ensue to the claimant than with the single trial of the old method.

We may not lightly presume that the Legislature intended to set up a new system, the result of long agitation, much study and the fullest publicity, and then deliberately, in the very act creating its new system, pull down the work of its hands.¹⁸²

In 1979, legislation was passed, which for the first time, allowed for intra-agency review. Appeals from compensation commissioners were to be taken to the "Compensation Review

¹⁸⁰ Grady v. St. Mary's Hosp., 427 A.2d 842 (Conn. 1980) (in case where the trial court set aside commissioner's findings and made his own instead, supreme court reversed).

¹⁸¹ Powers v. The Hotel Bond Co., 93 A. 245 (Conn. 1915).

¹⁸² *Id.* at 248.

Division.”¹⁸³ These fundamental changes were intended, in part, to create a more authoritative commission head, who in turn would better “facilitate the timely and efficient processing of cases.”¹⁸⁴ In 1991, meanwhile, the CRD “was replaced, largely semantically, with the modern workers’ compensation review board.”¹⁸⁵ The commissioner, however, remained “the trier of fact [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses”¹⁸⁶

Reconsideration of the adjudicatory structure came about in the midst of what some characterized as a management crisis in the handling of contested cases. A January 1991 legislative report, *Workers’ Compensation in Connecticut*, determined:

that the system’s current administrative structure is not responsive to the concerns of either employers . . . or employees Management is weak and accountability is lacking. . . . Administrative resources . . . are inadequate, particularly given the dramatic growth in workload . . . and [the fact that] backlogs and delays in case processing are widespread.¹⁸⁷

The report also identified burgeoning employer costs as a factor in the overall reform.¹⁸⁸

¹⁸³ *Fair v. People’s Savs. Bank*, 542 A.2d 1118, 1120 (Conn. 1988) (court, holding that CRD impermissibly engaged in fact-finding, remarks, “It is clear that under . . . § 31-3019(a) and § 31-301-8 of the Regulations of Connecticut State Agencies the review division’s hearing of an appeal from the commissioner is not a de novo hearing of the facts. Although the . . . division may take additional material evidence, this is proper only if it is shown to its satisfaction that good reasons exist as to why the evidence was not presented to the commissioner. Otherwise, it is obliged to hear the appeal on the record and not ‘retry the facts.’”).

¹⁸⁴ *Dixon v. United Illuminating Co.*, 657 A.2d 601, 608 (Conn. 1995).

¹⁸⁵ *Stec v. Raymark Indus. Inc.*, 2009 Conn. App. LEXIS 220, *90 (Conn. App. Ct. 2009), *rev’d on other grounds*, 10 A.3d 1 (Conn. 2010).

¹⁸⁶ *Healey v. Hawkeye Const.*, 4 A.3d 858, 861 (Conn. App. Ct. 2010) (quotation omitted).

¹⁸⁷ *Dixon v. United Illuminating Co.*, 657 A.2d 601, 608 (Conn. 1995).

¹⁸⁸ *Id.* at 608 n.7 (“The Report also focused on, and made recommendations regarding, ‘a more equitable structure, and better control over rising benefit costs.’”).

Delaware. Prior to 1997, the Delaware Industrial Accident Board (IAB) (a multi-individual panel) heard the testimony of the parties in contested cases. The appellate courts have long deferred to the IAB's fact-finding powers.¹⁸⁹ In modern days, appeal has been to the superior court, which reviews the decision on a substantial evidence basis.¹⁹⁰ As to the findings of fact, a tradition has long existed of deference to the first-level hearing officers who actually saw and heard the witnesses.

Since 1997, the Board has had the power to hire hearing officers who, with the consent of the parties, may sit in place of the Board. When this process unfolds, the appeal to the superior court is governed by the same substantial evidence standard. The 1997 amendment was intended "to assist the Department and Board in expediting . . . cases."¹⁹¹

Alaska. The Alaska experience is perhaps in its own category. Contested cases in Alaska are heard by the Workers' Compensation Board of the Department of Labor &

¹⁸⁹ Children's Bureau of Del. v. Nissen, 29 A.2d 603, 609 (Del. Super. Ct. 1942):

This Court acts with a prudent caution in reversing a finding of fact made by the Industrial Accident Board. It will not disturb the Board's findings if there was evidence from which its conclusions could have been fairly and reasonably drawn (citation omitted). The reason for the rule . . . is that the trial court sees and hears the witnesses, and is better able to determine the credit and weight to be given to their testimony. The reason falls when the testimony is not presented orally.

Id.

¹⁹⁰ General Motors Corp. v. Freeman, 164 A.2d 686, 689 (Del.1960) ("The position of the Superior Court and of this Court on appeal is to determine only whether or not there was substantial evidence to support the findings of the Board. If there was, these findings must be affirmed.").

¹⁹¹S.B. 147, 139th Gen. Assemb., Pub. Act. 84 (Del. 1997).

Workforce Development.¹⁹² Since 2005, decisions of the Board have been appealed to the Alaska Workers' Compensation Appeals Commission. The Board is the final fact-finder.¹⁹³ Prior to 2005, a somewhat different scheme existed. At that time (as it has been at all times since statehood), the Board acted as fact-finder, but no intra-agency review existed. Instead, an appeal was taken to the superior court.¹⁹⁴

According to the state supreme court:

Among the goals of the legislature in changing the . . . Act were decreasing costs and speeding the processing of claims. The Appeals Commission was created to help achieve these goals: it was intended to provide "consistent, legally precedential decisions in an expeditious manner." The legislature hoped that the Appeals Commission would provide necessary expertise and thereby improve the appeals process.¹⁹⁵

D. The Pre-Crisis Trend Makers

Long before the cost and litigation crisis of the 1980s, a number of states developed adjudication regimes under which the WCJ became, in practice, the final fact-finder. In Florida, the appellate court combined statutory interpretation with the common-law concern over assessing credibility, and held that appellate review was restricted to substantial evidence. In Arizona and Rhode Island,

¹⁹² ALASKA STAT. ANN. § 23.30.128 (West 2012). Two members of a hearing panel of the Board constitute a quorum for taking action on a disputed benefits claim.

¹⁹³ *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (indicating that the Board's findings are to be upheld if supported by substantial evidence).

¹⁹⁴ *See Aleutian Homes v. Fischer*, 418 P.2d 769 (Alaska 1966).

¹⁹⁵ *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 39 (Alaska 2007). *See also Knudsen to Chair Workers' Compensation Appeals Commission*, SIT NEWS (Nov. 25, 2005), http://www.sitnews.us/1105news/112505/112505_workers_comp.html (quoting the governor as complaining, "Too often in the past, workers' compensation cases encountered unreasonable delays and scatter-shot rulings that were inconsistent . . .").

meanwhile, the courts seemed to have flatly disregarded the statute – which voiced the orthodox rule – and insisted that there could be no reassessment of demeanor credibility on appeal. (In Arizona, the decision which so held was reversed as contrary to statute, but the holding was later *ratified* by the legislature.) In New Jersey, the statute was changed to eliminate trial *de novo* in the county courts. Finally, in Oklahoma, amendments to the law in 1977 changed the system so that the judge’s findings could only be altered when against the “clear weight of the evidence.”¹⁹⁶

Florida. Florida was the first jurisdiction to declare that the WCJ (deputy commissioner), and not the Industrial Commission, was the final fact-finder. The state supreme court, interpreting a 1941 change to the law, held in 1951 that the Commission could only review the deputy commissioner’s decision for substantial evidence, and it was not permitted to reassess credibility.¹⁹⁷

The court, in so declaring, pointed out that the law initially provided that the hearing “may” be conducted by the deputy commissioner, instead of one of the members of the full commission, and that upon application the full commission could once again hear the witnesses.¹⁹⁸ The case could then be heard *de novo* in the trial court.¹⁹⁹ The 1941 amendment, the court observed, eliminated the word “may” and substituted the word “shall,” and at once limited the

¹⁹⁶ See *Parks v. Norman Mun. Hosp.*, 684 P.2d 548, 550 (Okla. 1984) (superseded on other grounds).

¹⁹⁷ *U.S. Cas. Co. v. Maryland Cas. Co.*, 55 So. 2d 741 (Fla. 1951). The court acknowledged that it had issued decisions *overlooking* the apparent change in the decade since the amendment. *Id.* at 743. At least one critic had complained about the regime during this period, remarking that review of the facts by commission and trial court was “surprising, because the Circuit Court does not enter upon a trial *de novo*, and must depend upon the record made before the deputy commissioner.” Harris, *supra* note 131, at 215-16. The critic found the adjudicatory structure unwieldy and a burden to injured workers. A critical analysis of the *United States Cas. Co.* case is found in Malcom B. Parsons, *The Substantial Evidence Rule in Florida Administrative Law*, 6 U. FLA. L. REV. 481 (1953).

¹⁹⁸ See *U.S. Cas. Co.*, 55 So. 2d at 743.

¹⁹⁹ See *id.*

full commission to review of “the matter *upon the record* as prepared and certified by the deputy commissioner.”²⁰⁰ The court declared:

under the law the deputy commissioner is the only person charged with the burden and responsibility of hearing the witnesses and making findings of facts [and he is hence appropriately deemed final fact-finder]. It is patent that the full Commission functions much in the same manner as does an appellate court, although it is quasi judicial rather than strictly so.²⁰¹

The trial court, meanwhile, was limited to determining whether the full commission “observed the ‘substantial evidence’ rule” in the course of its own review of the deputy commissioner’s findings.²⁰²

The amendment, notably, did not in so many words declare that the deputy commissioner was the final arbiter of credibility and the finder of the facts. Rather, the court inferred that this must be the case “in lieu of the provision that the full commission might hear the witnesses and in effect conduct a hearing *de novo*”²⁰³ The court added that “[t]he fact-finding arbiter is usually in a better position than the reviewing body to judge the ability, experience and reputation of the various so-called expert witnesses who appear personally before him [and] to determine the weight which should be given their testimony.”²⁰⁴ This issue was of some moment in the case at hand, as the critical credibility determination did not turn on lay testimony, but on the choice of which medical expert to believe.²⁰⁵ With regard to this issue, the court declared, “doctors are human. They may be appraised as witnesses and their testimony evaluated, in much the same manner as other witnesses and their testimony are judged and estimated.”²⁰⁶

²⁰⁰ *Id.*

²⁰¹ *Id.* at 744.

²⁰² *Id.* at 745.

²⁰³ U.S. Cas. Co., 55 So. 2d at 743.

²⁰⁴ *Id.* at 745.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

The Florida rule endured. Indeed, by 1965 the court was prompted to say that it was virtually “hackneyed” to declare that the “deputy commissioners have the prerogative of determining questions of fact,” to be sustained on appeal as long as the evidence relied upon “is competent and substantial and comports with reason and logic.”²⁰⁷ In the present day, the “Judge of Compensation Claims” remains the final fact-finder, and upon appellate review in the First District Court of Appeals the “competent, substantial evidence” standard of review prevails.²⁰⁸

Arizona. An Arizona court, in 1967, declared that the referee of the system, and not the Industrial Commission, should be the arbiter of credibility.²⁰⁹ The court in that case reasoned that it is the

referee who hears the testimony, observes the demeanor of the petitioner, and is best able to judge the reliability and credibility of the witnesses who have testified at the hearing. Absent testimony before them, the Industrial Commission in reviewing the hearings before the referee, is in the same position as an appellate court in that both the Commission and the appellate court must evaluate the evidence from the record presented.²¹⁰

The court added this endorsement: “[T]he importance of the referee to a fair and just determination of the issues cannot [be] over-emphasized. It is the referee who hears the witnesses, rules on the admission of evidence, and forms the impressions from the demeanor of the witnesses which the cold record on review cannot indicate.”²¹¹

This decision articulates the renowned common-law principle of fact-finding, and it is often cited as definitely placing Arizona into the minority camp. In point of fact, however, the state supreme court

²⁰⁷ *Crowell v. Messina Contractors*, 180 So. 2d 329, 329 (Fla. 1965).

²⁰⁸ FLA. STAT. § 440.271. *See James W. Windham Builders, Inc. v. Van Overloop*, 951 So.2d 40, 43 (Fla. Dist. Ct. App. 2007).

²⁰⁹ *See Powell v. Indus. Comm’n*, 418 P.2d 602 (Ariz. Ct. App. 1966), *rev’d*, 423 P.2d 348 (Ariz. 1967).

²¹⁰ *Id.* at 606.

²¹¹ *Id.* at 607.

promptly reversed, declaring that “[t]he [c]ommission of course was not bound by the finding of its referee.”²¹² The commission could delegate the gathering of evidence to an agent, but could not delegate the actual decision-making.²¹³

However, in the midst of broad-based 1973 reforms, the legislature abolished review by the full commission. While the amendment allowed administrative review of the ALJ’s decision,²¹⁴ that review, similar to the “reconsideration” provided for in the Black Lung program, is by the same ALJ who heard the contested claim.²¹⁵ Following potential administrative review, however, the award is final pending appellate review. A 1989 subsequent decision explained that the legislature changed the law in 1973 in order to comport with the holding of the appeals court.²¹⁶

Since the change to the scheme, Arizona courts have continued to produce language that supports the common-law view of fact-finding. In one court of appeals decision, the court held:

If the administrative decision-maker and this court are both reaching a decision upon the “cold record” the integrity of the legal process not only falters, it fails. In cases of conflicting evidence, meaningful appellate review requires that the conflict be resolved by something more personal than a sterile resort to pages of hearing transcripts.²¹⁷

Another court admonished, “Not only is credibility a larger question than truthfulness, but also the quality of substantial justice demands a higher standard When the administrative or

²¹² *Powell v. Indus. Comm’n*, 423 P.2d 348, 350 (Ariz. 1967).

²¹³ *Powell v. Indus. Comm’n*, 423 P.2d 348 (Ariz. 1967). That the *Powell* appeals court ruling has been declared in treatise and court opinions as definitive is strange. Certainly the Court of Appeals knew that it had been reversed. See *Tolmachoff v. Indus. Comm’n*, 442 P.2d 145 (Ariz. Ct. App. 1968).

²¹⁴ The current statute may be found at ARIZ. REV. STAT. ANN. § 23-943 (2012).

²¹⁵ *Koval v. Indus. Comm’n*, 532 P.2d 549 (Ariz. Ct. App. 1975).

²¹⁶ *Ohlmaier v. Indus. Comm’n*, 776 P.2d 791 (Ariz. 1989).

²¹⁷ *Adams v. Indus. Comm’n*, 710 P.2d 1073, 1076 (Ariz. Ct. App. 1985).

managerial procedure ceases and the process of judicial fact finding occurs, then he who decides must hear.”²¹⁸

Rhode Island. The modern history of Rhode Island workers’ compensation starts in 1990, with the dramatic creation of the Rhode Island Workers’ Compensation Court. Under current law, the trial judge is the final fact-finder. Under one critical reading of the law, perhaps counterintuitive at first, the full panel exercises *de novo* review, except for the all-critical (for our discussion) issue of witness credibility. The state supreme court held “that the statute provides the Appellate Division with *de novo* review of such factual findings *except for credibility determinations made by the trial judge.*”²¹⁹

Prior to creation of the court, the Rhode Island adjudication structure was one of the familiar trial commissioner, with appeal to the full commission. Under the critical statute, the full commission determined whether the preponderance of the evidence sustained the burdened party’s case. This statute, which had its genesis in 1954 reforms, was held to mean that the full commission could weigh the evidence and serve as the final fact-finder.²²⁰ Nevertheless, in a 1967 case, the court declined to enforce the statute when it came to the issue of credibility findings.²²¹ “In our judgment,” the court declared, “it is not the business of the commission either to weigh the evidence or to determine where its fair preponderance lies until it first decides whether the trial commissioner, if he rejected testimony as unworthy of belief, was clearly wrong”²²²

In this action, the court was animated by the familiar common-law concern that deference should be paid to the findings of the hearing officer who observed the demeanor of the witnesses:

Under generally accepted appellate procedures a determination of credibility by the fact finder who saw and heard the witness should be entitled to great

²¹⁸ Ohlmaier, 776 P.2d at 793 (Ariz. 1989).

²¹⁹ Lambert v. Stanley Bostitch, Inc., 723 A.2d 777, 783 (R.I. 1999) (second emphasis added). Judicial review of the Appellate Division, meanwhile, is based upon the “any competent evidence” standard. *See id.* at 780.

²²⁰ Cairo v. Sayles Finishing Plants, Inc., 116 A.2d 188 (R.I. 1955).

²²¹ Laganieri v. Bonte Spinning Co., 236 A.2d 256 (R.I. 1967).

²²² *Id.* at 259.

weight on review. . . . The appearance of the witness, how he demeans himself and his manner of answering questions, can only be observed by the trial commissioner. They are observations which necessarily enter into his determination of what he believes and what he disbelieves. “The weight of the evidence” . . . “is to be determined by the touchstone of credibility” That touchstone, however, is not available to the full commission which never sees the witness or hears him testify and which, on review, looks only at a silent record.²²³

New Jersey. New Jersey undertook reform of its adjudicative process in 1972, when the legislature abolished *de novo* review in the county courts prior to appellate review.²²⁴ The state had long been noted for its “cumbersome trial *de novo* system,” which Larson famously highlighted in his treatise section, “The New Jersey Trial De Novo Story.”²²⁵ According to Larson, under the state’s longstanding law, “successive findings of fact could be made at four levels, culminating in the Supreme Court . . . and under which the reviewing court had not only the right but the duty to weigh the evidence.”²²⁶ However, the statutory change was foreshadowed by a renowned state supreme court holding in 1965.²²⁷ The court held that only the county court, upon appellate review, was charged with reassessing the weight of the evidence, and that neither the Appellate Division of the Superior Court nor the state supreme court were

²²³ *Id.* at 258-59 (quoting *Rossi v. Ronci*, 7 A.2d 773, 778 (R.I. 1939)).

²²⁴ See COMPILATION OF NEW JERSEY WORKERS’ COMPENSATION APPELLATE DECISIONS WITH COMMENT FOR THE JUDGE OF COMPENSATION, 1 n.2, available at http://wd.dol.state.nj.us/labor/forms_pdfs/wc/pdf/wc_research.pdf (stating that “[p]rior to March 2, 1972, the County Court was required ‘to bring a new mind to the case and conscientiously reach its own independent determination.’”) (remarks of Hon. Peter J. Calderon).

²²⁵ LARSON, *supra* note 164, § 130.05[7][e].

²²⁶ *Id.* (internal citation omitted).

²²⁷ *Close v. Kordulak*, 210 A.2d 753 (N.J. 1965).

under such obligation.²²⁸ After the statutory change, the Appellate Division immediately noted,

[T]he scope of our appellate review limits us to a determination of whether the findings of the judge of compensation could reasonably have been reached on sufficient credible evidence present in the whole record, after giving due weight to his expertise in the field and his opportunity of hearing and seeing the witnesses.²²⁹

The court also stated,

in reaching this conclusion, we [note] the fact that hearings before the Division are adversary in nature; are presided over and tried by a judge who must now be an attorney-at-law of New Jersey Under such circumstances, the judge of compensation's determination, when reviewed on appeal, is equivalent to a trial by a judge without a jury.²³⁰

²²⁸ *Id.* This opinion is said to remain the “seminal case” on the issue. Memorandum from Jeffrey D. Newby, Esq. to Author (Dec. 5, 2011) (on file with the Author).

²²⁹ *De Angelo v. Alsan Masons Inc.*, 299 A.2d 90, 91 (N.J. Super. Ct. App. Div. 1973).

²³⁰ *Id.* This case is still cited as a leading precedent for establishing the power of the Judge of Compensation. *See* JON L. GELMAN, *NEW JERSEY PRACTICE SERIES, WORKERS' COMPENSATION LAW* § 31.1 (2011). *See also* *Famularo Elec., LLC v. Lyndhurst Res. Comm.*, No. A-4218-08T3, 2010 N.J. Super. Unpub. LEXIS 1977 (N.J. Super. Ct. App. Div. 2010):

We must defer to a trial court's credibility determinations, which are binding on appeal when supported by adequate, substantial and credible evidence on the record (footnote omitted). This deference is provided because the trial court “has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record.” (Footnote omitted) Our role is not to reweigh the evidence; we determine only whether the factual findings are supported.

It appears as though one crucial motive for this change was to expedite the process by removing one step of appeals.²³¹

Montana. Prior to 1975, the Industrial Accident Board heard contested workers' compensation cases in Montana. An appeal from an order of the same was taken to the district court (*i.e.*, trial court), where "the trial . . . was considered *de novo*," with a "presumption of correctness."²³² Under this arrangement, "[t]he district court on appeal from the board is not justified in reversing a finding of the board unless the evidence clearly preponderates against such finding."²³³

In 1975, however, the office of Workers' Compensation Judge (a single individual) was created.²³⁴ An appeal under the

Id. at *18-19. In another case, the court held that:

An appellate court may not "engage in an independent assessment of the evidence as if it were the court of first instance." (quotation omitted) Findings of fact made by a trial judge "are considered binding on appeal when supported by adequate, substantial and credible evidence." (quotation omitted) Accordingly, if in reviewing an agency decision, an appellate court finds sufficient credible evidence in the record to support the agency's conclusions, that court must uphold those findings, even if the court believes that it would have reached a different result.

Sager v. O.A. Peterson Constr. Co., 862 A.2d 1119, 1124 (N.J. Sup. Ct. App. Div. 2004).

²³¹ Memorandum from Lora V. Northern, Esq. to the Author (Dec. 5, 2011) (on file with the Author),

²³² Erhart v. Great W. Sugar Co., 546 P.2d 1055, 1058 (Mont. 1976).

²³³ Stordahl v. Rush Implement Co., 417 P.2d 95, 98 (Mont. 1966); Moffett v. Bozeman Canning Co., 95 Mont. 347 (Mont. 1933). This latter case shows that in the early days of the Montana practice, additional evidence could be presented to the district court, "for good cause shown." *Id.* at 350.

²³⁴ The fact that a single individual has such significant power is remarkable. This was apparently the thinking of the state's Chamber of Commerce, which in 2010 issued a report evaluating the judge. MONTANA CHAMBER OF COMMERCE, THE 2010 JUDICIAL REVIEW OF THE MONTANA WORKERS' COMPENSATION COURT (2010), *available at* <http://www.montanachamber.com/files/2010%20Workers'%20Compensation%20Court%20Review.pdf>. After summarizing his rulings, the Chamber accorded him a

current practice goes directly to the state supreme court.²³⁵ The court is to affirm the WCJ's ruling if supported by substantial evidence.²³⁶ According to the state's website, "[t]he Legislature created the Workers' Compensation Court . . . to provide an efficient and effective forum for the resolution of [workers' compensation] disputes"²³⁷

Oklahoma. Workers' compensation cases in Oklahoma are litigated before the Workers' Compensation Court, an entity created in 1978. Under Oklahoma law, a case is first heard before a trial judge of the court, followed by review within the court by a three-judge or *en banc* review panel. The panel "is not free to reverse at will a trial judge's findings,"²³⁸ but first must make a threshold determination that the judge's decision "was against the clear weight of the evidence"²³⁹ Upon true judicial review, the test, in the wake of a 2010 amendment, is the same.²⁴⁰ Under the pre-existing scheme, meanwhile, review undertaken by the displaced "State Industrial court *en banc*" was similar (though not identical) to trial *de novo*.²⁴¹

Under the Oklahoma statute, panel-substituted fact findings can exist, but only when the panel makes the threshold determination

2008-2009 "Total Business Score" of 78%, noting further that his "Lifetime Business Score" was 66%. *Id.* at 10.

²³⁵ MONT. CODE ANN. § 39-71-2904 (2011).

²³⁶ *Michalak v. Liberty N.W. Ins. Corp.*, 175 P.3d 893 (Mont. 2008).

²³⁷ See *Workers Compensation Court*, MONTANA OFFICIAL STATE WEBSITE, http://courts.mt.gov/workers_comp/default.mcpx (last visited Jan. 3, 2012).

²³⁸ *Parks v. Norman Mun. Hosp.*, 684 P.2d 548, 551 (Okla. 1984) (superseded on other grounds).

²³⁹ See OKLA. STAT. ANN. tit. 85, § 3.6 (West 2010) (current version at OKLA. STAT. ANN. tit. 85, § 340 (West 2011)).

²⁴⁰ *Mobile Mini, Inc. v. Liberty Mut. Ins. Co.*, 249 P.3d 517, 522 (Ct. Civ. App. Okla. 2011) (citing OKLA. STAT. § 3.6(c)). For the pre-2010 rule, see *Smalygo v. Green*, 184 P.3d 554, 559 (Okla. 2008).

²⁴¹ *Parks v. Norman Municipal Hospital*, 684 P.2d 548, 550 (Okla. 1984) (referring to the 1977 amendments, court remarks, "fact findings of the trial judge are now impervious to *any* alteration unless the panel finds them to be clearly against the weight of the evidence.").

of error by the trial judge.²⁴² Reported cases may be found where this occurs,²⁴³ and one precedent indeed states that the three-judge review panel is the “final arbiter of questions of fact.”²⁴⁴ Still, as the usual definition of “against the clear weight of the evidence”²⁴⁵ gravely limits the fact-finding power of any review tribunal, Oklahoma can be seen as one of the pre-crisis trend makers in assigning marked fact-finding power to the WCJ. In fact, the genesis of the 1978 reform was a conviction that:

[A] better system could be devised if one could separate completely the role of administration from the role of adjudication. It was argued that this would increase accountability, reduce unnecessary litigation, and provide a more effective mechanism for handling such key new features . . . as physical and vocational rehabilitation and job placement.²⁴⁶

²⁴² See OKLA. STAT. ANN. tit. 85, § 340 (West 2011).

²⁴³ See, e.g., *Foster’s Florist v. Jackson*, 997 P.2d 843 (Okla. 2000). The court also stated:

The claimant and the employer both presented competent evidence to support their respective views of causation. However, an appellate court will not disturb a fact-substituting panel order that has the statutorily-mandated determination that the trial judge’s finding was “against the clear weight of the evidence,” where, as in this cause, the record contains ample competent evidence to support the panel’s findings.

Id. at 848.

²⁴⁴ *Dunkin v. Instaff Personnel*, 164 P.3d 1057, 1062 (Okla. 2007). In this case, both the trial judge and the three-member panel dismissed a claimant’s original claim, but on judicial review the court held that both opinions were so unexplained that judicial review could not be accomplished. See *id.* at 1059

²⁴⁵ See, e.g., *Wood v. Allen*, 130 S. Ct. 841, 848 n.1 (2010) (“a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable.”).

²⁴⁶ Chris Sturm, *The Workers’ Compensation Act of 1977*, 3 OKLA. CITY U. L. REV. 1, 4 (1978).

E. Jurisdictions Influenced by the National Commission

Longshore Act. As noted above, the hearing officer under the Longshore Act has long been the final fact-finder.²⁴⁷ However, in 1972, his or her decision became subject to intra-agency review as part of a National Commission-inspired administrative restructuring.²⁴⁸ The Benefits Review Board (BRB) undertakes substantial evidence review of the ALJ's decision based upon the record considered as a whole.²⁴⁹ Thus, as one practitioner phrases it, "Questions of witness credibility are particularly within the ALJ's province and reviewable only for the most extreme credulity or skepticism without an apparently reasonable basis."²⁵⁰

²⁴⁷ See *supra* Section V(C).

²⁴⁸ Francis J. Gorman, *The Longshoremen's and Harbor Workers' Compensation Act – After the 1972 Amendments*, 6 J. MAR. L. & COM. 1, 2 (1974). See also John Vittone, *Practice Before the Office of Administrative Law Judges*, in THE LONGSHORE TEXTBOOK 120 (2010) (stating that the BRB had remarked in a decision that the "legislation reflected legislative concerns that the administrative and adjudicative functions had been too closely tied together prior to the 1972 amendments.").

²⁴⁹ 33 U.S.C. § 921 (2012).

²⁵⁰ Joshua T. Gillelan II, *Appellate Procedure Under the Longshore Act*, in THE LONGSHORE TEXTBOOK 142 (2010). See, e.g., *Norfolk Shipbuilding v. Faulk*, 228 F.3d 378 (4th Cir. 2000):

The ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based. . . . Despite this deference [to the ALJ], the evidence must still be sufficient – more than a scintilla but less than a preponderance.

Id. at 381, 386; *Office of Workers' Comp. Programs v. Belcher Erectors*, 770 F.2d 1220, 1222 (D.C. Cir. 1985) (in case where BRB reassessed credibility, court declares, the "intent of Congress [was] that litigation of the facts of these matters substantially terminate at the ALJ level." See also *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 53 (1st Cir. 2010) (shows court treating as an issue of law whether employer rebutted the presumption of causation allowed by Longshore Act, and revealing the operation of presumption – if ALJ finds the presumption rebutted, parties are where they normally would be in a civil case, as the "presumption 'falls out of the case.'"); *Greenwich Terminals, LLC v. Office of Workers' Comp. Programs*, 309 Fed. Appx. 658 (3rd Cir. 2009) (after ALJ refused to reduce claimant's benefits, employer appealed alleging that he applied the "true

Pennsylvania. The Pennsylvania legislature, in 1972, enacted sweeping amendments to the law.²⁵¹ These amendments eliminated the ability of the Appeal Board to reassess credibility.²⁵² The Board changed the referee from a patronage hire of limited employment duration to a professional possessing civil service protections.²⁵³ A Pennsylvania court immediately held that the referee was now the final fact-finder.²⁵⁴

The Pennsylvania amendment was part of a major effort to follow the National Commission recommendations that the adjudicative and oversight functions of workers' compensation agencies be made separate, and that agency employees be given civil service protections. The legislature, accordingly, sought to remove overt political influences from adjudication and replace those influences with a more professional ethic.²⁵⁵

Expedition of cases was also a motive. In this regard, the amendments removed the county trial courts from the appellate process, a procedure that had been in place since the enactment of the law in 1915. According to a contemporary treatise writer, "It was the 1972 Legislature's view that this intermediate appeal . . . served no useful purpose, but only served to involve such appeal proceedings in an additional major delay"²⁵⁶

doubt rule," which had been rejected by Supreme Court in 1994; court also explained that, within limits, ALJ may accept the expert medical opinion that he chooses).

²⁵¹ TORREY, *supra* note 70, § 1:46.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Universal Cyclops Steel Corp. v. Workmen's Comp. Appeal Bd.*, 305 A.2d 757 (Pa. Commw. Ct. 1973) (landmark case defining WCJ as final fact finder; court interpreted 1972 amendments that removed review powers from Board, and which renamed the latter "Appeal Board"). The hearing officer's title was finally changed from referee to WCJ in 1993. *See* TORREY, *supra* note 70, § 1:99.

²⁵⁵ Comments of Stanley Siegel, Esq. to the Author (Feb. 4, 2011); Comments of Raymond Keisling, Esq. to the Author (Feb. 7, 2011).

²⁵⁶ ALEXANDER F. BARBIERI & THOMAS R. BOND, 3 PENNSYLVANIA WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASE § 6.25 (Bisel 1996). One of the National Commission consultants, in an early effort to study reform factors in Pennsylvania, interviewed a major insurer and was told, "Compensation benefits are now paid too slowly in contested cases, and litigation is too protracted when a contest occurs." Arthur W. Motley, *A Study of the Forces that Produce*

The Pennsylvania Supreme Court has ascribed the change to the legislature's conviction that the judge who sees and hears the witnesses should be the final fact-finder.²⁵⁷ This assertion, however, does not find any contemporary documentation. The iconic court precedent that first clarified the meaning of the 1972 amendment is completely silent on intent.²⁵⁸

In the present day, the WCJ is firmly ensconced as the final fact-finder and arbiter of credibility. Reforms of 1993 and 1996 brought the "reasoned decision" requirement, which obliged the Pennsylvania WCJ to detail the reasons for his or her decisions and some level of explanation for his fact-findings. Nevertheless, both the Appeal Board and the appellate courts, upon true judicial review, undertake a markedly deferential substantial evidence or "arbitrary and capricious" review.²⁵⁹ These entities never substitute credibility determinations. Indeed, in the nineteen years this Author has been a WCJ, his determinations with regard to the facts have not been overthrown on a single occasion.²⁶⁰

Change in the Workmen's Compensation Laws of Four States: Maryland, Pennsylvania, Virginia, and West Virginia, in SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 544 (1973).

²⁵⁷ *Peak v. Unemployment Comp'n Bd. Of Rev.*, 501 A.2d 1383 (Pa. 1985) ("It may be wiser, more efficient or more expedient to entrust administrative determinations of fact based on credibility to the person who hears the evidence. . . . [J]ust such a judgment was made by our legislature when it amended Section 423 of the Pennsylvania Workmen's Compensation Act to change those referees from mere agents of the Board to independent factfinders whose credibility determinations became binding on the Workmen's Compensation Appeal Board. Before that amendment, the . . . Board had had the same power of *de novo* review over its referees as the Unemployment Compensation Board of Review retains under. . . . the Unemployment Compensation Act. . . ." (footnote omitted) (citation omitted)).

²⁵⁸ *See Universal Cyclops Steel Corp. v. Workmen's Comp. Appeal Bd.*, 305 A.2d 757 (Pa. Commw. Ct. 1973).

²⁵⁹ With regard to use of these terms, see *Republic Steel Corp. v. Workers' Comp. Appeal Bd.*, 421 A.2d 1060, 1062-1063 (Pa. 1980) (court using "substantial evidence" and "arbitrary and capricious" in same discussion). For the law and analysis of WCJ fact-finding under the Pennsylvania Act, see TORREY, *supra* note 70, §§ 13:96-13:139.

²⁶⁰ A resultant Pennsylvania phenomenon may be identified: the perennial effort of disappointed parties to find ways to avoid such fact-finding finality and find relief on appeal. In one case of this variety, a claimant on appeal to the Commonwealth Court alleged that the WCJ had committed a "capricious

F. Jurisdictions Influenced by Counterreform

Eight states, in direct response to concerns over litigation and costs crises, have altered their adjudication systems to make the WCJ the fact-finder. A number of orthodox rule states, meanwhile, have undertaken other steps at streamlining the adjudication process. In Oregon, for example, *de novo* review of the Board's decision by the Court of Appeals was abolished in 1987.²⁶¹ In Illinois, the Industrial Commission remains the final fact-finder, but the parties as of 1989 may no longer, on review, submit new evidence.²⁶² In Georgia, meanwhile, the Board endures as the final fact-finder, but review is no longer *de novo*. Instead, the ALJ's findings are to be accepted when "supported by a preponderance of competent and credible evidence" ²⁶³

Minnesota (1983). The compensation judge in the Minnesota system has been the final fact-finder since 1983.²⁶⁴ Prior thereto, an appeal taken to the Workers' Compensation Court of Appeals was reviewed on a *de novo* basis. That court now reviews for substantial

disregard" of evidence. He suggested that when only one party to the contested litigation presents evidence, the WCJ's decision to discredit the same should be subject to special scrutiny, particularly under the "reasoned decision" requirement of the Act noted above. Utilizing creative prose, the claimant submitted that this proposed review was admittedly unique, to wit, "a form of review normally resisted by appellate courts." Claimant asserted, "Thus, notwithstanding the instinct of an appellate tribunal to defer to the fact-finder, this is simply not what is mandated. . . ." To this assertion the court responded, "We disagree with Claimant's premise that appellate court judges defer to the fact finder by employing 'instinct;' in truth, it requires discipline." *Remaley v. Workers' Comp. Appeal Bd. (Turner Dairy Farms, Inc.)*, 861 A.2d 405 (Pa. Commw. Ct. 2004).

²⁶¹ See *Erck v. Brown Oldsmobile*, 815 P.2d 1251, 1254 (S. Ct. Oregon 1991). Jury trial *de novo* was not abolished in Oregon until 1965. For a case critical of that development, see *Hannan v. Good Samaritan Hosp.*, 471 P.2d 831, 833 (Or. Ct. App. 1970) ("Under the pre-1965 system, an award was made by the State Industrial Accident Commission to the claimant. . . . If he was not satisfied he had a right to a jury trial At that trial he produced witnesses; the commission produced witnesses, the court instructed the jury on the applicable law, the jury returned its verdict which was reduced to judgment, and the scope of review on appeal was no broader than that in any other action at law.").

²⁶² See *infra* Section VII.

²⁶³ See *infra* Section VII.

²⁶⁴ See MINN. STAT. § 176.421 (2009).

evidence.²⁶⁵ According to the first case to confirm the meaning and import of the revised law, the intent was efficiency. The change, in this regard, “should result in fewer appeals to the Workers’ Compensation Court of Appeals, with resultant savings in time and cost to the workers’ compensation system.”²⁶⁶ WCRI researchers, meanwhile, reported that the 1983 “reform sought to lower costs without reducing benefits and to reduce litigation and friction costs.” Among the changes were “new paths for dispute resolution.”²⁶⁷

Michigan (1985). Up until 1985 in Michigan, a state which has roiled with reform, the Workers’ Compensation Appeal Board (WCAB) undertook *de novo* review on appeal from a referee decision. In the wake of post-National Commission growth in costs

²⁶⁵ *Stately v. Red Lake Builders et al.*, 2010 MN Wrk. Comp. LEXIS 99 (2010) (“On appeal, the Workers’ Compensation Court of Appeals must determine whether ‘the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted’ . . . Substantial evidence supports the findings if, in the context of the entire record, ‘they are supported by evidence that a reasonable mind might accept as adequate.’ . . . ‘Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed . . .’ Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, ‘unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of evidence or not reasonably supported by the evidence as a whole.’”) (citations omitted). For a well-considered decision that parses the difference between finding of fact and conclusion of law in the old injury/new injury context, see *Busch v. Advanced Maintenance*, 659 N.W.2d 772, 778-79 (Minn. 2003).

²⁶⁶ *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54, 59 (Minn. 1984). The court continued, in this vein, “We think it may be of some significance that the legislature added the appellate review amendments, not to its then pending bill for general revision of the workers’ compensation law, but to House File No. 1290, an appropriations bill dealing with budget considerations.” *Id.* WCRI researchers found it ironic, in their 1990 study, that even after the abolition of *de novo* review, almost 40 percent of compensation judge decisions were appealed. The researchers heard many explanations for the high appeal rate, but perhaps the most ironic was from one attorney, who stated that he “attributes the high appeal rate in part to the unpredictability of WCCA decision, particularly with respect to the change in the standard of review from *de novo* to substantial evidence. This new standard does not allow WCCA judges to second-guess OAH judges, which may lead to a perception of inconsistency.” DUNCAN S. BALLANTYNE & CAROL TELLES, *WORKERS’ COMPENSATION IN MINNESOTA: ADMINISTRATIVE INVENTORY* 79 (Workers Compensation Research Institute ed., 1991).

²⁶⁷ BALLANTYNE, *supra* note 266, at 79.

and claims, a litigation crisis unfolded.²⁶⁸ A major reform of that year “completely revamped the appeal procedure,”²⁶⁹ abolished the position of referee, and created a Board of Magistrates. The WCAB was likewise abolished and replaced by the Workers’ Compensation Appellate Commission (WCAC). The Magistrate is now, for all practical intents and purposes, the final fact-finder.²⁷⁰

According to the state supreme court: “The Legislature sought thereby to reduce the delay in adjudicating workers’ compensation claims, which had been attributed to a large backlog in the WCAB resulting from the appeal of seventy-five to eighty-five percent of referee awards.”²⁷¹

In 1986, the supreme court, considering an extraordinary case in which the displaced referees sought an injunction against their removal, summarized the legislative intent. In so summarizing, the court referred to a renowned report, authored by Professor Theodore St. Antoine (a special counselor of the governor), which had recommended reform:

De novo review, described in the report as an “open invitation to disappointed litigants and their lawyers to seek to retry the case from scratch,” . . . was seen as the principal cause. Having in mind that there is now a large body of precedent, that over the years referees were affirmed on questions of law about sixty-six percent of the time and on issues of fact about eighty-two percent of the time, and the backlog at the appellate level, de novo review, Professor St. Antoine said, is no longer “a luxury that can be afforded, or a

²⁶⁸ EDWARD M. WELCH & DARYL C. ROYAL, WORKER’S COMPENSATION IN MICHIGAN: LAW & PRACTICE § 18:10, at 18-11 (5th ed. 2010). See also H. ALLAN HUNT & STACEY M. ECCLESTON, WORKERS’ COMPENSATION IN MICHIGAN: ADMINISTRATIVE INVENTORY 43 (1990) (referring to policymakers’ frustrations that as of 1985 a “five-year backlog of cases” existed at the Appeal Board, an aggravating effect of *de novo* review which meant that “the loser at the hearing level could get another chance on appeal.”).

²⁶⁹ HUNT, *supra* note 268, at 43.

²⁷⁰ MICH. COMP. LAWS § 418.206; MICH. COMP. LAWS § 418.861(a).

²⁷¹ Mich. Civ. Serv. Comm’n v. Mich. Dept. of Labor, 384 N.W.2d 728, 730 (Mich., 1986), on remand, *Matulewicz v. Governor*, 435 N.W.2d 785 (Mich. Ct. App. 1989).

procedure that is needed” and should be eliminated. . . .
. A referee should become a “true-decision maker,”
and the decision at that level “a much more dispositive
step in the administrative process.”²⁷²

St. Antoine also “recommended that the referees be required to support their decisions with findings of fact and conclusions of law. Their findings of fact should be conclusive if supported by competent, material, and substantial evidence on the whole record”²⁷³ The appeal process, he added, “should be ‘streamlined,’ by creating a new five- or possibly seven-member board, which should be able to handle the anticipated reduced number of appeals, given the substantially reduced record-reading and fact-finding responsibilities, and the use of legal assistants”²⁷⁴

Under the 1985 amendment, the new Workers’ Compensation Appellate Commission (WCAC)²⁷⁵ does indeed review the magistrate’s decision for substantial evidence.²⁷⁶ This change led Larson to say that Michigan had adopted the minority rule that the WCJ was the final fact-finder. Some confusion, however, thereupon unfolded, as a 1992 case of the supreme court interpreted the statute

²⁷² *Id.* at 733.

²⁷³ *Id.*

²⁷⁴ *Id.* at 734-35. For another account of the 1985 reforms, see *Holden v. Ford Motor Co.*, 484 N.W.2d 227 (Mich. 1992). The St. Antoine report, the opinion notes, was actually foreshadowed by the 1980 “Lesinski Report,” which “proposed that decisions of a magistrate be made conclusive ‘unless fraudulently obtain[ed] or contrary to the great weight of the evidence.’” *Id.* at 228. No reform was enacted at that time. St. Antoine, meanwhile, believed that giving the WCAC whole record substantial evidence review would “allow the Appeal Board a bit more latitude” than the Lesinski standard noted above. “St. Antoine said this would enable the reviewing panel to ‘remedy any serious misstep by [a hearing officer] in assessing the evidence and making factual findings.’” *Id.* at 229.

²⁷⁵ The WCAC is now (2012) the Michigan Compensation Appellate Commission.

²⁷⁶ For a recent case, see *Djelaj v. RGIS Inventory Specialists*, 2011 Mich App. LEXIS 1771 (Mich Ct. App. 2011). (“The WCAC reviews the magistrate’s decision under the ‘substantial evidence’ standard in accordance with MCL 418.861a(3) . . .”).

to allow for limited WCAC fact-finding.²⁷⁷ In 1997, however, the court ruled that no such power existed.²⁷⁸

Finally, in a landmark 2000 case,²⁷⁹ the court disavowed the *latter* ruling and clarified that the WCAC can under limited circumstances undertake fact-finding. The court did so by a meticulous parsing of the law. The pivotal statute provides, in this regard, for substantial evidence review. However, it also provides for review of the “whole record,” to wit, “the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination.” Finally, the section admonishes:

(13) A review of the evidence pursuant to this section shall include both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review.

(14) The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive²⁸⁰

According to the court, these sections provide for WCAC “fact-finding powers, and permits it in some circumstances to substitute its own findings of fact for those of the magistrate, if the WCAC accords different weight to the quality or quantity of evidence presented.” The court rejected the idea, however, that this was *de novo* review of any kind:

[A]pplication of the clear and plain language of [these sections] . . . does not connote a *de novo* review by the

²⁷⁷ *Holden v. Ford Motor Co.*, 484 N.W.2d 227 (Mich. 1992). The *Holden* case, which is very well written, is an excellent example of “whole record review” as undertaken in a workers’ compensation case. The magistrate, notably, had denied a cardiac claim, but the WCAC changed his findings and issued an award of benefits.

²⁷⁸ *Goff v. Bil-Mar Foods, Inc.*, 563 N.W.2d 214 (Mich. 1997).

²⁷⁹ *Mudel v. Great Atlantic & Pacific Tea Co.*, 614 N.W.2d 607 (Mich. 2000).

²⁸⁰ *See id.* (citing MICH. COMP. LAWS § 418.861(a) (13-14)).

WCAC of the magistrate's decisions Clearly, it would be improper for the WCAC to engage in its own statutorily permitted independent fact finding if "substantial evidence" on the whole record existed supporting the decision of the magistrate.²⁸¹

Of note is that the WCAC applauded the ruling for the clarity it was presumed to bring to its own review tasks. In addition, however, the Commission thought that having fact finding power would *promote* expedition of cases. The new precedent, the Commission stated, by allowing it to correct "faulty or incomplete magistrate decisions[,] will streamline the decision-making in worker's compensation by eliminating wasteful remands and expediting the resolution of disputes in the system."²⁸²

In the present day, one Michigan expert reports that despite possessing the power:

[T]he WCAC rarely disturbs the Magistrate's finding of fact on a factual issue. They can re-analyze the facts as it applies to a legal issue. For example, if the issue was credibility, it would never be overturned but if the WCAC felt that the Magistrate incorrectly applied the facts to the law, they may make an adjustment.²⁸³

The treatise writer Welch is in accord, stating the "commission has typically declined to push the limits of its power.... [I]n practice, the commission seems to impose on itself a rather high

²⁸¹ *Id.* at 612. Judicial review thereafter is actually in the discretion of the court, and when it does take a case, it is under an "any evidence" standard. Importantly, when the court undertakes review, it reviews the WCAC decision, not that of the magistrate.

²⁸² Press Release, "'CIS' Appellate Commission Applauds Supreme Court Clarification of its Review Standards" (July 26, 2000), *available at* http://www.michigan.gov/lara/0,4601,7-154-10573_11472-50550--,00.html (last visited Jan. 3, 2012).

²⁸³ Memorandum from Denise Clemmons, Esquire, Farmington Hills, MI, to Author (Nov. 21, 2011) (on file with Author). Ms. Clemmons represented defendant Atlantic & Pacific Tea Co. in the *Mudel* appeal.

standard, perhaps higher than required by *Mudel*, and tends to reverse factual decisions only in exceptional cases.”²⁸⁴

Massachusetts (1985, 1991). The Administrative Judge (AJ) under the Massachusetts Act has been the final fact-finder in earnest since the state’s 1991 amendments.²⁸⁵ The system had undergone a remarkable progressive reform in 1985, said to have been informed by a tardy response to National Commission recommendations.²⁸⁶ Those changes first deprived the intra-agency review board of *de novo* powers, but still left it authority to reweigh evidence. However, it was only six years later, the pendulum having swung back towards retractive reform, that the AJ was finally equipped with his or her current power.

Before 1985 the hearing officer in the system was an individual commissioner. Appeal was taken to a reviewing board of “‘not less than three members’ or commissioners The commissioners . . . presided over their own hearings and also, as members of a reviewing board, reviewed the single member decisions of their colleagues.”²⁸⁷ This board “could entirely

²⁸⁴ WELCH & DARYL, *supra* note 268, at 18-12, 18-13. Still, the researcher can find cases where the Commission has substituted its own fact-findings for those of the magistrate. *See, e.g.*, *Romero v. Burt Moeke Hardwoods, Inc.*, 760 N.W.2d 586, 592-93 (Ct. App. Mich. 2008) (WCAC did not engage in illicit *de novo* review, but instead legitimately found as fact reason that claimant left Michigan to return to Mexico, as his visa had run out: “Here, the WCAC found sufficient evidence on the record to make a finding and determined that plaintiff left the United States because his visa expired. Because there is record evidence to support the WCAC’s finding, we will not overturn it on appeal.”) (note: the magistrate had not made a hard finding on why claimant departed); *Daniel v. Dep’t of Corrs.*, 658 N.W.2d 144 (Mich. 2003) (magistrate determined that claimant had developed depression because of employer’s disciplining of him, but WCAC, reversing award, found that claimant had brought discipline upon himself by harassing co-worker; court affirms over dissent).

²⁸⁵ M.G.L. c.152, § 11C. With regard to the 1991 amendments, see *Laurence Bengston’s Case*, 609 N.E.2d 1229 (Ct. App. Mass. 1993). *See generally* *David Carpenter’s Case*, 923 N.E.2d 1026, 1031 (Mass. 2010) (“credibility determinations are within the sole province of an administrative judge and are to be considered final by both the reviewing board and an appellate court.”).

²⁸⁶ Memorandum from Alan Peirce, Esquire, Salem, MA to Author (Dec. 16, 2011) (on file with Author).

²⁸⁷ LEONARD NASON, 29, 29A MASSACHUSETTS PRACTICE, WORKERS’ COMPENSATION § 14:27 (3d ed. West 2003).

supersede the single member's decision," empowered as it was to hear testimony, take evidence, and "revise the decision in whole or in part" ²⁸⁸ By one account, this arrangement had encountered efficiency problems. Consequently, by the 1980s, the public could read of acute delays in the litigation process: "An injured employee faced months, if not years, of delays waiting for a decision regarding benefits." This unsatisfactory arrangement was superimposed on a system that paid only modest benefits that "often left injured workers impoverished over time." ²⁸⁹ It was out of this environment that the 1985 reform evolved.

Under the initial reform, the title "commissioner" was abolished. ²⁹⁰ The first-level hearing officer became the Administrative Judge (AJ) and the intra-agency review board was composed of Administrative Law Judges (ALJs), an arrangement which continues to the present. ²⁹¹ This effort was no doubt intended to address the "effective delivery" goal of the system, but the statute still allowed the reviewing board to "weigh evidence" and substitute its decision if the AJ's decision was "unwarranted by the facts." ²⁹² In a 1988 case, the court held that the law said what it meant, thus

²⁸⁸ *Barbara Pospisil's Case*, 525 N.E.2d 646 (Mass. 1988) (noting also that change to single commissioner as fact-finder was procedural, and hence permissibly retroactive; employer had no vested right in having the Board on appeal be able to reassess claimant's credibility). According to one expert, even though the reviewing board had this power, it did not exercise the same very often. The Review Board would usually operate as a "rubber stamp . . . [I] cannot ever remember having a case revisited or having facts revised." Memorandum from Alan Peirce, *supra* note 286. Another expert has observed that the prior process resulted in such rubber-stamping due to the personal/political dynamic involved, stating that the "Sitting Review Board members would in turn have their own hearing decisions be the subject of appeals to be heard by their fellow Commissioners." The present arrangement is more satisfactory. Memorandum from Joseph Agnelli, Jr., Esquire, Boston, MA to Author (Dec. 17, 2011) (on file with Author).

²⁸⁹ ASSOCIATED INDUSTRIES OF MASSACHUSETTS FOUNDATION, MASSACHUSETTS WORKERS COMPENSATION: HISTORICAL OVERVIEW & MOVING FORWARD FROM THE 1991 REFORM 16 (2004), available at http://www.aimnet.org/AM/Template.cfm?Section=Web_Site&CONTENTID=7442&TEMPLATE=/CM/ContentDisplay.cfm.

²⁹⁰ *Id.* at 12.

²⁹¹ *Id.*

²⁹² *Id.*

allowing for the review board to make new fact-findings.²⁹³ The exception was that the personal assessment of a live witness could not be overthrown.²⁹⁴

According to the treatise writer Nason, “[r]eaction to the . . . decision was swift,” with bills submitted prohibiting the reassessment of credibility.²⁹⁵ According to Nason, this advocacy grew out of a fear “that in the absence of legislative correction, the fact finding ability of the reviewing board would undoubtedly result in an increase in appeals from decisions of administrative judges.”²⁹⁶ In the end, the statute was changed so as to remove any doubt regarding where the power to assess credibility lay and now it is “clear that the reviewing board has absolutely no fact finding authority.”²⁹⁷ Nason also asserts that a legislative motive in making the AJ the final fact-finder was “that it was felt that the hearing judge was in the best position to find ‘credible’ facts based upon a live witness’ testimony, i.e., assess a witness’ credibility. In the absence of hearing live testimony it was felt that it was inappropriate for the reviewing board to revisit the facts found, especially when based on credibility.”²⁹⁸

This 1991 change was, in fact, part of a broader reform, which itself was a reaction to the 1985 amendments referenced above.²⁹⁹ The latter had given rise to the “unintended consequence of rapidly accelerating benefits to the point where they served as a disincentive for many employees to return to work.”³⁰⁰ This crisis in costs and premiums was exacerbated by a bad economy and insurance industry woes, leading to a “decidedly pro-

²⁹³ Robert Lettich’s Case, 530 N.E.2d 159 (Mass. 1988).

²⁹⁴ *Id.* at 163.

²⁹⁵ LEONARD Y. NASON, 29 MASSACHUSETTS PRACTICE, WORKERS’ COMPENSATION § 16:27 (3d ed. 2003).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Memorandum from Leonard Y. Nason, Esquire, Bedford, MA, to Author (Dec. 17, 2011) (on file with Author).

²⁹⁹ See ASSOCIATED INDUSTRIES OF MASSACHUSETTS FOUNDATION, MASSACHUSETTS WORKERS COMPENSATION: HISTORICAL OVERVIEW & MOVING FORWARD FROM THE 1991 REFORM, *supra* note 237.

³⁰⁰ *Id.* at 20.

business/insurer” reform,³⁰¹ the outlines of which endure to the present day.

According to the veteran attorney, Alan Pierce, the 1991 reform tended to improve the adjudication of cases, and has significantly reduced the number of appeals:

Since the old practice [pre-1985] was almost always an affirmation of the fact finder [anyway] the new [Review Board] really has taken [itself] seriously as an appellate body. Both the 1985 and 1991 changes made a previously “simple and summary” process (and statute) now chock full of procedural and substantive nuances (i.e. different levels of causation when there is a pre-existing condition, tighter definitions of earning capacity and so on), [and] the appeals that actually are briefed (and in rare cases orally argued) usually have some substance to them. If you read the Review Board decisions now there are a great deal of reversals, or more commonly remands, to correct the original AJ’s analysis.

Two other factors . . . dictate the volume of cases appealed and ultimately heard. Under the old system, despite the Review Board rubber stamping almost everything, cases were nevertheless almost always appealed [This was so because it] kept the case alive for [a] possible lump sum. Since getting anywhere at the old IAB took a long time, cases usually settled when there was something coming up on the docket. Also there was another appeal level (eliminated in 1985) to the Superior Court (now cases go from the Review Board to the Appeals Court).

[T]he other factor influencing the lower volume of appeal decisions today is that prior to the filing of briefs, the Review Board upon receipt of an appeal will schedule an informal conference with counsel and

³⁰¹ Memorandum from Alan Peirce, *supra* note 286.

just one of the three Review Board judges to ask what the “real” issues are and try to get the appealing party to withdraw if it appears the filing of the appeal was just a long shot or to appease the losing client. Also[,] a certain number of those cases would settle[,] or if there was an obvious error below the appellee might in the interest of time agree to a remand to correct the minor error below. About one-third of appeals today to the Review Board “go away” after this informal conference.³⁰²

Nason agrees: “I think overall that [the 1991 changes have] reduced reviewing board appeals, and hearing judges have been very careful to make it clear that his/her findings of fact were based upon their own credibility determinations, having in mind the witness’ demeanor, memory, testimony, corroborating evidence, and the like.”³⁰³

Kentucky (1988). The ALJ has been the final fact-finder in the Kentucky system since 1988.³⁰⁴ The motive for the change was to create a more efficient process of adjudication.³⁰⁵ “[T]he primary goal of the [1987] Special Session” of the legislature, one veteran states, was:

[determining] how to shorten the time from filing of claim to final decision. It was not unusual for a claim to take two years to litigate. . . . Because all claims were decided by the three-member Workers’ Compensation Board, there was a substantial backlog of cases to be decided The result of the Special Session was that the Board was replaced by twelve

³⁰² *Id.*

³⁰³ Memorandum from Leonard Y. Nason, Esquire, Bedford, MA, to Author (Dec. 17, 2011) (on file with Author).

³⁰⁴ See KY. REV. STAT. ANN. § 342.285 (West 2010).

³⁰⁵ Comments from Hon. Mike Alvey, Chair, Kentucky WCB, to Author (Aug. 28, 2011) (indicating that under the displaced practice, cases would go into an adjudication “pipeline,” with the end-point years away; amendment was intended to “expedite” the process).

ALJs, and a fast-track litigation scheme was adopted.³⁰⁶

Under this scheme, the Board became an appellate entity,³⁰⁷ reviewing the ALJ decision on a substantial evidence basis.³⁰⁸

In a renowned case, the state supreme court stressed that the amendment sought to “streamline the workers’ compensation process,” and it encouraged parties to avoid appeals that simply asked (in vain) that the appellate court reweigh the evidence and reassess credibility.³⁰⁹ Supreme Court review should not, the court admonished, be the end sought in every litigated workers’ compensation case. The court remarked memorably that “[t]he WCB

³⁰⁶ Memorandum of Stephanie Ross, Esquire, Florence, KY, to Author (Sep. 1, 2011) (quoting James Fogle, Esq.) (on file with Author).

³⁰⁷ *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992). According to the court:

The 1988 statutory restructuring . . . intended appeal to the WCB to be the functional equivalent of appellate review in the Court of Appeals. These statutes worked fundamental changes. The ALJs were created and empowered to function the same as a trial court trying a case without a jury. The WCB was divested of the fact-finding function and restructured to carry out the same functions as an intermediate court reviewing the decisions of a court of original jurisdiction, to perform the error correcting function normally assigned to the Kentucky Court of Appeals, lacking only the power of constitutional review.

Id. at 687 (citation omitted).

³⁰⁸ *See, e.g.*, *Couch v. Blevins Logging*, 2011 Ky. Unpub. LEXIS 69 (Ky. 2011) (“The courts have construed KRS 342.285 to require a party who appeals a finding that favors the party with the burden of proof to show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence.”) (footnote and citations omitted); *Jefferson Cnty Public Schools v. Stephens*, 208 S.W.3d 862 (Ky. 2006) (ALJ’s findings that claimant did not suffer idiopathic fall, and that she did not otherwise suffer a work-related injury, were not arbitrary and capricious, court remarking that “[a]lthough KRS 342.285 designates the ALJ as the finder of fact, a finding that is arbitrary, capricious, or clearly erroneous is subject to reversal on appeal. [We have previously explained] that a finding may only be affirmed if it is reasonable and supported by substantial evidence.” (citing *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986)).

³⁰⁹ *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992) (emphasis omitted).

and the Kentucky Court of Appeals are not way stations, or rest stops, along the road to the Kentucky Supreme Court.”³¹⁰

Colorado (1987). The ALJ of the Colorado system gained full fact-finding power in the course of the 1987 amendments.³¹¹ An appeal is to be prosecuted to the Industrial Claims Appeals Office (ICAP or “panel”), which undertakes substantial evidence review.³¹² The legislature at the time was dissatisfied with the performance of the Industrial Commission, which at the time entertained disputes. This was particularly so at a time of “widespread perception that the costs of the system to employers were getting too high.”³¹³

The Court of Appeals, in 1995, confirmed that efficiency in the adjudication process was the legislature’s motive for eliminating intra-agency reassessment of the facts. In that case, the claimant argued that limiting the appeals panel to “substantial evidence” review compromised his due process rights. The court rejected this argument, replying that the “purpose of the Workers’ Compensation Act . . . is to provide ‘an expeditious method of compensating disabled workers with liability determined ‘with some degree of

³¹⁰ *Id.* The court continued: “The parties in cases such as the present one must accept that, notwithstanding their right to demand further appellate review, the body performing further review is there to address new problems, not to redecide the same evidentiary questions.” *Id.* (emphasis omitted).

³¹¹ See C.R.S. § 8-43-301(8). The 1987 reform also had retractive aspects, in particular the abolition of the injured worker’s right to vocational rehabilitation – a benefit type that had become highly costly and, reportedly, abused. See also Memorandum from Tom Kanan, Esq., Denver, CO to Author (Dec. 20, 2011) (on file with Author).

³¹² *May DF v. Indus. Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988) (court discerning a “conscious legislative intent to abolish the previous distinction between ultimate and evidentiary findings and to make any findings of fact by the ALJ binding on the Panel, if they are supported by substantial evidence, leaving only conclusions of law to be fully reviewed.”). See also *Panera Bread, LLC v. Indus. Claims Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006) (in horseplay case, court remarks, “Because the issues are factual in nature, they must be reviewed under the substantial evidence standard . . . The evidence must be considered in the light most favorable to the prevailing party, and we, like the Panel, must defer to the ALJ’s resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record . . .”).

³¹³ Memorandum from Tom Kanan, Esquire, Denver, CO to Author (Dec. 20, 2011) (on file with Author).

certainty' Since limited administrative review, such as provided here, avoids duplication of effort at the agency level, it is rationally related to the statutory goal"³¹⁴

One veteran who experienced the change states that investing the ALJ with fact-finding power, and making the Appeals Panel in effect an appellate court, has been a positive development. The panel "has in effect become the rule and statutory interpreter of most influence in the current system, but no longer deciding the outcome of cases on grounds of proximate cause or 'arising out of or in the course of' employment, except supposedly as based on legal standards." The Panel has also:

[G]reatly reduced the pressure on the Colorado Court of Appeals by, over time, interpreting and applying the Act and administrative rules in a legally sophisticated and consistent manner. . . . [This has been] much unlike the old Industrial Commission, which was composed of political appointees, with no requirement for legal expertise among them, influenced by common sense and "fairness" good and simple.³¹⁵

Texas (1989). The elimination of the Texas "jury trial *de novo*" is perhaps the most illustrious phenomenon of the counter-reform. The jury trial and the preexisting administrative process were displaced in a dramatic 1989 amendment. Now, after a mandatory benefit review conference, a disputed case can proceed to a contested case hearing. In this forum, the hearing officer is, for all practical intents and purposes, the final fact-finder. The law, in this regard, states, "The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence."³¹⁶

The Appeals Panel, which was created by the reform, is no "rubber stamp," but instead reviews the sufficiency of the facts under

³¹⁴ Wecker v. TBL Excavating, 908 P.2d 1186 (Colo. App. 1995).

³¹⁵ Memorandum from Tom Kanan, *supra* note 313.

³¹⁶ TEX. LAB. CODE ANN. § 410.165; Interview with Hon. Jennifer Hopens, Hearing Officer, Tex. Dept. of Ins. (Aug. 29, 2011).

a “clearly wrong and manifestly unjust” standard.³¹⁷ Some Appeals Panel decisions refer to appeals taken on this basis as “great weight” challenges.³¹⁸ As discussed below, a modified jury trial *de novo*, of limited character, endures. Contemporary observers posited that these 1989 changes “creat[ed] a strong administrative agency to oversee and improve the efficiency of the compensation system,” with a “multitiered system of dispute resolution designed to resolve more disagreements at the agency level.”³¹⁹ According to one system participant, the Appeals Panel in practice rarely disturbs the hearing officer’s fact-findings. The “modified” jury trials *de novo* that are potentially available, meanwhile, in practice unfold only rarely.³²⁰

Of course, when such a trial actually unfolds, the jury is in the position to find facts. The reform statutory scheme that makes this possible has been summarized as follows:

The Commission’s final decision may be appealed to
the courts under what might best be described as

³¹⁷ Texas Workers’ Comp. Ins. Fund v. Texas Workers’ Comp. Comm’n, 124 S.W.813, 823 (Tex. App. 2003).

³¹⁸ Appeals Panel, Appeal No. 110382, p.2 (filed May 5, 2011) (holding that the evidence did not support a 15% impairment rating, but only a 5%, and hence that hearing officer was “clearly wrong”; and stating, “In reviewing a ‘great weight’ challenge, we must examine the entire record to determine if: (1) there is only ‘slight’ evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence.”), available at <http://www.tdi.texas.gov/appeals/2011cases/110382r.pdf>.

³¹⁹ William O. Ashcraft & Anita M. Allesandra, *A Review of the New Texas Workers’ Compensation System*, 21 TEXAS TECH L. REV. 609, 610 (1990) (reviewing background of amendments).

³²⁰ Interview with Hon. Jennifer Hopens, Hearing Officer, Tex. Dept. of Ins. (Aug. 29, 2011). For a case where such trial did unfold, *see* State Office of Risk Management v. Trujillo, 267 S.W.3d 349, 352-54 (Tex. App. 2008) (trial court committed error in refusing to allow jury to hear testimony of employer’s medical expert, who was to opine that claimant’s carpal tunnel syndrome was not work-related; court agreed with employer’s argument that it was not obliged to have announced this expert in proceedings before the Appeals Panel, as it was “entitled to *de novo* review and [its] . . . appeal should not be considered a continuation of the administrative hearing.”) The court also noted that the “final decision of the TDI-DWC appeals panel may be appealed to the district court level under a ‘modified de novo review.’”).

modified *de novo* review. For all issues regarding compensability of the injury (for example, whether it occurred in the course and scope of employment) and eligibility for and the amount of income and death benefits, there is a right to trial by jury The party appealing bears the burden of proof by a preponderance of the evidence The jury, although informed of the Commission decision, is not required to accord it any particular weight Further, the opinion of the designated doctor regarding impairment is accorded no special weight.

In determining the extent of impairment, however, the jury must adopt the specific rating of one of the physicians in the case Evidence of the extent of impairment is limited to that presented to the Commission unless the court makes a threshold finding that the claimant's condition has substantially changed, in which case new impairment evidence may be introduced If the parties dispute whether the claimant's condition has substantially changed, the court must hear from the designated doctor, whose opinion is controlling on this issue "unless the preponderance of the other medical evidence is to the contrary." The court's finding of substantial change of condition is not revealed to the jury. . . . [I]ssues other than compensability of the injury and eligibility for and the amount of income and death benefits are reviewed by the court under the substantial evidence rule.³²¹

This restructuring unfolded in the wake of cost and litigation crises.³²² With regard to litigation, the availability of trial *de novo* was said to be abused, presumably by regular claimant demands for jury trials in weak cases that had met with defeat during

³²¹ Texas Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 515 (Tex. 1995).

³²² According to Larson, "the waste generated by the trial *de novo* process prompted the amendments." LARSON, *supra* note 164, § 130.05[7][d].

administrative review. The “Texas trial *de novo* . . . abuses,” a critic aligned with business interests asserts, “frankly had [an] organized crime dimension[.]”³²³ Whether or not this churlish statement is true, the Texas system developed a crisis that provoked a harsh, anti-lawyer/anti-litigation backlash.³²⁴

The background of the 1989 amendments may be ascertained by review of a committee report prepared for the legislature in the midst of the crisis. It states, in pertinent part, “[d]ue to the delay and costs of the system’s first factfinding (the court trial), disputes are resolved by compromises rather than application of the law to facts established through formal procedures”³²⁵ Among the suggestions for adjudicatory reform were the following:

[1] Provide for evidentiary hearings in the agency with appeals to an appeals board within the agency. Appellate review within the agency should be on law and facts and on the record of the administrative hearing. (No change in the [then-existing] pre-hearing system).

³²³ Robert B. Stegert, *Cost Trends and Cost Drivers: An Employer’s Perspective*, WORKERS’ COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? 72 (WCRI 2010).

A different view about the leveraging effect of the jury trial can be found in Sam B. Barton, *A Study of Administrative Improvements in Workmen’s Compensation in Texas*, SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS, 571, 579 n.10 (1973). Writing in the early 1970s, Barton complained that employers would deny benefits to deserving workers and try to leverage them to compromise-settle their cases for less than they were worth. A worker who could survive the delay attendant to the denial could turn the tables and use the threat of the trial *de novo* to leverage a higher settlement. “Contrary to academic orthodoxy,” Barton observed, “trial *de novo* served the interests of the injured worker under the Texas system. At times, the threat of a jury trial was the only effective restraint on the tendency of some insurance companies to pay workers less than the law intended.” *Id.*

³²⁴ See generally Phil Hardberger, *Texas Workers’ Compensation: A Ten-Year Survey – Strengths, Weaknesses, and Recommendations*, 32 ST. MARY’S L.J. 1, 42 (2000). See also Ashcraft & Allesandra, *supra* note 319 (reviewing background of amendments).

³²⁵ JOINT SELECT COMMITTEE ON WORKERS’ COMPENSATION INSURANCE: A REPORT TO THE 71ST TEXAS LEGISLATURE 5 (Dec. 9, 1988).

[2] . . . Provide for review of agency decisions on liability and compensation issues by the courts on the record of the agency under the substantial evidence standard.³²⁶

The latter suggestion, which the committee *recommended*, allowed only for substantial evidence review in (presumably) the county trial courts, after consideration of disputed cases by administrative officers. The committee, in voicing this recommendation, actually offered *four* different variations. Jury trial *de novo* was not, notably, mentioned in any of these variations. One variation, which allowed for revisitation of the facts, came close to what was ultimately adopted. As foreshadowed above, however, the enduring availability of a modified jury trial *de novo* was later added. The variation provided as follows:

Provide for review of liability and compensation decisions [by the trial court] on *both law and fact*; make the agency records admissible; the burden of the appealing party is to show the agency erred, based on the information before it at the time of the decision.³²⁷

This eventual retention of the jury trial, even in modified form, was controversial at the time.³²⁸ The choice to retain review by a jury, however, had its genesis in constitutionality concerns.³²⁹

The reforms were accompanied by severe restrictions on the fees that attorneys could charge injured workers. This aspect of the 1989 amendments has reportedly created a shortage of lawyers for such claimants. This lack of legal representation, critics complain, can become a real problem when the administrative fact-finding process is complete and the modified jury trial is pending. “Even if an injured worker overcomes denials through three administrative levels within the division, the insurance carrier can appeal for judicial review in state court The claimant can win every issue in the

³²⁶ *Id.* at 15.

³²⁷ *Id.* (Emphasis added).

³²⁸ Ashcraft & Alessandra, *supra* note 319, at 627 (1990).

³²⁹ *See supra* Section IV(A).

[administrative process] ‘only to lose on a default judgment in district court solely due to lack of representation’³³⁰ This critique raises the issue of whether the adjudication reform pendulum swung too violently in favor of employers.³³¹

Nebraska (1992). The single trial judge of the seven-member Workers’ Compensation Court is the final fact-finder under the Nebraska Act. This has been the law since 1992, when the prior practice of allowing a rehearing *de novo* by a three-judge review panel was abolished.³³² Under the current practice, the findings of the trial judge are final, and the three-judge panel of the court undertakes review of the decision under the “clearly wrong” standard,³³³ that is, as if the adjudication was a “jury verdict.”³³⁴

³³⁰ Terry Carter, *Insult to Injury: Texas Workers’ Comp System Denies, Delays Medical Help*, A.B.A. J. 42, 48 (Oct. 1, 2011) available at http://www.abajournal.com/magazine/article/insult_to_injury_texas_workers_comp_system_denies_delays_medical_help/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

³³¹ An irony, meanwhile, is that the specter of court review now more commonly leverages the claimant and not the employer. Arguably, the situation could be remedied by making the Hearing Officer the final fact-finder in every respect.

³³² See, e.g., *Phipps v. Milton G. Waldbaum & Co.*, 477 N.W.2d 919 (Neb.1991) (three-member panel on rehearing reversed trial judge; court describing then-existing review standard).

³³³ *Haworth v. Compass Group*, No. A-08-865, 2009 Neb. App. LEXIS 51, *5 (Neb. Ct. App., Mar. 17, 2009) (“On appellate review, the factual findings made by the trial judge of the Workers’ Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong”). With regard to the meaning of “clearly wrong,” “findings of the Workers’ Compensation Court unsupported by credible evidence are clearly wrong and will be set aside on appeal.” *Granados v. IBP, Inc.*, No. A-96-927, 1997 Neb. App. LEXIS 86, *19 (Neb. Ct. App. May 27, 1997). For case where the court agreed with the review panel that the trial judge had been clearly wrong in one aspect of his award, see *Vega v. Iowa Beef Processors, Inc.*, 699 N.W.2d 407 (Neb. 2005).

³³⁴ NEB. REV. STAT. § 48-185 (addressing appeals from WCC Review Panel, and stating, “the judgment made by the compensation court after review shall have the same force and effect as a jury verdict in a civil case. A judgment . . . of the . . . court may be modified, reversed, or set aside only upon the grounds” that court acted *ultra vires*, that fraud had occurred, or that “there is not sufficient competent evidence in the record to warrant the making of the . . . judgment . . .”). Importantly, the revised scheme, which was perceived to feature an inconsistency,

This change in the system unfolded in the wake of a litigation crisis, with backlogs of cases that had plagued the court for some time. The elimination of *de novo* review “was intended to streamline the system to bring a resolution to disputed cases in a more timely fashion . . . [and] provide for a better organization of the legal process”³³⁵

West Virginia (1995). In 1995 the legislature in West Virginia enacted legislation that reformed the compensation law. According to the state supreme court, “The purported goal of these sweeping reforms envisioned ameliorating the workers’ compensation fund’s fiscal crisis and restoring its financial integrity.”³³⁶ The definitive contemporary analysis of the amendment certainly confirms this assessment.³³⁷

Among the changes was making the ALJ of the Office of Judges the final fact-finder. In making this change, the legislature sought to streamline the litigation process.³³⁸ In this regard, the revised law provides that the Board of Review, as it is currently called, may reverse, vacate or modify the ALJ’s decision if his or her findings are “[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record” or “[a]rbitrary and capricious”³³⁹ Importantly, another statute altogether governs the

received a definitive interpretation by the state supreme court, to this effect, in *Pearson v. Lincoln Telephone Co.*, 513 N.W.2d 361 (Neb. Ct. App. 1994).

³³⁵ Floor Debate, 92d Leg., 2d Sess. 11, 324 (March 25, 1992) (on file with Author).

³³⁶ *Repass v. Workers’ Comp’n Div.*, 569 S.E.2d 162 (W. Va. 2002). See also *Blankenship v. Richardson*, 474 S.E.2d 906 (W. Va. 1996).

³³⁷ Emily A. Spieler, *Assessing Fairness in Workers’ Compensation Reform: A Commentary on the 1995 West Virginia Workers’ Compensation Legislation*, 98 W. VA. L. REV. 23 (1995).

³³⁸ *Id.* at 188 (“The Administration sought to streamline the adjudicative system by placing more authority with the Commissioner, at both the initial and final levels of review”). Spieler questioned the fairness of this change, as initially manifested, as it gave the same individual who was responsible for payments out of the state fund authority over the adjudication system.

³³⁹ W. VA. CODE § 23-5-12(B)(5)-(6) (2011). For a case in which the Supreme Court held that the Board of Review exceeded its power, see *Fenton Art Glass Co. v. West Virginia Office of Insurance Commissioner*, 664 S.E.2d 761 (W. Va. 2008).

state supreme court's review power over the decision of the Board of Review.³⁴⁰

G. States Experiencing Institutional Change

Since the trend towards making the WCJ the final fact-finder began, three states have undertaken fundamental institutional change. These states, Louisiana, New Mexico, and Wyoming, all moved the adjudication of contested workers' compensation cases from civil court to an administrative forum. In all three states, the WCJ was invested with final fact-finding powers, and in all three, notably, no intra-agency review was created. Instead, appeals from the WCJ in each state are prosecuted directly to judicial review.

Louisiana (1983/1988). The Office of Workers' Compensation, now located in the Louisiana Workforce Commission, dates from 1983, but WCJs of the system date from 1988. Since 1989 the WCJ has been the final fact-finder, and review is undertaken by appeal directly to the court of appeals.³⁴¹ Under the Act, "factual findings . . . are subject to the manifest error-clearly wrong standard of appellate review In applying [this] standard, the appellate court must determine whether the fact finder's conclusion was reasonable, not whether the trier of fact was right or wrong" ³⁴²

The Larson treatise remarks that in Louisiana "the standard is actively applied," and it collects many cases that have been "reversed because the trial court's findings on medical and factual causation or

³⁴⁰ W. VA. CODE § 23-5-15 (2011).

³⁴¹ The 1988 amendment created an intra-agency review panel, but this panel was abolished by a law passed in 1989. See John Devlin, *Louisiana Constitutional Law*, 51 LA L. REV. 295, 314, n.91 (1990). The governing statute is LA. REV. STAT. § 23:1310.5.

³⁴² *Bell v. Mid-City Printers, Inc.*, 54 So. 3d 1226 (La. Ct. App. 2010) ("factual findings in workers' compensation cases are subject to the manifest error-clearly wrong standard of appellate review.... In applying the manifest error-clearly wrong standard, the appellate court must determine whether the fact finder's conclusion was reasonable, not whether the trier of fact was right or wrong...."). See also *Chaisson v. Philip Services Corp.*, 917 So. 2d 514 (La. Ct. App. 2005).

other issue were clearly erroneous.”³⁴³ In the present day, courts state that they accord deference to the judge.³⁴⁴ Still, cases may be found where the court applies the clearly wrong standard and reverses fact-findings in situations where a commission or court applying the substantial evidence rule would not. In one case, the court stated, “‘where documents or objective evidence so contradict the witness’s story, or the story itself is so inconsistent or implausible on its face that a reasonable fact finder would not credit the witness’s story,’ even a finding purportedly based upon a credibility determination may be deemed manifestly erroneous or clearly wrong.”³⁴⁵

Under the 1983 reform, administrative hearing agents of the Director had limited power; they were essentially mediators undertaking informal dispute resolution. If one of the parties disagreed with the Director’s recommendations, he or she could seek consideration *de novo* in the district court.³⁴⁶ In 1988 the law was amended to create hearing officers with true adjudicatory power.³⁴⁷ At first, notably, an appellate entity within the agency was provided

³⁴³ LARSON, *supra* note 164, § 130.05[6][d]. *See, e.g., Britton v. Morton Thiokol, Inc.*, 604 So.2d 130 (La. Ct. App. 1992) (applying clearly erroneous standard, court states, “the conclusion of the hearing officer, at best, rests primarily upon the statements of the chiropractor, Dr. Aaron, whose diagnosis is directly contradicted by other objective evidence, and totally inconsistent and implausible when compared with all of the medical testimony. Hence, the record discloses no reasonable basis for the rejection of the preponderate medical evidence and for a decision that, instead, returns plaintiff to light duty work. Consequently, determining that the hearing officer’s finding is clearly wrong in that respect, we reverse the award of weekly benefits”).

³⁴⁴ *Herrera v. Cajun Co.*, 960 So. 2d 1161, 1166 (La. Ct. App. 2007) (in case where WCJ credited claimant based in on observations of non-English speaking claimant’s “demeanor and testimony and to evaluate his level of understanding first-hand,” award would be affirmed, court remarking, “When findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact’s finding.”).

³⁴⁵ *See, e.g., Ardoin v. Firestone Polymers, LLC*, 56 So. 3d 215 (La. 2011) (hearing officer found as fact that claimant had not promptly reported his injury because he feared discharge; court reverses as clearly wrong) (quoting *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989)).

³⁴⁶ *Turner v. Md. Cas. Co.*, 518 So. 2d 1011 (La. 1988).

³⁴⁷ *Ross v. Highland Ins. Co.*, 590 So. 2d 1177 (La. 1991).

for, but this was abolished in 1989. The original title of the judge was hearing officer, but in 1997 the title was changed to WCJ.³⁴⁸

A cause célèbre unfolded after the 1988 enactment, as the court of appeals declared the law unconstitutional. The Supreme Court affirmed, on the narrow grounds that the legislature had impermissibly deprived the civil courts of jurisdiction. The constitution, in this regard, provided that all civil matters were to be heard in the district courts and, in the court's view, workers' compensation cases were indeed civil matters.³⁴⁹ The next month, however, the state constitution was amended to permit adjudication of workers' compensation cases outside the civil system.³⁵⁰

Prior to this 1988 reform, the trial court was the final fact-finder, and on appeal the appellate court applied the "manifest error" or "clearly wrong" standard of review.³⁵¹ The early 1983 reform, which displaced this system, and the more fundamental 1988 reform, reflected the legislature "respond[ing] to longstanding criticism of the Louisiana system and [it] brought [the] system into line with that of the vast majority of other states."³⁵² The changes also unfolded, notably, in the midst of an insurance cost crisis – employers experienced a 477% increase in the cost of insurance during the period 1980 to 1990.³⁵³

³⁴⁸ *Able v. La. Workers' Comp. Corp.*, 702 So. 2d 1388, 1389 (La. 1997) (Johnson, J., dissenting). In this case, the majority held that a WCJ could not hold unconstitutional a provision of the Workers' Compensation Act. The dissent noted that compensation hearing officers were indeed "judges," that the state constitution specifically sanctioned a special tribunal for compensation disputes, and concluded as result that a WCJ should have such power.

³⁴⁹ *Moore v. Roemer*, 567 So. 2d 75 (La. 1990).

³⁵⁰ *Long v. Ins. Co. of No. America*, 595 So. 2d 636 (La. 1992).

³⁵¹ *See, e.g., Harris v. La. Pac. Corp.*, 420 So. 2d 1220 (La. Ct. App. 1982).

³⁵² John Devlin, *Louisiana Constitutional Law*, 51 LA. L. REV. 295, 314, n.90 (1990).

³⁵³ *See History of LWCC*, "The Historical Timeline of LWCC," available at <http://www.lwcc.com/content.cfm?id=19> (last visited Jan. 7, 2012) (stating, *inter alia*, that in October 1990 the "Louisiana Workers' Compensation Corporation (LWCC), a private nonprofit mutual insurance company, is created by a constitutional amendment and legislation to save the state's failed workers' compensation system by tackling the factors that led to its demise and stabilizing costs.").

New Mexico (1986). The New Mexico constitution was amended in 1986 to allow the adjudication of workers' compensation cases by an administrative agency. A law providing for the same was passed that year. The WCJ from the outset was final fact-finder. In a 1988 case, however, the state supreme court, in an articulate decision, held that on appeal the standard of review is "whole record" substantial evidence review.³⁵⁴

This reflected more rigorous review, notably, than that undertaken when a case was adjudicated before a trial court in the years before reform. In those days, the standard of review was simply substantial evidence.³⁵⁵ The court in its 1998 case noted that the whole record review it was imposing has its basis in the post-New Deal concern that administrative agencies will abuse their power. "In most cases," the court stated, "the administrative agency performs more than one function. It may be the complainant, the prosecutor, and the fact finder. It is those dual roles that prompts the reviewing court to closely scrutinize agency decisions, rather than acting as a rubber stamp."³⁵⁶

The genesis of workers' compensation adjudication in an administrative agency was fraught with trouble. An initial attempt, in 1957, by the legislature to transfer jurisdiction from the courts to the executive branch met with failure when the governor vetoed the

³⁵⁴ *Tallman v. ABF*, 767 P.2d 363 (N.M. Ct. App. 1988) (court citing, among others, *Universal Camera Corp. v. NLRB*, 71 S. Ct. 456 (U.S. 1951)). For a case where the court, having undertaken whole record review, reversed the decision of the WCJ, see *Chavez v. City of Albuquerque*, 228 P.2d 525 (N.M. Ct. App. 2009). In this case, the claimant/appellee argued that adjudications over physician choice under the New Mexico Act should be within the WCJ's discretion, to avoid appeals and delay. The court observed that the review of WCJ decisions was substantial evidence on the whole record, and that a change such as that proposed by claimant must be undertaken by the legislature.

³⁵⁵ See, e.g., *Sanchez v. Homestake Mining Co.*, 697 P.2d 156 (N.M. Ct. App. 1985) ("It is then through this small aperture called appellate review that we examine the evidence.").

³⁵⁶ *Tallman v. ABF*, 767 P.2d 363, 367 (N.M. Ct. App. 1988). We may note editorially, however, that this concern is not, or should not, be applicable in the workers' compensation context. The present-day professional WCJ in New Mexico, Pennsylvania – and everywhere – is supposed to be a neutral fact-finder entertaining a dispute between two private parties over money. See *supra* Section IV(B). Whole record review could be valuable in the name of accountability, but of the individual judge, not the agency and its institutional interests.

legislation. He did so out of the same sort of constitutional concerns that existed in Louisiana. In a consequent lawsuit, the state supreme court sustained his decision, ruling that the creation of a commission to resolve disputes “was an unconstitutional intrusion into the domain of the judicial branch”³⁵⁷ A second attempt, coupled with a change to the constitution, in 1986, was successful. Ironically, just before the voters passed the proposed amendment, the court overruled *Mechem* and held that a workers’ compensation law would not have offended the constitution.³⁵⁸ As for the legislative motive, by one account, the populous had “suffer[ed] through nearly thirty years of court administration. . . . [M]any complaints arose over the courts’ handling of . . . claims. Many workers believed the courts were too slow and too expensive. Others believed their decisions were too costly to business”³⁵⁹

Wyoming (1986). The Hearing Examiner has been the final fact-finder under the Wyoming Act since 1986. Prior to that time, contested compensation cases were entertained by judges in the district courts. The legislature in 1986 moved “. . . the adjudicatory function . . . from our state district courts to the ‘office of independent hearing officers.’”³⁶⁰ Appeals are brought to the district courts which, like the state supreme court thereafter, undertake substantial evidence review.³⁶¹ This significant change was

³⁵⁷ NEW MEXICO GOVERNMENT (PAUL L. HIAN, CHRIS GARCIA, AND GILBERT K. ST. CLAIR, EDS.), p.287 (1994) (discussing *State ex rel. Hovey Concrete Products v. Mechem*, 316 P.2d 1069 (S. Ct. New Mexico 1957), book available at http://books.google.com/books?id=uc4ahQfT3rsC&pg=PA288&lpg=PA288&dq=new+mexico+workers+compensation+supreme+court+1986&source=bl&ots=aULWHoI6Rr&sig=f7k2-CF3U4B-6vHXtnInyiYLcsg&hl=en&ei=OGPITrLrG8fL0QH57djlBQ&sa=X&oi=book_result&ct=result&resnum=3&sqi=2&ved (last visited Jan. 7, 2012),

³⁵⁸ *Wylie Corp. v. Mowrer*, 726 P.2d 1381 (N.M. 1986).

³⁵⁹ NEW MEXICO GOVERNMENT (PAUL L. HIAN, CHRIS GARCIA, AND GILBERT K. ST. CLAIR, EDS.) 287 (1994).

³⁶⁰ *State ex rel. Wyoming Workers’ Comp. Div. v. Hollister*, 794 P.2d 886, 888 (Wyo. 1990).

³⁶¹ *Hohnholt v. Basin Elec. Power Co-op.*, 784 P.2d 233, 234 (Wyo. 1989).

accompanied by substantive changes to the law, said to have been necessary because of a fiscal crisis with the state fund.³⁶²

The Wyoming statute maintains an unusual proviso whereby a dispute can be referred to a medical panel for fact-finding. In this regard:

If the percentage of physical impairment is disputed, the division shall obtain a second opinion and if the ratings conflict, shall determine the physical impairment award upon consideration of the initial and second opinion. Any objection to a final determination pursuant to this subsection shall be referred to the medical commission for hearing by a medical hearing panel acting as hearing examiner . . .

.³⁶³

VI. LAW AND PRACTICE: STATES MAINTAINING THE ORTHODOX RULE

Twenty-five states, in the present day, hew, at least nominally, to the orthodox rule that the WCJ is a subordinate officer whose credibility determinations and finding of fact can be overturned upon intra-agency review (*i.e.*, the Commission, as in Arkansas), or trial court (as in Maryland). Among these are four of the five states where a jury trial is permitted once the administrative adjudication has been completed.³⁶⁴ This article has addressed Texas in a prior section.³⁶⁵

In some states, the orthodox rule has endured in seemingly pristine shape. Thus, the review commissions in Arkansas, Kansas, Mississippi, and New Hampshire, among others, are characterized as undertaking *de novo* review. Perhaps the system of the latter state is the most true to the original model of many decades ago. A practitioner reports:

³⁶² George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Worker's Compensation Legislation, 1986-1997*, 33 LAND & WATER L. REV. 489, 494 (1998).

³⁶³ WYO. STAT. ANN. § 27-14-405(m) (West 2011). As for the composition and duties of the medical panel, *see id.* § 27-14-616.

³⁶⁴ These states are Maryland, Ohio, Vermont, and Washington.

³⁶⁵ *See supra* Section V.

[As] a practical matter, the hearings before the New Hampshire Compensation Appeals Board are purely *de novo*. Neither the prior decision nor the transcript of the hearing are allowed into evidence. (Transcripts are used to impeach.) The evidence from the initial hearing must be presented again, and the board makes its own, independent rulings and decision. They do not expressly reject prior findings or overturn the prior decision. Frequently, the Board will reach factual determinations that are different from the department's findings³⁶⁶

In other states in this category, fact-finding power has been limited, usually in the interest of streamlining litigation. As noted previously in this article, in Illinois the Industrial Commission is the fact-finder, but the parties as of 1989 may no longer, on review, submit new evidence for consideration.³⁶⁷ In Georgia, the Board is the fact-finder, but review is not *de novo*. Instead, the ALJ's findings are to be accepted when “. . . supported by a preponderance of competent and credible evidence”³⁶⁸

In analyzing WCJ fact-finding power, an essential question is the frequency with which the commission actually exercises its powers, reassesses the facts, and materially changes the outcome. Importantly, simply because a state statute provides that the commission may reassess credibility, one cannot infer that routine overthrow of the initial WCJ findings is the actual custom and practice. In fact, in many states the practice is rare.

For example, California cases can be found where the Appeals Board substitutes its judgment for that of the WCJ.³⁶⁹ Still,

³⁶⁶ Memorandum from Edward W. Stewart, Esquire, to Author (Dec. 10, 2011) (on file with Author). Mr. Stewart adds that, given this process of review, “Since we previously tried the case, we can work with the evidence and our clients to correct prior deficiencies.” *Id.*

³⁶⁷ ILL. ADMIN. CODE tit. 50, § 7040.40 (2012).

³⁶⁸ GA. CODE ANN. § 34-9-103 (West 2011).

³⁶⁹ *See, e.g.,* Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Palacio), 2005 Cal. Wrk. Comp. LEXIS 293 (Cal. Ct. App. 2005) (WCJ, crediting employer witnesses, ruled that claimant had not shown that he was employee of

lawyers report that such an act is a rare phenomenon,³⁷⁰ particularly as the state supreme court had admonished the Board years ago that credibility should be for the hearing officer:

Although the board is entitled to reject the referee's findings on credibility matters if substantial evidence supports contrary findings, the degree of substantiality required to sustain the board in such cases should be greater than that afforded by the evidence relied upon herein. As stated [previously] by this court . . . with respect to review of referee's findings in habeas corpus cases, "A referee's findings of fact are, of course, not binding on this court, and we may reach a different conclusion on an independent examination of the evidence produced at the hearing he conducts even where the evidence is conflicting. However, where the findings are supported by 'ample, credible evidence' . . . or 'substantial evidence' . . . they are entitled to great weight . . . because of the referee's 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand . . .'"³⁷¹

As discussed below, on the other hand, states can be identified where a commission does, on occasion, or even with some frequency, utilize its fact-finding powers.

How often a commission reassesses credibility may also turn on how "political" the current collection of members is behaving. One will hear, on occasion, that "workers' compensation is so political." This statement (or cliché) may have many dimensions, but

putative employer; WCAB, however, reassessing evidence, legitimately granted reconsideration and reversed, finding that claimant was in fact employee of putative employer – court noting that "Appeals Board has the authority to reweigh the evidence following . . . independent examination of the record to reach a conclusion which differs from that of the WCJ.").

³⁷⁰ Memorandum from Ms. Leslie S. Shaw, Esquire, to Mark Cowger, Esquire (Nov. 9, 2011) (on file with Author).

³⁷¹ *Garza v. Workmen's Comp. Appeals Bd.*, 475 P.2d 451, 456 (Cal. 1970).

in the realm of fact-finding, it usually suggests that the process is highly influenced by the proclivities of the commission members who have most recently been appointed by the Governor. In recent years, for example, some members of the claimants' bar insist that the Mississippi Commission, which is composed of political appointees, is biased in favor of the employers' side.³⁷² Another such assertion was made by an Arkansas claimants' attorney, who filed a legal ethics complaint against two Arkansas Commission members, claiming that they and other commission officials were ". . . excessively pro-employer and are trying to drive him out of workers comp practice."³⁷³ Participants in the Iowa system, meanwhile, told WCRI researcher Ballantyne ". . . that the politically appointed appellate person (the division commissioner) can influence the value of cases depending on the leanings of the appointing governor."³⁷⁴

The Author's analysis in the next two sections is based on interviews as opposed to a crunching of hard numbers.³⁷⁵ A more definitive analysis would, of course, involve a study of reversal and decision modification rates. This is a statistic that can be located in a number of states, in resources such as annual reports as published on state agency websites. A review of such data, however, can leave the discrete question of substitution of credibility determinations hanging. This is so as reversal and modification rates, even when reported, do not usually set forth the reasons for such alteration.

³⁷² See *infra* Section VI(B).

³⁷³ Doug Smith & Max Brantley, *Lawyer Files Ethics Complaint Against Workers Comp Commission*, ARKANSAS TIMES (Apr. 7, 2005), <http://www.arktimes.com/arkansas/lawyer-files-ethics-complaint-against-workers-comp-commission/Content?oid=868487>

³⁷⁴ DUNCAN S. BALLANTYNE, WORKERS' COMPENSATION IN IOWA: ADMINISTRATIVE INVENTORY 92 (Workers Compensation Research Institute ed., 2004).

³⁷⁵ The Author and his assistant sought to interview or correspond with at least two specialists in the field for each state. The same answer was not always provided, but the findings set forth above suggest what seems to be the consensus view. The Author welcomes corrections or differing views.

A. Commissions/Courts That Rarely Reassess Credibility

Indiana. Workers' compensation claims under the Indiana Act are litigated before a single member of the Workers' Compensation Board, with appeal thereafter to the full board. The review before the Board is *de novo*;³⁷⁶ and it may even accept further evidence,³⁷⁷ but it rarely does so.³⁷⁸ The Board, further, would only very rarely reverse the credibility determinations of one of its single members.³⁷⁹

Maryland. Under the Maryland statute, the adjudication of the Maryland Commissioner is subject to appeal to the trial court, and a jury may even be empanelled to reassess witness credibility and the facts.³⁸⁰ "With 75 years of extensive case law behind it," one court declared, "the plenary availability of trial de novo at the circuit court

³⁷⁶ IND. CODE ANN. § 22-3-1-3 (LexisNexis 2011). See *ACLS v. Bujaroski*, 904 N.E.2d 1291, 1293 (Ind. Ct. App. 2009) (quoting *Eades v. Lucas*, 23 N.E.2d 273, 276 (Ind. Ct. App. 1939) ("If such an application is duly filed, any action of the hearing member disposing of a controversy on its merits ceases to be effective for any purpose and leaves the status of the parties unchanged . . . [A]ll parties to the proceeding are bound to know that a new finding and award to be made by the full board is necessary; that said board neither affirms nor reverses an award made by one member, but 'shall review the evidence, or, if deemed advisable, hear the parties at issue, their representatives and witnesses, and make an award and file the same with the finding of the facts on which it is based . . . ' Where an application for review of an award by one member is filed, the application . . . then stands for hearing before the full board, and is to be heard de novo.")). See also, e.g., *Shultz Timber v. Morrison*, 751 N.E.2d 834, 838 (Ind. Ct. App. 2001) (court remarking, ". . . the Board has an obligation to enter specific findings of basic facts to support its finding of ultimate fact and conclusion of law . . . The Board's findings must be stated with sufficient specificity upon contested issues so as to allow intelligent review by a reviewing court.").

³⁷⁷ 631 IND. ADMIN. CODE § 1-1-15 (West 2011).

³⁷⁸ Memorandum from Sharon F. Murphy, Esquire, to Author (Dec. 6, 2011) (on file with Author).

³⁷⁹ Memorandum from Sharon F. Murphy, Esquire, to Author (Dec. 6, 2011) (on file with Author). Memorandum from G. Terence Coriden, Esquire, to Author (Jan. 6, 2012) (on file with Author).

³⁸⁰ MD. CODE ANN., LAB. & EMPL. § 9-745(b),(c) (West 2011). The formal term in Maryland is not "appeal," but, instead, "petition for judicial review." Comments of Mr. Richard Lafata, Esquire, to Author (Aug. 18, 2011) (on file with Author).

level is not to be doubted, even if its statutory pedigree is more implicit than explicit.”³⁸¹ According to Chief Commissioner Karl Aumann, however, only 6% of commissioner decisions are appealed, and of these, 50% are settled prior to trial.³⁸² Thus, the trial judge or jury, the ultimate fact-finder, in the vast majority of cases will never have an opportunity to exercise its power.

Missouri. Under the Missouri Act, the Commission, not the ALJ, is the “. . . sole judge of the credibility of witnesses and the weight and value to give to the evidence.”³⁸³ The same opinion recounts the rules that the “. . . Commission, as the finder of fact, is free to believe or disbelieve any evidence [I]n conducting our review, this Court reviews the findings of the Commission; however, ‘[i]f the Commission incorporates the [ALJ’s] opinion and decision, the reviewing court will consider the Commission’s decisions as including those of the [ALJ].’”³⁸⁴

Still, appellate court opinions have stressed for a number of years the importance of deference to the hearing officer who actually encountered the witness. “We agree . . . ,” a recent court opinion announced, that the “. . . Commission should duly consider an ALJ’s credibility determinations, and should articulate any reasons for differing therefrom as an aid to judicial review;” and the Commission

³⁸¹ Gen. Motors Corp. v. Bark, 555 A.2d 542, 545 (Md. 1989).

³⁸² Chief Commissioner R. Karl Aumann, Remarks while sitting on the Comparative Law Panel Nat’l Ass’n of Workers’ Comp. Judiciary Coll. (Aug. 22, 2011) (on file with Author). For a *tour de force* case in which the trial court came to a different factual conclusion from that of the Commission, see Bd. of Educ. v. Spradlin, 867 A.2d 370 (Md. Ct. Spec. App. 2005). There, the Commissioner determined that the claimant, who had been injured in an altercation with a co-worker, did not suffer an injury arising in the course of employment. The trial judge, after a bench trial, determined the opposite. In the course of a long opinion affirming, the appeals court stated, among other things, “[s]ince both the initial fact finder and the supervening fact finder enjoy the same prerogative independently to assess credibility and independently to weigh evidence, they may with equal validity reach different conclusions even upon the same record. A fortiori, they may do so when the witnesses testify afresh at the trial de novo, quite possibly with differences the second time around both in the substance of their testimony and in their demeanors as they testify.” *Id.* at 378, n.4.

³⁸³ Vice v. Advantage Waste Servs., Inc., 298 S.W.3d 145, 149 (Mo. Ct. App. 2009).

³⁸⁴ *Id.* See MO. ANN. STAT § 287.495 (West 2011).

cannot “. . . callously ignore, capriciously reject, or arbitrarily disregard . . .” the fact-findings of the ALJ.³⁸⁵ The leading case that informs this thinking dates from 1995:

However, to say that the Commission is not *obligated* or *bound* to defer to the ALJ’s credibility determinations is not to say they may be slighted or ignored, either by the Commission or the appellate court. Credibility is clearly a consideration for both the ALJ and the Commission, and the Commission should not make its credibility calls in a vacuum . . . Furthermore, in reviewing the award of the ALJ, the Commission should properly consider that the ALJ “had the witnesses before him and was thus in a position which gave him a great vantage ground over the members of the Commission who afterwards had [only] the opportunity of reading [a transcript of] the testimony.”³⁸⁶

³⁸⁵ *Garrett v. Treasurer of Missouri*, 215 S.W.3d 244, 247, 250 (Mo. Ct. App. 2007) (quoting *Davis v. Research Med. Ctr.*, 903 S.W.2d 557, 570-71, 574 (Mo. Ct. App.1995)). Nevertheless, the “. . . Commission need not defer to ALJ findings, credibility or otherwise, but is authorized to reach its own decisions.” *Id.* at 247.

³⁸⁶ *Davis v. Research Med. Ctr.*, 903 S.W.2d 557, 569 (Mo. Ct. App. 1995). The state supreme court, in a subsequent decision, modified the case somewhat for the manner in which the appellate court reviews the Commission’s final fact-findings. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-23 (Mo. 2003) (“A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence . . . Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.”). In *Hampton*, the ALJ granted benefits, but limited them to permanent partial disability. The Commission reassessed credibility, including that of the claimant, and awarded permanent total disability. The Commission was affirmed despite an employer argument that the award “. . . was not supported by competent and substantial evidence and the award was against the overwhelming weight of the evidence.” *Id.* at 221.

Veterans of Missouri practice report that it is rare for the Commission to reassess credibility. “Seldom,” one defense lawyer writes, “will you see the commission take issue with any credibility findings the judge makes on the live witnesses, because, I believe, they think the judge is in the superior position to make that call.”³⁸⁷ A claimant’s attorney, meanwhile, reports that the “Commission is required to defer to the ALJ on credibility determinations of witnesses that testify in-person. While this deference is not absolute, I would say that it is ‘rare’ . . . for the Commission to reverse an ALJ on the credibility determination of [such] a witness.”³⁸⁸

Treatise writer Korte remarked that the Commission in recent years has “made it clear, in both public and private statements, that it did not intend to go out of its way to reverse ALJ awards on any basis – it believed in the importance of letting the ALJs do their jobs without fear of undue interference.”³⁸⁹ He continues:

[W]hen this Commission has reversed an ALJ’s credibility findings, it has almost always been very careful to point to specific inconsistencies between the testimony of the witness and other evidence in the record (usually medical evidence or the witness’s deposition testimony) as the basis for its reversal. The commission has consistently refrained from making judgment calls based [on] such things as a witness’s interest in the outcome of the claim, and . . . never on the witness’s appearance, attitude or demeanor.³⁹⁰

Missouri experts stress, however, that both the Commission and Appeals Court have a somewhat different rule when it comes to assessing the credibility of experts, such as physicians who testify via

³⁸⁷ Memorandum from Kip Kubin, Esquire, to Author (Dec. 7, 2011) (on file with Author).

³⁸⁸ Memorandum from Todd C. Werts, Esquire, to Mark Cowger, Esquire (Dec. 2, 2011) (on file with Author).

³⁸⁹ *Id.*

³⁹⁰ Memorandum from Michael Korte, Esquire, to Author (Dec. 7, 2011) (on file with Author).

deposition. In this realm, they accord less deference to fact-findings.³⁹¹

New York. Under New York law, the Board “[is] not bound by the WCLJ’s credibility determinations and [is] entitled to make its own findings.”³⁹² The Board possesses “broad authority to resolve factual issues based on credibility of witnesses and draw any reasonable inferences from the evidence in the record.”³⁹³

According to one WCLJ, “it is exceedingly rare [though not unheard of] that [the Board] would disturb a well-supported credibility finding.”³⁹⁴ An experienced defense lawyer posits, on the other hand, that “Board reversals of WCLJs on credibility questions occur more than just occasionally.”³⁹⁵

One of the Board’s “guiding principles” since 2008 has been to recall that the judge “is in the best position to review credibility,” and hence that a “reversal on credibility should be based on (a) a specific inconsistency, or (b) otherwise state why a witness is found to be incredible, or (c) otherwise state why a witness is found to be

³⁹¹ See *infra* Section VII(B).

³⁹² *In re Ortiz v. Five Points Correctional Facility*, 762 N.Y.S.2d 535 (2003). The statute that provides for the powers and duties of the New York Board’s judges is found at N.Y. WORKERS’ COMP. LAW § 150 (McKinney 2006).

³⁹³ *In re Myers v. Eldor Contracting Co.*, 705 N.Y.S.2d 108, 109 (N.Y. 2000).

³⁹⁴ Memorandum from Hon. John Farrell to the Author (Aug. 26, 2011) (on file with Author).

³⁹⁵ Memorandum from Ronald A. Weiss, Esq., to the Author (Jan. 11, 2012) (on file with Author). For cases where the Board reassessed credibility and reversed the WCLJ’s decision, see *Pavone v. Advance Auto Parts*, 912 N.Y.S.2d 771 (N.Y. 2010) (WCLJ found as fact that claimant injured his back while lifting and loading auto parts, but Board reversed, stating, “Although there is conflicting testimony in the record regarding the nature and frequency of the deliveries, lifting and loading that claimant performed, we accord deference to the Board’s credibility determinations and its resolution of conflicting evidence.”); *Caballero v. Fabco Enters.*, 909 N.Y.S.2d 167 (N.Y. 2010) (reversing WCLJ’s rejection of claimant’s testimony that she was “injured when she failed to navigate between a shoe display and a large box and she fell into the box,” Board found that she did suffer such injury); *Fortunato v. Opus III VII Corp.*, 867 N.Y.S.2d 252 (N.Y. 2008) (crediting claimant, a salesman, WCLJ found that he “suffered injuries after he was struck by a car as he attempted to cross a street while out on a sales call,” but the Board found him not credible).

credible, which is supportable by the record. It should not be merely conclusory.”³⁹⁶ This principle also provides that “[i]n reversing, the writer or commissioner should state that basis clearly.”³⁹⁷

Oregon. Under the Oregon Act, “The board engages in that same weighing [of evidence] in its own evaluation of the record on *de novo* review.”³⁹⁸ Specialists in the field, however, report that reassessments of credibility are relatively rare. According to a veteran practitioner, “If an ALJ has made a credibility determination, the Board will give deference to it and reversal of such is rare. If the ALJ did not make a specific credibility determination, the Board will review the record and make its own determination.”³⁹⁹ Another expert states, “The Board takes the role of the ALJs seriously when they make credibility assessments That being said there are times when the Board will look at contemporaneous records or other parts of the transcript to make its own credibility determinations [T]he Board rarely reverses an ALJ when that ALJ specifically makes a credibility determination as part of the opinion, particularly based upon demeanor.”⁴⁰⁰

³⁹⁶ NEW YORK WORKERS’ COMPENSATION BOARD, GUIDING PRINCIPLES (as summarized in a Memorandum to the Author from Timothy P. Schmidle, Ph.D. (Aug. 30, 2011) (on file with Author)).

³⁹⁷ *Id.*

³⁹⁸ *Pietrzykowski v. Albertsons, Inc.*, 157 P.3d 1268 (Or. 2007). See OR. REV. STAT. § 656.295(6) (2011). When the WCRI assessed the Oregon system in 1995, they considered the rate of appeals from ALJ decisions to the Board to be high. According to the authors, “system participants have several explanations for the appeal rate. First, the review is *de novo* based upon the written record” DUNCAN S. BALLANTYNE & JAMES F. DUNLEAVY, WORKERS’ COMPENSATION IN OREGON: ADMINISTRATIVE INVENTORY 101 (Workers Compensation Research Institute ed., 1995).

³⁹⁹ Memorandum from Chris Frost, Esquire, to Mark Cowger, Esquire (Nov. 9, 2011) (on file with Author).

⁴⁰⁰ Memorandum from Aaron Clingerman, Esquire, to Mark Cowger, Esquire (Nov. 10, 2011) (on file with Author). Mr. Clingerman reports that the Oregon Board often signals its deference to the ALJ by recognizing a leading appellate case that emphasizes the importance of the ability of the judge to have assessed demeanor. See *Erck v. Brown Oldsmobile*, 815 P.2d 1251, 1254 (Or. 1991) (remarking, “Claimant is correct in his argument that on *de novo* review, a reviewing entity normally gives deference to findings made below, especially when they relate to witness credibility.”).

South Carolina. Under the South Carolina Act, the “Appellate Panel is the ultimate fact finder . . . and is not bound by the Single Commissioner's findings of fact The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel.”⁴⁰¹ A veteran claimant’s attorney, however, reports that “credibility findings made by the original hearing commissioner are rarely overturned by the commission’s appellate panel.”⁴⁰² A defense attorney agrees, stating that for the full commission to reverse “is very rare in South Carolina. Our commission is relatively collegial and I think they give great weight to the findings of the single commissioner on credibility issues. On matters of law or non-credibility findings they are more apt to reverse.”⁴⁰³

Another defense attorney advised this Author that the full commission will indeed, on occasion, reverse on credibility.⁴⁰⁴ He recounted a recent case in which the claimant testified that he had injured his leg when he fell from a tree in the midst of his work. The evidence of the employer (whom he represented) was that claimant had been dared to jump twenty feet on a bet of \$20.00. The single commissioner credited the claimant, but the full commission, on a “cold record,” believed the employer’s witnesses and disallowed the claim.⁴⁰⁵

⁴⁰¹ Hargrove v. Titan Textile Co., 599 S.E.2d 604, 611 (S.C. Ct. App. 2004). See S.C. CODE ANN. § 42-3-20 (C) (2011).

⁴⁰² Memorandum from Ken W. Harrell, Esquire, to Mark Cowger, Esq. (Nov. 14, 2011) (on file with Author).

⁴⁰³ Memorandum from O. Shayne Williams, Esquire, to Mark Cowger, Esquire (Nov. 9, 2011) (on file with Author).

⁴⁰⁴ Interview with Mikell H. Wyman, Esquire (Aug. 22, 2011) (on file with Author). Mr. Wyman ventured that reversals on the grounds of credibility were “somewhere in between” the proffered choices of rare or occasional.

⁴⁰⁵ Zepeda-Cepeda v. Priority Landscaping and Lawn Care, No. 2011-UP-229, 2011 S.C. App. LEXIS 266, *8 (S.C. Ct. App. 2011) (rejecting claimant’s arguments that employers witnesses were not credible: “In workers’ compensation cases, the Full Commission is the ultimate fact finderThe final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.”) (quoting Shealy v. Aiken County, 532 S.E.2d 438 (S.C. 2000)).

Utah. Under the Utah Act, the Appeals Board of the Commission is the final fact-finder. “[T]he Commission,” indeed, “need not hold further hearings, and in its review of the record made before the Administrative Law Judge, may make its own findings on the credibility of the evidence presented.”⁴⁰⁶ Still, workers’ compensation lawyers find that the Appeals Board substitutes its findings only on a rare or occasional basis.⁴⁰⁷

Virginia. The findings of the Deputy Commissioner in Virginia may be overthrown by the full commission,⁴⁰⁸ but in practice reassessment of credibility is said to be rare.⁴⁰⁹ Still, Deputy

⁴⁰⁶ *Gates v. Labor Comm’n*, No. 20010943-CA, 2002 Utah App. LEXIS 268 (Utah Ct. App. 2002) (quoting *U.S. Steel Corp. v. Indus. Comm’n*, 607 P.2d 807, 811 (Utah 1980)) (rejecting claimant’s argument that he was “substantially prejudiced by the Commission’s decision to substitute its own findings and conclusions for those of the Administrative Law Judge (ALJ) . . .”). In that case, an ALJ found that the claimant, Anderson, was not an employee, but instead an independent contractor of defendant, Gates Sr. The Commission reversed, finding that Anderson was indeed an employee of that defendant. The court was of the view that employer’s appeal was deficient, as it failed to acknowledge the evidence that the Commission had relied upon. “In the absence of properly marshaled evidence,” the court stated, “even though the evidence relied upon by Gates Sr. might support a different finding, we must assume that the Commission’s findings are correct.” *Id.* at *3.

For a case that construed an earlier version of the law, to the same effect, see *U.S. Steel Corp. v. Indus. Comm’n*, 607 P.2d 807, 810 (S. Ct. Utah 1980) (“Our statutes do not mandate or indicate that the Commission is bound by the findings of the Administrative Law Judge when the evidence is conflicting. On the contrary, Section 35-1-82.54 provides that when a case is referred to the full Commission, it shall review the entire record, and may make its own findings of fact and enter its award thereon. In doing so it may, in its discretion, take further evidence.”).

⁴⁰⁷ Memorandum from Philip B. Shell, Esquire, to Mark Cowger, Esquire (Nov. 10, 2011) (on file with Author); Memorandum from K. Dawn Atkin, Esquire, to Mark Cowger, Esquire (Nov. 10, 2011) (on file with Author); Memorandum from Richard R. Burke, Esquire, to Mark Cowger, Esquire (Nov. 10, 2011) (on file with Author).

⁴⁰⁸ *Karban v. Universal Fiber Systems*, No. 2094-09-3, 2010 Va. App. LEXIS 274 (Va. Ct. App. 2010). See VA. CODE ANN. § 65.2-201(2005) (entitled, “General duties and powers of the Commission”).

⁴⁰⁹ Memorandum from Ms. Annie Williams to Author (Nov. 10, 2011) (on file with Author) (quoting Dan Lynch, Esquire). According to Ms. Williams, reassessment of credibility and the fact is

Commissioners are typically cautious in this regard, and will often be mindful to phrase findings of fact in explicit credibility terms to avoid reversal. One of the Virginia Commissioners, in seeming acknowledgement of the Deputy Commissioner's ability to better judge credibility, will likely remand a case where the fact-finding process seems incomplete or yielded a result that is somehow unsatisfactory.⁴¹⁰ These behaviors are likely informed by the courts' emphasis on the common law precept about the importance of assessing demeanor:

Although the commission is not bound by the credibility determination of a deputy commissioner, the commission cannot reject the determination arbitrarily "If the commission does not follow the deputy commissioner's findings when these findings are based on a determination of a key witness's demeanor or appearance in relation to credibility, the commission must offer a rationale for its reversal and demonstrate on the record how the commission found the evidence [in]credible."⁴¹¹

rare if non-existent . . . The three Commissioners almost always rely on the facts as presented to the Deputy Commissioners. They believe that the Deputy Commissioners are better able to judge the credibility of the witnesses, claimant, etc. as they saw the testimony in person and determined the facts below. Most of the appeals that go to the full Commission are regarding interpretation of the statutes and rules rather than facts. As an addition, in Virginia, from the level of the full Commission, cases can be appealed to the Virginia Court of Appeals and they absolutely never look at facts, only matters of law.

Id.; Memorandum from Robert Rapaport, Esquire, to Author (Nov. 22, 2011) (on file with Author) ("The rule for the VWC is to give deference to the Deputy Commissioner's finding on credibility. I believe it is safe to say that the full Commission rarely reverses a Deputy's finding on credibility.").

⁴¹⁰ Interview with Hon. James Szablewicz, Virginia Chief Deputy Commissioner (Aug. 23, 2011).

⁴¹¹ *Karban*, 2010 Va. App. LEXIS 274. See VA. CODE ANN. § 65.2-201 (2005) (entitled, "General duties and powers of the Commission").

B. Commissions That Reassess Credibility With Some Frequency

A number of states are better known as having commissions or boards that are willing, with some regularity, to reassess WCJ credibility determinations and alter awards as a consequence. However, one should recognize that, simply because a commission may potentially exercise its credibility reassessment powers, hardly means that the judge and the parties do not approach trial with seriousness. As one respected judge remarked to this Author, for example, being reversed on credibility is a gravely considered matter. “My response” in such situations, he quipped, is that “the decision was *right* when it left *my* desk.”

It is likely that some WCJs in this position chafe at having their findings reassessed, reversed, or changed by commission members. This is so because, in the present day, the WCJ will likely be a career professional. He or she will hence be an expert in both the law and in the craft of decision-making. The commission member in charge of reviewing the case, in contrast, may not necessarily bear these traits because of the political nature of the office.

Arkansas. The Arkansas Commission is “the fact finder, and as such has a duty and statutory obligation to make specific findings of fact on *de novo* review based on the record as a whole”⁴¹² Thus, the ALJ’s credibility determinations and findings may be overthrown upon review. Such an action is said to occur on occasion, though as might be expected, the percentage varies among the thirteen Arkansas ALJs.⁴¹³ A change in the appellate structure occurred in 1979, when appeals ceased going to county circuit courts. Appeals from the Commission are now prosecuted directly to the court of appeals.⁴¹⁴

⁴¹² *Wilson v. Cargill, Inc.*, 873 S.W.2d 171, 172 (Ark. Ct. App. 1994) (italics in original).

⁴¹³ Memorandum of James A. Arnold, II, Esquire, to Mark Cowger, Esquire. (Nov. 9, 2011) (on file with the Author).

⁴¹⁴ *See Scarbrough v. Cherokee Enter’s*, 816 S.W.2d 876 (Ark. 1991). The court noted that its scope review consists of reviewing the Commission’s decision and, in addition:

ignoring the findings of the ALJs . . . While we have gone so far as to allow the Commission to rely on an ALJ’s stated

The ability of the Commission to overrule credibility determinations has been treated in the state supreme court. In a 1987 opinion, a concurring justice objected to the redundancy of fact-finding at two levels, particularly when the Commission did not see or hear the witnesses, and because the Commission was a political entity.⁴¹⁵ Superimposed upon this unsatisfactory state of affairs was the fact that the judging of compensation cases had become professionalized, with the title “referee” changed to ALJ, and with the ALJ exclusively undertaking the actual personal exposure to the parties’ witnesses.⁴¹⁶ However, when the court again squared upon

perceptions of the “demeanor, conduct, appearance, or reaction at the hearing,” it has not been held that a court may use an ALJ’s remarks to reverse a credibility determination made by the Commission.

Id. at 877.

⁴¹⁵ *Webb v. Workers’ Comp. Comm’n*, 733 S.W.2d 726 (Ark. 1987) (Newbern, J., concurring). With regard to the political make-up of the commission, the concurring opinion stated:

Requiring management and labor representatives on such a reviewing body, so analogous to a court, is like assuring that our court of appeals or this court be composed of equal numbers of plaintiffs’ advocates and defendants’ advocates in tort cases. In any body exercising the function of legal review, the public is entitled to, and should, demand the putting aside of social philosophies which are the stuff of legislation

Id. at 728.

⁴¹⁶ *Id.* at 727-28. The justice stated, among other things:

It would surely be wasteful . . . to hold the hearing with the live witnesses a second time, so the decision of the commission is much like that of an appellate court; it operates from a cold, or at best, warmed-over, record [created by the ALJ]

T]he ALJ position has been upgraded. The ALJ is no longer just an aide to the commission or a referee

Despite the fact that it is the ALJ who hears the witnesses and has the opportunity to see them face to face, we persist in holding that his or her decision is meaningless when a decision of the commission is on appeal . . .

..

this issue just four years later, it declined to overthrow the statute.⁴¹⁷ The court relied upon *stare decisis*, but noted also that the U.S. Supreme Court had ratified the idea that an administrative agency may legitimately overthrow the findings of its subordinate agent.⁴¹⁸

Georgia. The ALJ of the Georgia Board is not the final fact-finder. Upon the losing party's appeal, the three-member Board (the Appellate Division), though not undertaking *de novo* review, may reassess credibility. The statute provides that the "findings of fact made by the administrative law judge . . . shall be accepted by the appellate division where such findings are supported by a preponderance of competent and credible evidence . . ."⁴¹⁹ The change from *de novo* review to the present law occurred in 1994.

The well-respected Georgia Board is known to reassess the facts on occasion.⁴²⁰ A veteran Atlanta attorney posits that the "Board can, and does, act to reverse some ALJ decisions, but not strictly because it simply interprets the evidence differently. Rather, I think the Appellate Division takes very seriously the notion that the ALJ is in the best position to view the evidence and make factual

[W]e should be thinking of creating a system in which the decisions of the ALJs are like those of juries, to the extent that the factual determinations should be reviewed only to determine if they are supported by substantial evidence

Id. See also Hamby v. Everett, 627 S.W.2d 266, 268 (Ark. Ct. App. 1982) (Glaze, J., dissenting) ("How this rule on review has become so well established is a real conundrum [A] Board or Commission which reviews a cold record on appeal is in a poor position to weigh the credibility of any witness.").

⁴¹⁷ Scarbrough v. Cherokee Enters., 816 S.W.2d 876 (Ark. 1991).

⁴¹⁸ *Id.* (citing Universal Camera Corp. v. NLRB, 71 S. Ct. 456 (U.S. 1951)).

⁴¹⁹ GA. CODE ANN. § 34-9-103 (2009). For a case in which the Board reversed the ALJ's finding with regard to the occurrence of a traumatic back injury, see *Georgia Mountain Excavation, Inc. v. Dobbins*, 710 S.E.2d 205, 206 (Ga. Ct. App. 2011) (noting, "the Appellate Division is authorized to assess witness credibility, weigh conflicting evidence, and draw factual conclusions different from those reached by the [administrative law judge] who initially heard the dispute." (citation omitted)).

⁴²⁰ Memorandum of Gary M. Kazin, Esquire, to Mark Cowger, Esquire (Jan. 9, 2012) (on file with Author); Memorandum of Kelley Benedict, Esquire, to Mark Cowger, Esquire (Jan. 9, 2012) (on file with Author).

determinations.”⁴²¹ The Board will, he continues, “review the totality of the evidence to determine if it supports the particular legal issues and burdens of proof involved and, on occasion, will find the evidence lacking. In my experience, that is not a common occurrence, and is not done unless there is a fairly obvious and legally significant flaw in the underlying evidence.”⁴²²

With regard to the change from *de novo* review, the likely intent “was to reduce to some degree the appeals of ALJ decisions which, under a true ‘de novo’ system, virtually assured an appeal in every case.”⁴²³ WCRI researchers, reflecting on the change in 1995, observed that it came in the wake of a cost and litigation crisis—in the 1980s “[b]oth indemnity and medical costs spiraled upward, attorney involvement and hearing requests increased significantly, and lump sum settlements occurred even more frequently.”⁴²⁴ An earlier, pre-reform WCRI study commenting upon *de novo* review, found that “[m]ost public and private respondents characterize this as ‘a second bite of the apple.’” Still, “Although many public and private respondents express some dissatisfaction with *de novo* review, they do not consider it a significant problem.”⁴²⁵

Illinois. Reassessment of the facts is said to occur with some regularity under the Illinois practice. In that state, cases are litigated before an Arbitrator of the Workers’ Compensation Commission. After the Arbitrator issues his decision, review (not “appeal”) may be undertaken by the Commission, which has “original jurisdiction” and is not bound by credibility determinations of the Arbitrator.⁴²⁶ The

⁴²¹ Memorandum of Dan Kniffen, Esquire, to Author (Dec. 6, 2011) (on file with Author). The Chair of the Georgia Board concurred with Mr. Kniffen’s assessment. Memorandum of Hon. Rick Thompson, to Author (Dec. 6, 2011) (on file with Author).

⁴²² *Id.*

⁴²³ Memorandum of Dan Kniffen, Esquire, to Author (Dec. 6, 2011) (on file with Author).

⁴²⁴ JOHN A. GARDNER, CAROL A. TELLES & GRETCHEN A. MOSS, COST DRIVERS AND SYSTEM CHANGE IN GEORGIA, 1984-1994 32 (1995).

⁴²⁵ DUNCAN S. BALLANTYNE & STACEY M. ECCLESTON, WORKERS’ COMPENSATION IN GEORGIA: ADMINISTRATIVE INVENTORY 72 (Workers Compensation Research Institute ed., 1992).

⁴²⁶ 820 ILL. COMP. STAT. § 305/19. See *R&D Thiel v. Illinois Workers’ Comp. Comm’n* (Robledo), 923 N.E.2d 870 (Ill. 2010) (noting that the

Act does provide that, “Whenever the Commission adopts part of the Arbitrator’s decision, but not all, it shall include in the order the reasons for not adopting all of the Arbitrator’s decision.”⁴²⁷ An appeal thereafter may be taken to the district court, and then to the appellate courts.⁴²⁸ The Commission is the final fact-finder. The court, on appeal from the Commission decision, accords deference to the Commission decision and rarely reverses.⁴²⁹

Prior to 1989, the Commission could accept certain additional evidence not presented to the Arbitrator. In that year, the law was amended to disallow such *post hoc* submissions.⁴³⁰ A 1984 amendment, notably for the first time, disallowed the practice of freely submitting any evidence to the Commission.⁴³¹ One reason for these changes was expediting litigation in the midst of a litigation crisis;⁴³² a related concern was that the ability to submit evidence upon review led to lawyers intentionally withholding vital evidence until the case reached the Commission stage.⁴³³

According to a number of attorney reports, from to twenty to thirty-three percent of Arbitrator decisions are modified on review by

“Commission exercises original jurisdiction and is not bound by an arbitrator’s findings,” and that “when, as in this case, the Commission gives its reasons for making credibility findings contrary to those made by the arbitrator, our inquiry on review is whether the findings are against the manifest weight of the evidence.”).

⁴²⁷ *Id.*

⁴²⁸ For a broad overview, see Brad A. Elward, *Workers’ Compensation Reviews and Appeals: A Review and Suggestions for Change*, 22 N. ILL. U. L. REV. 493 (2002).

⁴²⁹ Comments of Matthew Schiff, Esquire, to Author (Aug. 10, 2011) (on file with Author). For composition of the Commission, see § 820 ILL. COMP. STAT. 305/13.

⁴³⁰ Brad A. Elward, *Workers’ Compensation Reviews and Appeals: A Review and Suggestions for Change*, 22 N. ILL. U. L. REV. 493 (2002).

⁴³¹ See *Adams Truck Lines v. Indus. Comm’n*, 550 N.E.2d 1148 (Ill App. Ct. 1990) (Barry, P.J., concurring).

⁴³² *Id.* (concurring) (stating, in reference to 1984 amendment, “Against this backdrop of an increasing caseload and a lengthening delay between the filing of cases and their final resolution, the legislature amended” the law).

⁴³³ Comments of Kim Presbrey, Esquire, to Author (Nov. 28, 2011) (on file with Author).

the Commission.⁴³⁴ An attorney summarizing the Industrial Commission's 2008 statistics stated as follows:

Interestingly, when an injured worker filed an appeal to the Review level before the Commissioners, benefits were increased only 15% of the time. In appeals by the worker, benefits were actually reversed or decreased in 13% of the cases. The great majority of appeals by the worker resulted in no change of the Arbitration Decision in 72% of decisions in appeals filed by the employee.

In employer appeals to the Review stage, benefits were affirmed almost 66% of the time. However, the employer was successful in obtaining a reduction or a decrease in benefits awarded from the Arbitration Decision in 21% of the appeals filed by an employer. Outright reversals were obtained in only 6% of the Review Decisions filed and benefits were actually increased in 6% of the decisions appealed from.⁴³⁵

As might be expected, some Arbitrators have their decisions changed more than others. The decision can and may well be changed in whole or in part. Most frequently, the change in findings of fact will surround expert medical testimony. For example, the Arbitrator will have said that the testimony of one particular medical expert establishes that "by a preponderance of the evidence, some fact exists," but the Commission will reverse and find as fact that the burden was not met and that no such fact exists. Less frequently, the Commission will change findings of fact surrounding such things as

⁴³⁴ Comments of Matthew Schiff, Esquire, to Author (Aug. 10, 2011) (on file with Author); Comments of David Menchetti, Esquire, to Author (Nov. 28, 2011) (on file with Author); Comments of Kim Presbrey, Esquire, to Author (Nov. 28, 2011) (on file with Author).

⁴³⁵ Brad Bleakney, *2008 Annual Report Illinois Workers Compensation Commission*, Larson's Emerging Issues & Trends (Blog) (July 8, 2009) available at <http://www.lexisnexis.com/community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2009/07/08/2008-annual-report-illinois-workers-compensation-commission.aspx>.

the claimant's statement that an accident did indeed occur when the employer had questioned the allegation.⁴³⁶

Lawyers are, of course, keenly aware that the Illinois Arbitrator does not make the final and binding factual determinations. If a lawyer believes that the Arbitrator to decide the case is unlikely to find facts in his favor, he may well "try the case for review," *i.e.*, litigating before the Arbitrator but fully expecting to be rearguing credibility upon review by the Commission.⁴³⁷

The rule that the Commission exercises *de novo* review has long been established, as leading cases over many decades firmly established the principle.⁴³⁸ Illinois courts have not, however, always shown fidelity to the precept.⁴³⁹ In a 1988 case, the state supreme court produced language to the effect that where the Commission changes the Arbitrator's credibility-based fact-findings, the

⁴³⁶ Comments of Matthew Schiff, Esquire, to Author (Aug. 10, 2011) (on file with Author).

⁴³⁷ *Id.*

⁴³⁸ *Rodriguez v. Indus. Comm'n*, 21 N.E.2d 741, 743 (Ill. 1939) ("the arbitrator in his consideration of the case is but the agent of the Commission, similar in character to that of a master in chancery or a referee in bankruptcy, so far as the character of the functions performed by the arbitrator is concerned."). In this case, the arbitrator awarded claimant steelworker an award on his lung disease claim, crediting claimant's physician that the ailment was from shop dust. The commission reversed, having recalled for testimony the employer's physician. That expert had studied x-rays and had testified at both levels (especially after seeing a theretofore withheld x-ray) that claimant had advanced TB. The circuit court, in an activist gesture, reversed the commission, remarking that the commission could not reverse the arbitrator in such circumstances. The Supreme Court reversed, stating that commission review is "sui generis," and that (1) that such review is *de novo*; and that (2) its decision was not, in any event, contrary to the manifest weight of the evidence. *Id.*

See also Berry v. Indus. Comm'n, 459 N.E.2d 963 (Ill. 1984) (in case where circuit court had insisted that the "arbitrator is best to judge credibility," court reverses, stating, it "is the peculiar province of the Industrial Commission to determine the credibility of witnesses, to weigh the testimony, and to determine the weight to be given to the evidence. Regardless of whether or not the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings.") (court also noting institutional expertise of commission).

⁴³⁹ Thanks to David Menchetti, Esq., Chicago, IL, who provided to the Author his CLE presentation, *The Commission Reverses the Arbitrator: Extra Scrutiny?* (on file with Author).

reviewing court will apply “an extra degree of scrutiny” to see if such action was justified.⁴⁴⁰ This was so held in the controversial case, *Cook v. Industrial Commission*.⁴⁴¹ Thereafter, for a period, a number of decisions seemed to exercise such review, or at least to have responded to *Cook*’s “extra degree of scrutiny” approach.⁴⁴²

In the early 1990s, however, the court retreated from the rule and insisted that it had “repudiated” *Cook*.⁴⁴³ Still, within another decade, in 2007, the court stated (perhaps ill-advisedly) that it “may be time to reconsider” the Commission’s *de novo* power.⁴⁴⁴ In a 2009 case, however, the court insisted that such language was dicta, and again admonished that *Cook* was repudiated.⁴⁴⁵

⁴⁴⁰ *Cook v. Indus. Comm’n*, 531 N.E.2d 379, 384 (Ill. App. Ct. 1988).

⁴⁴¹ *Id.* (“While recognizing that the Commission is in no way bound by an arbitrator’s decision, we note that the arbitrator’s decision is not without legal effect. . . . Further, we note that in performing its role as reviewer of the record, the Commission is at a practical disadvantage as compared to the arbitrator. The arbitrator, having heard the live testimony, is actually in a better position to evaluate that evidence. . . .Accordingly, in cases where the Commission has rejected the arbitrator’s factual findings without receiving any new evidence, we apply an extra degree of scrutiny to the record in determining whether there is sufficient support for the Commission’s decision.”).

⁴⁴² *Adams Truck Lines v. Indus. Comm’n*, 550 N.E.2d 1148 (Ill. App. Ct. 1990); *Kress Corp. v. Indus. Comm’n*, 545 N.E.2d 1046 (Ill. App. Ct. 1989).

⁴⁴³ *Komatsu Dresser Co. v. Indus. Comm’n*, 601 N.E.2d 1339, 1341 (Ill. App. Ct. 1992); *Dillon v. Indus. Comm’n*, 552 N.E.2d 1082 (Ill. App. Ct. 1990).

⁴⁴⁴ *S&H Floor Covering, Inc. v. Workers’ Compensation Comm’n*, 870 N.E.2d 821 (Ill. App. Ct. 2007). In this case, the arbitrator ruled for the employer, but on review the commission found for the employee. The circuit court affirmed, as did the appeals court. The court, however, threw out a mischievous invitation:

[E]mployer argues we should review our precedent that the Commission is not required to give deference to the arbitrator’s findings of credibility. In the recent past, this court has been presented with more than a few cases where the Commission has made credibility findings contrary to those of the arbitrator. It may very well be time to reconsider the Commission’s prerogative to determine credibility regardless of the arbitrator’s decision.

Id. at 827.

⁴⁴⁵ *Hosteny v. Ill. Workers’ Comp. Comm’n*, 928 N.E.2d 474 (Ill. App. Ct. 2009). In this case, the arbitrator found for claimant. The commission reversed and the circuit and appellate courts court affirmed. Claimant appealed, arguing

Iowa. The Commissioner under the Iowa Act is the final fact-finder. “The commissioner as trier of fact,” one court explained, “has the duty to determine the credibility of the witnesses and to weigh the evidence”⁴⁴⁶ He or she “may affirm, modify, or reverse the decision of a deputy commissioner or the commissioner may remand the decision to the deputy commissioner for further proceedings.”⁴⁴⁷ According to one claimant’s attorney, “[t]he vast majority of decisions are simply adopted by the Commissioner who adopts the findings and rulings of the Deputy Commissioner. Sometimes, though, the Commissioner will appoint a Deputy Commissioner”⁴⁴⁸ to recommend a decision. A defense lawyer, on the other hand, advised that the Commissioner “quite often” substitutes credibility judgments.⁴⁴⁹

Two recent cases perhaps suggest that review of witness credibility is a sensitive issue. In one case, the district court, on appeal from the decision of the Commissioner, was held to have inappropriately reassessed the latter’s credibility judgment.⁴⁵⁰ In another, an “acting commissioner,” via the process noted above, was held to have made his findings on legally insufficient evidence.⁴⁵¹ In that case, the district court, and a concurring judge of the appeals court, utilized harsh language not commonly encountered in appellate

that the court should “abandon the deferential standard of review . . . in favor of a stricter standard when the Commission’s credibility findings are contrary to those of the arbitrator.” The court, however, insisted that *Cook* “has since been repudiated in almost every reported case that has cited it” The case, the court admonished, “is a misstatement of the appropriate standard of review. Accordingly, we decline to apply to this case the extra-degree-of-scrutiny referenced in *Cook*.” *Id.* at 483.

⁴⁴⁶ *Dunlavey v. Economy Fire & Casualty Co.*, 526 N.W.2d 845 (Iowa 1995).

⁴⁴⁷ IOWA CODE § 86.24 (2011).

⁴⁴⁸ Memorandum of Ryan Beattie, Esquire, to Mark Cowger, Esquire (Jan. 12, 2012) (on file with Author). For a case where the Commissioner referred the review to a Deputy Commissioner, see *Square D Co. v. Plagmann*, 2011 Iowa App. LEXIS 1475 (Iowa Ct. App. 2011).

⁴⁴⁹ Memorandum of Lee P. Hook, Esquire, to Author (Dec. 6, 2011) (on file with Author).

⁴⁵⁰ *Cedar Rapids Cty. Sch. Dist. v. Pease*, 2011 Iowa Sup. LEXIS 103 (Iowa 2011).

⁴⁵¹ See *Beef Products, Inc. v. Rizvic*, 806 N.W. 2d 294 (Iowa Ct. App. 2011).

opinions.⁴⁵² In any event, the current Commissioner posits that he hews to the common law principle of deference to the Deputy Commissioner on issues of credibility.⁴⁵³

Kansas. The Kansas Board is the final fact-finder. The law provides that the Board “shall have exclusive jurisdiction to review all decisions . . . and awards . . . of administrative law judges”⁴⁵⁴ This review “shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.”⁴⁵⁵ Of note is a 2009 amendment to the laws governing appeals from administrative agencies to the court system. The appellate courts are now to undertake a whole-record review, the parameters of which are defined in the statute. Among other things, the court must take into account “any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency’s explanation of why the relevant evidence in the record supports its material findings of fact.”⁴⁵⁶

⁴⁵² *See id.*

⁴⁵³ *Bouska v. St. Luke’s Hospital*, File Nos. 5022542 & 5022543 (Workers. Comp. App. March 23, 2009). Commissioner Godfrey stated:

While I performed a de novo review, I gave considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly, made by the deputy who presided at the hearing. The deputy who presided at the hearing had the best opportunity to evaluate the demeanor of the persons who testified at the hearing. The presiding deputy has the ability to include the demeanor of a witness when weighing credibility to find the true facts of the case. My ability to find the true facts that are affected by witness demeanor and credibility cannot be expected to be superior to that of the deputy who presided at the hearing. If anything, my ability when reviewing a transcript is likely inferior because I do not have the tool of witness demeanor to use in my evaluation.

Id.

⁴⁵⁴ KAN. STAT. ANN. § 44-555(c) (West 2011).

⁴⁵⁵ *Id.*

⁴⁵⁶ KAN. STAT. ANN. § 77-621(d) (West 2011). *See generally* *Redd v. Kansas Truck Ctr.*, 239 P.3d 66 (Kan. 2010) (discussing substantial evidence standard of review and how 2009 law changed standard).

In a 2011 case, a claimant whose award had been reversed by the Board, on credibility grounds, asserted that it had done so improperly under the new statute. The court, however, replied that the scrutiny referred to in the new statute applied to its review of the Board's decision, not the Board's review of the ALJ's decision. The court would not, as perhaps suggested by claimant, reweigh the competing evidence. Still, under the amendment, "it may [be] the better practice for the Board to give its reasons when disagreeing with any credibility determinations of the ALJ. . . . Such practice is based on the Board's contemplation that its decision will be subject to judicial review with the amended standards" noted above.⁴⁵⁷

According to a veteran attorney, the Appeals Board does make its own credibility determinations with a fair amount of frequency. This is particularly so with "'preliminary hearing appeals' (which are mostly limited to compensability issues) with medical evidence (provider and hospital records come into evidence without the testimony of the doctor at preliminary hearings)"⁴⁵⁸ In such cases "a Board member will independently weigh the evidence and typically not feel constrained by the findings or credibility determinations of the ALJ."⁴⁵⁹

Mississippi. Under the Mississippi Act, workers' compensation cases are adjudicated before ALJs of the three-member, politically-appointed Workers' Compensation Commission. The Commission has considerable powers to reassess credibility and the facts,⁴⁶⁰ and this has been said by some attorneys to occur with some regularity. A Mississippi ALJ advised this Author that the "Commission may accept or not accept the ALJ's findings about

⁴⁵⁷ *Rausch v. Sear Roebuck & Co.*, 263 P.3d 194, 197 (Kan. Ct. App. 2011). In this case, the employer denied that the claimant had suffered any injury while at work. After a period of modified duty, she was subject to termination for cause. As she exited, she advised the employer that she would "make them pay." *Id.* at 198. The ALJ found that the circumstantial evidence proved an injury, but the Board reversed, finding claimant's testimony, in light of the surrounding circumstances, incredible.

⁴⁵⁸ Memorandum of Kim Martens, Esquire, to Author (Dec. 6, 2012) (on file with Author).

⁴⁵⁹ *Id.*

⁴⁶⁰ *See Short v. Wilson Meat House*, 36 So.3d 1247, 1251 (Miss. 2010) (the "Commission is the fact-finder and the judge of the credibility of witnesses.").

anything. This includes the assessment of the credibility of the witness or claimant In most claims, the Commission will accept most or all of the judge's findings but may amend or reverse the dollar amount of an award of permanent disability or the date of maximum medical improvement or one such aspect of the claim – or may find that the judge has misapplied the law to the facts."⁴⁶¹

The fact-finding process in Mississippi workers' compensation has been a subject of interest recently, as a claimants' attorney charged that the current Commissioners were biased against injured workers. According to a study, "the commission's three members voted to reject administrative law judge decisions favoring workers between 75 and 91 percent of the time."⁴⁶² The allegations have led to a "PEER review" by a state legislative agency, the Joint Committee on Performance Evaluation and Expenditure Review.⁴⁶³

North Carolina. North Carolina is another state where the Industrial Commission, the final fact-finder,⁴⁶⁴ is willing, on occasion, to overthrow the Deputy Commissioner's credibility determinations on a "cold record." Such overthrows include changing fact-findings which have been made based on considerations of witness demeanor. A source who spoke with the Author anonymously believed that the Commission (as of 2009) made substantial changes in fact-findings in about fifteen percent of

⁴⁶¹ Memorandum of Hon. Linda Thompson, ALJ, to Author (Aug. 8, 2011) (on file with Author).

⁴⁶² Joe Atkins, *Mississippi Workers' Compensation Commission Rulings Under Review for Anti-worker Bias*, FACING SOUTH[:] THE INSTITUTE FOR SOUTHERN STUDIES, <http://www.southernstudies.org/2011/01/mississippi-workers-compensation-commission-rulings-under-review-for-anti-worker-bias.html> (last visited Sept. 1, 2011).

⁴⁶³ *Id.*

⁴⁶⁴ N.C. GEN. STAT. § 97-85 (providing, *inter alia*, that "[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence"). See *Johnson v. S.Tire Sales & Serv.*, 599 S.E.2d 508 (N.C. 2004). With regard to the North Carolina system, see generally J. Randolph Ward, *Primary Issues in Compensation Litigation*, 17 CAMPBELL L. REV. 443 (1995) (note: possibly dated given recent reforms).

cases.⁴⁶⁵ A leader in the field, however, an attorney who represents injured workers, stated to the Author, “I know of no hard statistics on this issue so it’s hard to say. The Court of Appeals has firmly determined that the full commission has the power to determine credibility issues based on the cold record and they do reverse every now and then, but I would have to say it happens ‘rarely.’”⁴⁶⁶

Of note is the state supreme court’s tenacious rule (in effect since 1998), that the Full Commission is not required to make findings explaining why it was reversing the Deputy Commissioner’s credibility findings concerning a claimant’s testimony regarding the cause of the accident.⁴⁶⁷ This was the implication of a 1998 landmark case, in which the court clarified:

Whether the full Commission conducts a hearing or reviews a cold record, [the statute] . . . places the ultimate fact-finding function with the Commission – not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner’s credibility findings, the full Commission is not required to demonstrate, as [one of our precedents] states, “that sufficient consideration was paid to the fact that

⁴⁶⁵ A Charlotte, NC, lawyer, in a website posting, estimates that in 30% of the cases the Industrial Commission will reverse on one ground or another. He states, “The loser at the Deputy level will typically appeal to the Full Commission in my experience. The defendants may do it sometimes to delay payment to you, without any real expectation of winning. About 70% of the time the Full Commission will affirm what the Deputy decided, and the rest of the time they may modify the Deputy award or reverse most or all of it” Comments of Bob Bollinger, Esq., Discussion Board at WorkersCompensationInsurance.com (Dec. 2007), available at <http://www.workerscompensationinsurance.com/forum/showthread.php?43708-Appeals-to-Full-Commission>.

⁴⁶⁶ Memorandum of Leonard T. Jernigan, Jr., Esquire, to Author (Nov. 28, 2011) (on file with Author).

⁴⁶⁷ See *Brown v. The Kroger Co.*, 610 S.E.2d 447, 453 (N.C. Ct. App. 2005) (“we also disagree with defendants’ contention that in cases in which observation of the claimant’s actual physical behavior is a ‘crucial issue,’ the Full Commission should acknowledge the hearing officer’s credibility findings and offer a full explanation if it substitutes a different judgment for those findings.”).

credibility may be best judged by a first-hand observer of the witness when that observation was the only one.”⁴⁶⁸

According to another opinion:

Requiring the Commission to explain its credibility determinations” and “allowing [this Court] to review the Commission’s explanation of those credibility determinations would be inconsistent with our legal system’s tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.”⁴⁶⁹

In a 2004 case that followed this holding, the Deputy Commissioner found as fact that an injured worker had not shown good faith in pursuing work, and he denied a request for permanent total disability.⁴⁷⁰ The Full Commission, however, found flatly to the contrary, and continued the claimant on total disability.⁴⁷¹ On appeal, the employer argued that the Commission had “erred by failing to consider the Deputy Commissioner’s personal observations that plaintiff was exaggerating any pain he was experiencing at the hearing”⁴⁷² The Court of Appeals was unmoved, citing the 1998 precedent.⁴⁷³

Furthermore, in a 2005 case that followed this holding, the Deputy Commissioner had found claimant’s testimony about a fall at home, said to have been a consequence of an at-work injury, to be incredible.⁴⁷⁴ The Full Commission, however, found her credible and

⁴⁶⁸ Adams v. AVX Corp., 509 S.E.2d 411, 413 (N.C. 1998).

⁴⁶⁹ Arce v. Bassett Furniture Indus., No. COA10-1064, 2011 N.C. App. LEXIS 699, *9-10 (N.C. Ct. App. Apr. 19, 2011)) (quoting Deese v. Champion Int’l Corp., 530 S.E.2d 549, 553 (N.C. 2000)).

⁴⁷⁰ Johnson v. S. Tire Sales & Serv., 599 S.E.2d 508, 510-11 (N.C. 2004).

⁴⁷¹ *Id.* at 511.

⁴⁷² *Id.* at 515.

⁴⁷³ *Id.*

⁴⁷⁴ Brown v. Kroger Co., 610 S.E.2d 447, 449 (N.C. Ct. App. 2005).

awarded benefits.⁴⁷⁵ In the state supreme court, the employer argued that “in cases in which observation of the claimant’s actual physical behavior is a ‘crucial issue,’ the Full Commission should acknowledge the hearing officer’s credibility findings and offer a full explanation if it substitutes a different judgment for those findings.”⁴⁷⁶ In rejecting this argument, the Court of Appeals similarly relied upon the 1998 precedent quoted above.⁴⁷⁷

C. Jury Trial States

In five states, the parties may seek a jury trial (or a bench trial, for that matter) even after the exhaustion of the administrative adjudication scheme. In four of these states, Maryland, Ohio, Vermont, and Washington, the trial court is the final fact-finder and the arrangement obviously retains an element of its original form. The case of Texas is discussed above – the Author has, exercising his organizational discretion, categorized the state as maintaining administrative finality. This is in light of the jurisdiction’s dramatic 1989 reform which gave the Texas Hearing Officer significant fact-finding power, and which truncated the jury trial right.⁴⁷⁸

Maryland. Under the Maryland Act, the “decision of the Commission is presumed to be prima facie correct; and . . . the party challenging the decision has the burden of proof.”⁴⁷⁹ In addition, “[The statute] . . . provide[s] . . . the prerogative of a trial *de novo* . . . of *any or all of the factual issues initially determined by the Commission*. . . . [T]he trial is *de novo*, *but only on the questions of fact submitted to the Commission* by way of some evidence or by a formal issue.”⁴⁸⁰ The process can be gleaned from a 2011 case, in

⁴⁷⁵ *Id.* at 450.

⁴⁷⁶ *Id.* at 453.

⁴⁷⁷ *Id.*

⁴⁷⁸ *See supra* Section V(E).

⁴⁷⁹ MD. CODE ANN., LAB. & EMPL. § 9-745(b)(1), (2) (West 2011).

⁴⁸⁰ *Bd. of Educ. for Montgomery Cnty. v. Spradlin*, 867 A.2d 370, 384 (Md. Ct. Spec. App. 2005) (quoting *Gen. Motors v. Bark*, 555 A.2d 542, 545 (Md. Ct. Spec. App. 1989) and MAURICE J. PRESSMAN, *WORKMEN’S COMPENSATION IN MARYLAND* 170-71(1970)) (*Spradlin* features an exhaustive description of trial process).

which the claimant was the punter for the Washington Redskins football team.⁴⁸¹ The Maryland Commissioner granted benefits, but the employer appealed to the county court and sought a jury trial.⁴⁸² The jury, however, also found for the claimant.⁴⁸³

The Maryland scheme poses a special task for the lawyer, as he or she must have expertise both in administrative proceedings before the commissioners and trial skills as well. As discussed above, relatively few contested cases unfold on appeal in a jury trial.⁴⁸⁴

Ohio. Under the Ohio Act, contested cases are heard before administrative agency officers before a jury trial would ever unfold.⁴⁸⁵ A case is first heard by the District Hearing Officer (DHO), with any appeal thereafter to a Staff Hearing Officer (SHO).⁴⁸⁶ Then, with permission, a case will be reviewed by the Industrial Commission.⁴⁸⁷ The review is *de novo* at each level.⁴⁸⁸ Any subsequent appeal is taken to a county trial court, which will convene a jury or bench trial.⁴⁸⁹ At this level, factual determinations may once again be made.⁴⁹⁰ A limitation exists: “The claimant or the employer may appeal an order of the industrial commission . . . in any injury or occupational disease case, *other than a decision as to the extent of disability* to the court of common pleas”⁴⁹¹

⁴⁸¹ Pro-Football, Inc. v. Tupa, 14 A.3d 678, 679 (Md. Ct. Spec. App. 2011).

⁴⁸² *Id.* at 680.

⁴⁸³ *Id.*

⁴⁸⁴ See *supra* Section V(A).

⁴⁸⁵ See OHIO REV. CODE ANN. § 4123.511 (West 2011)

⁴⁸⁶ *Id.* § 4123.511 (D),(E).

⁴⁸⁷ *Id.* § 4123.511(E).

⁴⁸⁸ Comments of Frank Gallucci, Esq. to Author (Dec. 7, 2011) (on file with Author).

⁴⁸⁹ *Id.* § 4123.512(A).

⁴⁹⁰ *Id.* § 4123.512(D).

⁴⁹¹ *Id.* § 4123.512(A) (emphasis added). The entire process just described may be gleaned in Lockett v. Ryan, 2011 Ohio App. No. 1-10-49, 2011 Ohio Ct. App. LEXIS 2545, *2-5 (Ohio Ct. App. 2011 Jun. 20, 2011) (claimant was unsuccessful through several levels, including jury trial, in expanding accepted injury from scalp laceration to more involved orthopedic injuries).

In a 2006 case, the state supreme court addressed the issue of whether a party's due process rights were violated by the trial court's mandate that all testimony at time of jury trial was to be by videotape.⁴⁹² The claimant in that case unsuccessfully asserted that "his right to a jury includes the right to present his own testimony and that of his witnesses live and the right to have the jury see him as the case is presented."⁴⁹³ The court rejected this argument, respecting the authority of the trial judge to manage his cases, and it remarked that no constitutional right to a workers' compensation jury trial existed.⁴⁹⁴ The court did indicate that the "preferred practice" was direct interface between the parties and the jury,⁴⁹⁵ but it was unwilling to say that videotape was impermissible.⁴⁹⁶

A claimant's attorney with a heavy caseload estimates that, of the appeals he takes from the Industrial Commission to the trial court (referred to as "512" appeals), not more than 10%, perhaps 5%, will unfold in a jury trial.⁴⁹⁷ The other cases will settle on appeal; indeed, the fact of an appeal and demand for a jury trial may work to leverage settlement.⁴⁹⁸

Vermont. Under the Vermont Act, "either party may appeal to the superior [trial] court of a county wherein a civil action between the parties would be triable. Either party shall be entitled to a trial by

⁴⁹² Arrington v. Daimler Chrysler Corp., 849 N.E.2d 1004, 1006 (2006).

⁴⁹³ *Id.* at 1011.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 1014. The court added that, in so ruling:

[W]e are not blinded by the promise of technology and its integral role in contemporary society. Questions as to the proper integration of technology into law are complicated ones. In cases in which technology permeates the courtroom, we must guard against the suggestion that technology can be used for "so arranging the world that we don't have to experience it."

Id. (quoting MAX FRISCH, HOMO FABER 178 (Michael Bullock trans., 1959)).

⁴⁹⁶ *Id.* at 1006.

⁴⁹⁷ Comments of Frank Gallucci, Esq. to Author (Dec. 7, 2011) (on file with Author).

⁴⁹⁸ *Id.*

jury.”⁴⁹⁹ However, “[t]he jurisdiction of [the superior court] . . . shall be limited to a review of questions of fact or questions of fact and law certified to it by the commissioner”⁵⁰⁰

As foreshadowed above, the jury trial is only reached after administrative remedies have been exhausted.⁵⁰¹ In this regard, the final agency fact-finder is the Commissioner of the Department of Labor.⁵⁰² The Commissioner employs full-time hearing officers (currently two) to undertake the hearing process.⁵⁰³ The hearing officers consider the cases and prepare a proposed decision for the Commissioner.⁵⁰⁴ The Commissioner does indeed possess the power to change a hearing officer’s decision.⁵⁰⁵ However, in practice, if the Commissioner were to have a question about the case, she would likely ask the hearing officer to address the same, or return the decision to be reheard and/or rewritten. According to the current Director of the Workers’ Compensation & Safety Division, these occasions are rare.⁵⁰⁶ “Fine-tuning” of decisions is much more common.⁵⁰⁷ Most “hard” fact-findings of the hearing officer are not questioned.⁵⁰⁸

According to the Director, about 30% to 40% of the Commissioner adjudications are appealed to the superior court (that is, the county court).⁵⁰⁹ The law, notably, supports a direct appeal to the Vermont Supreme Court if only *legal* error is alleged.⁵¹⁰ If the losing party wants *facts* reassessed, an appeal must be prosecuted to

⁴⁹⁹ VT. STAT. ANN. tit. 21, § 670 (West 2011).

⁵⁰⁰ *Id.* tit. 21 § 671.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* tit. 21 § 671.

⁵⁰⁶ Comments of J. Stephen Monahan, Esq., Director of the Workers’ Compensation & Safety Division, to Author (Dec. 20, 2011) (on file with Author).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

the superior court for trial.⁵¹¹ In a 2010 case, the supreme court emphasized the meaning of such *de novo* review:

The [trial] court’s review of the Commissioner’s decision “involves a retrial *de novo*.” (Citation omitted.) That means, as the trial court found, that insurer is not limited to the arguments raised below, and preservation — or lack thereof — is not at issue. (Footnote omitted.) The doctrine of collateral estoppel is similarly not relevant here because there has not yet been a final judgment on the merits.⁵¹²

Washington. Under the Washington Act, contested cases are litigated before an Industrial Appeals Judge (IAJ), who issues a proposed decision and order.⁵¹³ Any appeal is prosecuted thereafter to the Board of Industrial Insurance Appeals (BIIA).⁵¹⁴ An aggrieved party may then seek review in the county (superior) court.⁵¹⁵

The Act provides that in such appeals, “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.”⁵¹⁶ In addition, the superior court proceeding “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 in the superior court”⁵¹⁷ The same statute provides, “In all [such] court proceedings . . . the findings and decision of the board shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same.”⁵¹⁸

⁵¹¹ *Roethke v. Jake’s Original Bar and Grill*, 772 A.2d 492, 493 (Vt. 2001).

⁵¹² *Estate of George v. Vt. League of Cities & Towns*, 993 A.2d 367, 371 (Vt. 2010) (quoting *Farris v. Bryant Grinder Corp./Wausau Ins. Co.*, 869 A.2d 131, 135 (2005)).

⁵¹³ WASH. REV. CODE ANN. § 51.52.104 (West 2010).

⁵¹⁴ *Id.* § 51.52.106.

⁵¹⁵ *Id.* § 51.52.110. This process can be seen unfolding in *Puget Sound Energy, Inc. v. Lee*, 205 P.3d 979 (Wash. Ct. App. 2009).

⁵¹⁶ WASH. REV. CODE ANN. § 51.52.115 (West 2010).

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

Furthermore, the court is directed to “advise the jury of the exact findings of the board on each material issue before the court.”⁵¹⁹

The statute’s admonition that no further evidence is permitted at trial has the most razor-like of teeth.⁵²⁰ “The Superior Court appeal,” one veteran notes, “is nothing more than reading the record to the judge or jury.”⁵²¹ He further estimates that, of the BIIA “hearings which conclude with a decision and order, [5-10%] go on to the Superior Court. Of those 75% are tried to a jury.”⁵²² Another lawyer confirms that jury trials are not uncommon:

Cases proceeding to trial at Superior Court are not rare. They are most frequent involving pension cases and allowance of injury where the issue is occupational disease. As a percentage of all cases administratively adjudicated the number is probably less than 1%. But at any given time in this County there is usually at least one compensation case being tried every week.⁵²³

A third lawyer notes the custom and practice of transcript recitation:

It is . . . common . . . for a jury to be empanelled in Superior Court. In Washington, the transcript adduced at the Board . . . is *read* to the jury. No live testimony is presented in Superior Court. (It is an incredibly boring experience for a juror, I am sure!) Sometimes we try cases to the Bench, but a jury trial is much more common.⁵²⁴

⁵¹⁹ *Id.*

⁵²⁰ *See id.*

⁵²¹ Memorandum from Christopher Sharpe, Esq. to Mark Cowger, Esq. (Jan. 12, 2012) (on file with Author).

⁵²² *Id.*

⁵²³ Memorandum from Patrick H. LePley, Esq. to Mark Cowger, Esq. (Jan. 9, 2012) (on file with Author).

⁵²⁴ Memorandum from Thomas L. Doran, Esq. to Mark Cowger, Esq. (Jan. 9, 2012) (on file with Author).

VII. NUANCES IN THE FACT-FINDING ANALYSIS

A. *Wisconsin, Due Process, and the Credibility Consultation*

Under the Wisconsin Act, the ALJ is not the final fact-finder.⁵²⁵ An aggrieved party may, in this regard, petition the Labor & Industry Review Commission (LIRC) for review of the ALJ's decision and the "commission shall either affirm, reverse, set aside or modify the findings or order in whole or in part, or direct the taking of additional evidence."⁵²⁶ Such review "shall be based on a review of the evidence submitted."⁵²⁷ "The hearing examiner," one decision explains, "may make initial determinations on witness credibility, but these determinations are subject to the commission's independent review."⁵²⁸

The Wisconsin process is remarkable for its significant nod towards due process. In this regard, if the Commission has concerns over the credibility of a witness, prior to its changing of a credibility-based fact-finding, it must convene a "credibility conference" with the ALJ who actually saw and heard the witness.⁵²⁹ Further, to change such credibility determinations, the LIRC must set forth reasons.⁵³⁰ According to the treatise writer Domer, the LIRC often

⁵²⁵ See WIS. STAT. ANN. § 102.18 (West 2011).

⁵²⁶ *Id.* § 102.18(3).

⁵²⁷ *Id.*

⁵²⁸ *Hakes v. Labor & Indus. Review Comm'n*, 523 N.W.2d 155, 158 (Wis. Ct. App. 1994).

⁵²⁹ See *Shawley v. Indus. Comm'n*, 114 N.W.2d 872, 876 (Wis. 1962)

⁵³⁰ See *Braun v. Indus. Comm'n*, 153 N.W.2d 81, 85 (Wis. 1967) (relying on *Shawley v. Indus. Comm'n*, 114 N.W.2d at 876.). Interface between hearing officer and Commission is perhaps a longstanding tradition. When Professor Dodd studied the Wisconsin system, he noted that examiners sent to remote locations to conduct hearings were

at periodic intervals given a week at the commission's headquarters in Madison to prepare reports on the cases he had heard. When this was done the examiner sought out the commissioners and, in a conference with him, presented the case as it developed at the hearing and indicated what he thought the order of the commission should be. If the commissioner approved, the examiner was directed to draw the findings of fact and the award or the dismissal.

convenes credibility conferences, particularly when the ALJ has flatly rejected the credibility of the claimant.⁵³¹ In the end, however, outright reversals of the ALJ on credibility grounds are estimated at five percent “by anecdotal authority.”⁵³²

A leading precedent illustrating the Wisconsin process comes from the 1972 Wisconsin Supreme Court case, *Transamerica Ins. Co. v. Dep’t of Industry*.⁵³³ In that case, the hearing examiner had limited a claimant’s benefits, having credited an expert who had apparently been called by the employer.⁵³⁴ After a credibility conference, the Commission modified the findings and, in a summary set of findings, found the claimant totally disabled.⁵³⁵ When the case reached the state supreme court, the employer asserted that its due process rights had been violated because the Commission had not set forth its reasons for rejecting the fact-findings of the examiner.⁵³⁶ The court ultimately affirmed, but agreed in principle that merely setting forth replacement fact-findings, without an explanation for the change, would no longer be tolerated:

The parties to litigation, workmen’s compensation claims included, are entitled to know, not only that the department set aside the findings of an examiner but why it did so – not only what independent findings the department found proper, but on what basis and evidence it made such findings. Particularly is this true where credibility of witnesses is involved. Fundamental fairness requires that administrative agencies, as well as courts, set forth the reasons why a

DODD, *supra* note 53, at 258. He further noted, “In 99 cases out of a hundred, the commission approved the examiner’s view of the case.” *Id.*

⁵³¹ Memorandum from Thomas M. Domer, Esq. to Author (Nov. 16, 2011) (on file with Author). For a recent case reflecting that such a conference was held, *see* Hall v. Sch. Dist. of St. Croix Falls, 778 N.W.2d 172 (Wis. Ct. App.2009).

⁵³² *Id.*

⁵³³ *Transamerica Ins. Co. v. Dep’t of Indus.*, 195 N.W.2d 656 (Wis. 1972).

⁵³⁴ *Id.* at 659.

⁵³⁵ *Id.* at 660.

⁵³⁶ *Id.* at 661.

fact-finder's findings are being set aside or reversed, and spell out the basis for independent findings substituted.⁵³⁷

The court stated, as a consequence:

[W]e do not expect to have again to search a record either for the basis of independent findings as to credibility of witnesses or the reasons for [the] department setting aside an examiner's findings as "probable error." Trial courts can be expected to reverse department findings and remand for the completion of the record whenever the department rejects the findings of its examiner and makes its own findings involving credibility of witnesses and fails to accompany such reversal and making its own findings with an opinion stating why it has rejected the facts found by the examiner and why it has made its own and differing findings of fact.⁵³⁸

In a 1994 case, the Court of Appeals rejected an argument that more was required than a credibility conference and a statement of reasons before the Commission could reassess fact-findings.⁵³⁹ In that case, an employee asserted that she had injured her back and leg at work.⁵⁴⁰ The hearing examiner awarded benefits, but the Commission discredited the claimant's testimony as riddled with inconsistencies.⁵⁴¹ On appeal, the claimant asserted that, for due process to be afforded, "the record must disclose who consulted with the hearing examiner, when the consultation was made and how the consultation proceeded."⁵⁴² Further, the claimant contended that the "commission should adopt a standardized procedure by which its consultations are held. [She] argues that the adoption of standardized

⁵³⁷ *Id.* at 663.

⁵³⁸ *Transamerica Ins. Co.*, 195 N.W.2d at 664.

⁵³⁹ *Hakes*, 523 N.W.2d at 157-58.

⁵⁴⁰ *Id.* at 156.

⁵⁴¹ *Id.*

⁵⁴² *Id.* at 157.

procedures is warranted because the availability of compensation benefits for injured workers is so important and because the effect of a wrong decision has such dire consequences.”⁵⁴³ In response, the court held that due process was already accorded by the existing system, and the proposed undertaking “[sought] to delve into the mental processes the commission used in making its determinations of fact. [The court held that] [t]he law . . . [did] not require this.”⁵⁴⁴

That the appellate court may require a detailed Commission adjudication is suggested by a 2011 case.⁵⁴⁵ There, the ALJ credited the employer (a small businessman) when he testified that he terminated (*viz.*, refused to re-hire) claimant for incompetence and not out of alleged retaliation for his having suffered a work injury, missing work, and stating that he was going to have to undergo another disabling surgery.⁵⁴⁶ The Commission reversed, “determining that [claimant] was the credible party and that [employer] had, in fact, refused to rehire [claimant] because of [his] work-related injury”⁵⁴⁷ On employer’s appeal, the court carefully parsed the Commission decision, compared it with the record, and held that “the inadequacy of LIRC’s accompanying memorandum opinion is the basis for our decision to set aside its order. ‘Fundamental fairness’ requires that LIRC set forth the reasons why the ALJ’s findings are being reversed and LIRC must ‘spell out the basis for [its] independent findings.’”⁵⁴⁸

B. Judging Credibility of Expert Medical Witnesses

In a substantial evidence jurisdiction, deference to the fact-finder usually extends to all credibility determinations, lay and expert.⁵⁴⁹ This is certainly the rule in Pennsylvania, though the WCJ

⁵⁴³ *Id.*

⁵⁴⁴ Hakes, 523 N.W.2d at 158.

⁵⁴⁵ See *Open Hearth Homes, LLC v. Labor & Indus. Review Comm’n*, No. 2010 AP 1225, Wis. Ct. App. Lexis 363, at *11 (Wis. Ct. App. 2011).

⁵⁴⁶ *Id.* at *3-4.

⁵⁴⁷ *Id.* at *4-5.

⁵⁴⁸ *Id.* at *11.

⁵⁴⁹ See, e.g., *Ullmann v. City of Tampa Parks Dep’t*, 625 So. 2d 868, 873 (Fla. Dist. Ct. App. 1993); *Tiburcio v. United Parcel Service*, 2010 N.J. Super.

must provide his or her reasons for crediting and discrediting the critical evidence.⁵⁵⁰

In a jurisdiction where the commission, or even appellate court, reserves the right to make its own findings, however, courts recognize a dichotomy in this area. Many believe that the common-law rule about deference to the trial judge “applies more to lay witnesses than expert medical witnesses. After all, (1) expert witnesses have to base conclusions on evidence, and (2) medical testimony comes down to persuasiveness more than credibility.”⁵⁵¹

As established above, for example, the Commission in Missouri is the final fact-finder, but a policy seems to prevail that it will give great deference to the ALJ on issues of witness credibility.⁵⁵² Several lawyers report, however, that this deference is usually afforded to the credibility of *lay witnesses*. The Commission is less likely to accord deference to credibility determinations made by the ALJ relative to experts testifying by deposition:

If there is one area where the commission has been more activist than any other in credibility determinations, it has been with weighing the opinions of experts (who, in Missouri, almost universally testify by deposition). The commission has been most attentive to assuring that [a] proper foundation has been laid for an expert’s opinion, and that the opinion is based on un-contradicted evidence found in the record. It tends to characterize its findings as concerning the “persuasiveness” of the expert’s opinions, and this commission’s awards are replete with decisions saying a doctor was not persuasive in one case, while finding the same expert persuasive in

Unpub. LEXIS 1873, *5 (N.J. Super. Ct. App. Div. 2010); *Huntington v. State of Wyoming*, 163 P.3d 839, 843 (Wyo. 2007).

⁵⁵⁰ See *infra* Section IX(C)(2) (discussion of Pennsylvania doctrine).

⁵⁵¹ Memorandum from Hon. David Wertheim, WCLJ (now retired) to Author (Aug. 30, 2011) (on file with Author).

⁵⁵² See *supra* Section VI(A).

another, always including a careful recitation of the basis of its determination.⁵⁵³

“The commission,” another attorney writes, “sees itself in the same position to judge the testimony in depositions as is the administrative law judge, so they have no qualms in reweighing that evidence.”⁵⁵⁴

Of some irony is that Missouri *appellate courts*, which are ostensibly undertaking substantial evidence/whole record review,⁵⁵⁵ may *also* be detected reassessing the credibility of experts.⁵⁵⁶ In a 2006 case, for example, the claimant alleged an ongoing disability from myofascial pain afflicting his shoulders.⁵⁵⁷ The ALJ and Commission rejected this assertion.⁵⁵⁸ The Court of Appeals reversed, stating that the uncontradicted expert medical proofs showed that he did suffer from the malady, and that the inferences relied upon by ALJ and Commission were not sufficient.⁵⁵⁹ The “ALJ simply lacked the expertise,” the court noted, to conclude that claimant’s problems really had their genesis in non-work-related slip

⁵⁵³ Memorandum from Michael Korte, Esq., to Author (Dec. 7, 2011) (on file with Author). To the same effect is Mr. Todd Werts, Esq.:

[I]t is “rare” . . . for the Commission to reverse an ALJ on the credibility determination of a witness who testified in person. I think the matter becomes a little more complicated with medical testimony given by deposition . . . [I]t is not uncommon for the Commission to disagree with an ALJ on the medical testimony.

Memorandum from Todd Werts, Esq., to Author (Dec. 2, 2011) (on file with Author). The disagreement, however, often “is over which expert better supports his or her opinion and may not necessarily be a credibility issue, so much as an issue with the doctor’s logic or medical basis for his/her opinion.” *Id.*

⁵⁵⁴ Memorandum from Kip Kubin, Esq., to Author (Dec. 7, 2011) (on file with Author).

⁵⁵⁵ See *Vice v. Advantage Waste Servs., Inc.*, 298 S.W.3d 145 (Mo. Ct. App. 2009).

⁵⁵⁶ Memorandum from Michael Korte, Esq., to Author (Dec. 7, 2011) (on file with Author). This is a phenomenon long noted, also, by the Larson treatise. See LARSON, *supra* note 164, § 130.05[3], [4].

⁵⁵⁷ *Kuykendall v. Gates Corp.*, 207 S.W.3d 694, 698 (Mo. Ct. App. 2006).

⁵⁵⁸ *Id.* at 697.

⁵⁵⁹ See *id.* at 712.

and fall incidents.⁵⁶⁰ According to the court, “[w]hile we ‘defer to the Commission’s decisions regarding the weight given to witnesses’ testimony, and are bound by the Commission’s factual determinations when the evidence supports either of two opposed findings,’ ... here there was no credible medical evidence opposing Dr. Eaton’s findings.”⁵⁶¹

This reasoning, notably, recalls the so-called “sit and squirm” cases of the Social Security Disability cases.⁵⁶² In the 1980s, a number of federal court cases were filed indicating that the Social Security Disability (SSD) ALJ could not discredit a claimant on the issue of physical impairment in the face of uncontradicted medical testimony. In the most illustrative case, the ALJ, in dismissing the claim, stated:

At no time during the hearing was the claimant observed to be suffering any physical or mental discomfort, nor was physical pain or discomfort evidenced by any facial grimaces or restlessness.

The medical evidence reveals that although the claimant suffers some discomfort from her impairments, they do not appear severe.⁵⁶³

This reasoning was found insufficient, in the face of uncontradicted medical evidence, to support denial of the claim.⁵⁶⁴

⁵⁶⁰ *Id.* at 711.

⁵⁶¹ *Id.* (citation omitted).

⁵⁶² For use of this term, *see* *Norris v. Heckler*, 760 F.2d 1154, 1158 (11th Cir. 1985).

⁵⁶³ *Benson v. Schweiker*, 652 F.2d 406, 409 (5th Cir. 1981).

⁵⁶⁴ *Id.* One court provided a practical reason for the rule. *See* *Wilson v. Heckler*, 734 F.2d 513, 517 (11th Cir. 1984):

[T]he ALJ engaged in what had been condemned as “sit and squirm” jurisprudence. In this approach, an ALJ who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied. . . . [T]his approach . . . will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage

This phenomenon is, in any event, also one of the Tennessee practice. There, contested cases are heard in the trial courts via bench trials.⁵⁶⁵ Rather remarkably, the appellate courts still have the power to assess credibility on appeal. In this latter regard, review of issues of fact “is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise.”⁵⁶⁶ Tennessee courts generally would not presume to change a trial judge’s credibility judgment about a live witness, but without any hesitation they could potentially change a judgment about expert testimony given by deposition.⁵⁶⁷ A veteran specialist admonishes, “in particular, the testimony of expert witnesses and other witnesses who testify by deposition is routinely reweighed based upon the theory that the trial judge is in no better position than the appellate court to evaluate the testimony of a witness who testifies by deposition.”⁵⁶⁸

The language of the Tennessee appellate precedents bears out the dichotomy.⁵⁶⁹ “Where the trial judge has seen and heard the witnesses,” a recent opinion states, “especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review”⁵⁷⁰ This is so “because it is the trial court which had the opportunity to

claimants to manufacture convincing observable manifestations of pain, or, worse yet, discourage them from exercising the right to appear before an [ALJ] for fear that they may not appear to the unexpert eye to be as bad as they feel.

Id. (internal quotation omitted).

⁵⁶⁵ See *supra* Section III (discussion of court administration in Tennessee).

⁵⁶⁶ *Griffin v. Walker Die Casting, Inc.*, No. M2009-01773-WC-R3-WC, 2010 Tenn. LEXIS 1020, at *5-6 (Tenn. Nov. 10, 2010) (citing TENN. CODE ANN § 50-6-225(e)(2) (2008)). The court also said that “[w]here the issues involve expert medical testimony and all the medical proof is documentary, as in this case, the reviewing court may draw its own conclusions about the weight and credibility of that testimony.” *Id.*

⁵⁶⁷ Memorandum from Cully Ward, Esq., to Mark Cowger, Esq. (Jan. 6, 2012) (on file with Author).

⁵⁶⁸ Memorandum from Tony Farmer, Esq., to Mark Cowger, Esq. (Jan. 6, 2012) (on file with Author).

⁵⁶⁹ See *Binkley v. E.I. Dupont De Nemours & Co.*, No. M2002-00278-WC-R3-CV, 2003 Tenn. Lexis 3 (Tenn. Jan. 14, 2003).

⁵⁷⁰ *Id.* at *2.

observe the witnesses' demeanor and to hear the in-court testimony."⁵⁷¹ On the other hand, "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues."⁵⁷²

The Arizona appellate courts demonstrate a unique opinion on the issue. There, the law requires that expert physicians must testify live and not by deposition.⁵⁷³ This is an extraordinary rule among states. On the issue of whether the WCJ benefits from having the expert physically present in the courtroom, an Arizona ALJ states:

[This] is an issue that is often discussed in our judges' meetings since we have gone to "telephone" testimony of expert witnesses if the expert so requests

[I]n-person testimony is nice since you can also ask a question or two if you need a clarification and also cut through the stuff that is not relevant. The phone allows that but doesn't allow the lawyers to show records that the doctor doesn't have, which sometimes impacts cross. Once I hear a doctor's testimony, I usually allow the telephone appearance as I have a feel for his or her credibility [O]ne benefit to the deposition approach is you have the transcript and can review certain sections of detailed testimony on complex medical issues with more time than you can when you are taking notes in a hearing So in general, when it is a first timer expert I like the live testimony requirement of Arizona but when we allow

⁵⁷¹ *Id.*

⁵⁷² *Pennewell v. Hamilton-Ryker*, No. W2006-1046-WC-R3-WC, 2007 Tenn. LEXIS 795, at *8 (Tenn. Sept. 17, 2007) (reading claimant's expert's deposition and concluding that he had speculated on cause, and holding that, as a result, claimant had not met her burden of proof). *But cf.* *U.S. Cas. Co. v. Maryland Cas. Co.*, 55 So.2d 741, 744 (Fla. 1951) (opining that viewing live the physician's demeanor can impact a credibility determination).

⁵⁷³ Comments of Hon. Luann Haley to Author (Dec. 1, 2011) (on file with Author).

telephone appearance, as we do now at the judge's discretion, deposition would be just as good⁵⁷⁴

C. *Live Versus Deposition Testimony*

The issue of whether commissions and courts should accord deference to credibility judgments based on *deposition* testimony has been raised in a variety of contexts. Courts often indicate that the policy surrounding deference due a trial judge on credibility collapses when the judge has not actually seen and heard the witnesses but has instead read deposition transcripts. This is a regular trope of Tennessee appellate courts.⁵⁷⁵ The general thinking is as follows:

Even when the subject matter of a case makes it likely that credibility will affect the result, the evidence may be presented in such a manner that demeanor evidence is absent or is irrelevant to the determination of credibility. This occurs when a case is presented on stipulated facts, or on affidavits and depositions.

⁵⁷⁴ *Id.*

⁵⁷⁵ *See, e.g., Davidson v. Bus. Pers. Solutions*, No. E2010-02366-WC-R3-WC, 2011 Tenn. Lexis 1213, at *9 (Tenn. Dec. 12, 2011):

When credibility and weight to be given testimony are at issue, considerable deference must be afforded the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. . . . No such deference is extended to a trial court's findings when reviewing documentary evidence, such as depositions.

Id. The court in *Orrick*, an earlier decision, set forth the rule as quoted in *Davidson*, and added:

We agree with the Panel that the trial court erred in adopting Dr. Gaw's 8% impairment rating for facial disfigurement. Our de novo review of the depositions and other documentary medical evidence leads us to the conclusion that the trial court erred in crediting Dr. Gaw's testimony over that of Dr. Jaffrey with respect to the loss of supporting structure to the face.

Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006).

Under these conditions, decision on the record by a substitute is clearly proper, since the original decision maker would have decided the case on the record himself.⁵⁷⁶

A Montana judge posited, in this context, “deference makes no logical sense where the Workers’ Compensation Court simply reads the same deposition that we read. In that situation, we are in as good a position to evaluate the medical testimony as the trial judge.”⁵⁷⁷

On occasion, the rule may even be found in a jurisdiction where the WCJ is the final fact-finder. Under the New Mexico Act, for example, review of the WCJ’s findings is undertaken on a substantial evidence/whole record basis.⁵⁷⁸ Still, in one case, the court recently overthrew a WCJ fact-finding, stating, “[B]ecause the medical causation evidence was presented by deposition, the WCJ findings on causation are not entitled to the usual deference accorded findings of fact.”⁵⁷⁹ Under the Connecticut Act, meanwhile, the commissioners are well established as final fact-finders.⁵⁸⁰ Still, limited authority seems to exist that on appeal deference to findings should not follow when the commissioner has relied upon a reading of depositions.⁵⁸¹

⁵⁷⁶ Note, *Replacing Finders of Fact – Judge, Juror, Administrative Hearing Officer*, 68 COLUM. L. REV. 1317, 1328 (1968).

⁵⁷⁷ *Hanks v. Liberty N.W. Ins. Corp.*, 62 P.3d 710, 716 (Mont. 2002) (Trieweiler, J., dissenting).

⁵⁷⁸ *Tallman v. ABF*, 767 P.2d 363 (N.M. Ct. App. 1988).

⁵⁷⁹ *Pinkerton v. Gibbs*, No. 29,872, 2010 N.M. App. Lexis 410, at *5 (N.M. Ct. App. Oct. 21, 2010).

⁵⁸⁰ *Powers v. Hotel Bond Co.*, 93 A. 245 (Conn. 1915).

⁵⁸¹ See, e.g., *Biasetti v. City of Stamford*, 1 A.3d 1231, 1237 n.5 (Conn. App. Ct. 2010). In this case, claimant, who suffered from Post Traumatic Stress Disorder (PTSD), argued on appeal that the Compensation Review Board should not have accorded deference to the commissioner’s crediting of the employer’s medical expert, as he had testified by deposition. The court, in rejecting this argument, distinguished a prior case by noting that here the commissioner had also based his denial of claimant’s PTSD claim on rejection of his lay evidence.

VIII. THE AUTOMATIC STAY ISSUE

Under the orthodox rule, a common, even natural, corollary was that a request for review of the hearing officer's decision operated to automatically stay the effect of the decision or recommended decision.⁵⁸² After all, the hearing officer or referee was an agent of the Board. To this day, notably, under the Indiana Act, an appeal from a single member of the Board to the full board does not, under the Act's language, purport to stay the decision. The law, indeed, does not reference any suspension of an obligation to pay.⁵⁸³ Still, a preeminent Indiana defense lawyer comments, "An appeal to the Full Worker's Compensation Board is technically a hearing de novo [T]here is no mention of a stay in the statute or otherwise, but the practical effect would seem to be the equivalent of a stay. No payment is made until the appeal process is complete."⁵⁸⁴

Presently, many states, chiefly those abiding by the orthodox rule of commission as fact-finder, provide for an automatic stay.⁵⁸⁵ This is, however, hardly an ironclad rule. For example, a request for review or appeal in California⁵⁸⁶ and Washington⁵⁸⁷ does not result in an automatic stay.

The issue of a stay on benefits pending review on appeal to commission or court has always been an important one. The "public policy behind the adoption of workers' compensation acts," is, after all, "to provide necessary day-to-day financial support to an injured worker and the worker's dependents."⁵⁸⁸ If the WCJ's award is a

⁵⁸² See DODD, *supra* note 53, at 394-395 (taking for granted that appeal usually operated as a stay, thus causing delay in payment to injured workers, and endorsing exceptions of California and Massachusetts).

⁵⁸³ See IND. CODE § 22-3-1-3 (LexisNexis 2011).

⁵⁸⁴ Memorandum from Robert A. Fanning, Esq., to Mark Cowger, Esq. (Oct. 7, 2011) (on file with Author).

⁵⁸⁵ This is the rule, for example, in Arkansas. Memorandum from David L. Schneider, Esq., to Mark Cowger (Oct. 7, 2011) (on file with Author). See ARK. CODE ANN. § 11-9-711. This is also the rule under the Georgia Act. Memorandum of Hon. David Imahara, ALJ, to Author (Oct. 5, 2011) (on file with Author).

⁵⁸⁶ CAL. LABOR CODE § 5910 (West 2012). See *Ulrich v. Workmen's Compensation Appeals Board*, 123 Cal. Rptr. 435, 437 (Cal. Ct. App. 1975).

⁵⁸⁷ WASH. REV. CODE ANN. § 51.52.050(b) (West 2012).

⁵⁸⁸ *Ex parte Lumbermen's Underwriting Alliance*, 662 So. 2d 1133, 1137 n.3 (Ala. 1998).

paper tiger, deprived of any meaningful significance until some remote review, this policy may be defeated. The earliest observers of workers' compensation systems recognized the phenomenon. Dodd, for example, stated that it "clearly appears that the burden of the delay occasioned by court review of a compensation award [and the attendant stay on benefits] rests primarily on the claimant."⁵⁸⁹ This was true in the 1930s and it can be true today. In Utah, for example, an appeal from ALJ to Appeals Board creates an automatic stay. According to a claimant's attorney:

The stay remains on appeals to the Court of Appeals or Utah Supreme Court except in cases of permanent total disability [PTD] In non-[PTD] claims, benefits are never paid on appeal Since our Motions For Review to the Commissioner were taking three years (this is being fixed) by the time a case got through the Utah Supreme Court, it was normally six or seven years since the original claim was filed [This is d]evastating to injured workers.⁵⁹⁰

The act of making the WCJ the final fact-finder in a jurisdiction has not always been accompanied by a corresponding setting-aside of the automatic stay. Indeed, in 1999 a WCRI researcher reported that "[a]mong 22 of the 36 jurisdictions with an administrative appellate forum an appeal stays the formal hearing decision without qualification. In five jurisdictions, an appeal stays part of the formal hearing decision."⁵⁹¹ Among these were jurisdictions where the WCJ had been made the fact-finder. Under the Minnesota Act, for example, "The decision from the formal hearing and obligation to pay will be stayed pending the appeal (if timely appealed) until a final determination is made by the Workers' Compensation Court of Appeals and/or Supreme Court for the State of Minnesota. Then the obligation to pay kicks in."⁵⁹² The states of

⁵⁸⁹ DODD, *supra* note 47, at 395.

⁵⁹⁰ Memorandum from Dawn Atkin, Esq., to Mark Cowger, Esq. (Oct. 13, 2011).

⁵⁹¹ BALLANTYNE, *supra* note 18, at 56.

⁵⁹² Memorandum from Charlene K. Feenstra, Esq., to Mark Cowger, Esq. (Nov. 2, 2011) (on file with Author).

Colorado⁵⁹³ and Connecticut⁵⁹⁴ also seem to be in this category. However, many states, like Connecticut, have provisions indicating that non-disputed amounts are to be paid despite any appeal.⁵⁹⁵

It is odd that the law is so backward in jurisdictions where reform is focused on expediting the potential delivery of benefits through more immediate finality in adjudication. The National Commission was certainly of the view that the stay should be abolished, although it did not record this assertion as one of its “essential recommendations.”⁵⁹⁶ The Report states as follows:

The decision of the hearing examiner could be appealed to the appeals board, which could overrule the hearing examiner on questions of fact and of law. The decision of the hearing examiner, however, should be presumed correct *and the appeal should not stay the examiner’s award.*⁵⁹⁷

The availability of the stay is known to prompt liable employers to prosecute appeals. This hard-to-resist act is often undertaken regardless of the likelihood of ultimate appellate success. Rather, the perverse motivation is delay, coupled with the sanguine hope that the claimant will be leveraged to a more modest compromise settlement.⁵⁹⁸ Whatever the intent, researchers have

⁵⁹³ COL. REV. STAT. ANN. § 8-43-301(12) (2011).

⁵⁹⁴ CONN. GEN. STAT. ANN. § 31-301 (2012).

⁵⁹⁵ CONN. GEN. STAT. ANN. § 31-301(d) (2012).

⁵⁹⁶ NAT’L COMM’N ON STATE WORKMEN’S COMP. LAWS, *supra* note 53, at 129 (Emphasis added).

⁵⁹⁷ *Id.*

⁵⁹⁸ See BALLANTYNE, *supra* note 425, at 73. According to these WCRI researchers, workers’ attorneys alleged that the availability of automatic stay “create[d] a perverse incentive for employers and insurers, who can use appeals . . . to gain leverage during negotiations.” *Id.* This was also the assertion in *Ex parte Lumbermen’s Underwriting Alliance*, 662 So. 2d 1133 (Ala. 1995) (claimant alleging that employer took advantage of the posting of bond simply to leverage him to settle: employer allegedly “intentionally discontinued the payments in hopes that [he] would consent to a post-judgment settlement of his claim at terms far less favorable” than those of the circuit court award.”).

often found that appeal is more likely given availability of an automatic stay.⁵⁹⁹

IX. ISSUES AND CHALLENGES IN ASSIGNING THE FACT-FINDING FUNCTION

In many states, reform-minded legislatures, motivated by a desire to streamline dispute resolution, have equipped the WCJ with final fact-finding power.⁶⁰⁰ While in some jurisdictions, the WCJ has long been the final fact-finder, other states have had to undertake fundamental institutional changes for WCJs to gain this status.⁶⁰¹ Through a process of evolutionary convergence, the WCJ in the present day, in about half of the states, is not master, but chancellor.⁶⁰²

A number of issues are implicated by the WCJ ascension to such extraordinary power. It is worthy to inquire whether this approach has in fact brought increased efficiency, accuracy, and other benefits. Another issue is whether investing the WCJ with such power creates concerns of its own – in particular, accountability.

A. Streamlining Adjudicatory Processes

“Efficiency” is often said to be a rationale for making the judge in *any* system the final fact-finder.⁶⁰³ In a discussion of the central panel movement, one commentator notes:

With respect to many issues, especially issues of fact, the ALJ’s decision will reflect the result of an

⁵⁹⁹ *Id.* (noting that one reason that many employer appeals were prosecuted at the time was the effect of the automatic stay); DUNCAN S. BALLANTYNE AND TELLES, *WORKERS’ COMPENSATION IN WISCONSIN: ADMINISTRATIVE INVENTORY 72*, 113 (Workers Compensation Research Institute ed., 1992) (“Appeal to LIRC stays the judge’s decision, providing some incentive to appeal when benefits have been awarded.”).

⁶⁰⁰ *See supra* Section V(F).

⁶⁰¹ *See supra* Section V(G).

⁶⁰² *See supra* Section I (quick reference table categorizing states).

⁶⁰³ *See, e.g.,* Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence with Accountability*, 19 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 6 (1999).

impartial evidentiary hearing, so allowing the agency an opportunity to modify the ALJ's findings introduces an inefficiency, especially if the agency is required to reevaluate some or all [of] the evidence previously presented before the ALJ.⁶⁰⁴

This analysis applies in the workers' compensation sphere. Assuming that the WCJ is competent and impartial, it seems wasteful and inefficient for a commission, upon the losing party's appeal, to re-examine the record and come up with its own factual determinations. *More importantly*, the pendency of the appeal can be wasteful for the *parties*, as both injured worker and employer, waiting for the final decision on the facts to be issued, frequently place their affairs on an indefinite hold.

When a workers' compensation commission can reassess the facts, and it is known for doing so, it is irresistible for counsel for the losing side to recommend such an appeal.⁶⁰⁵ The universal resolve of the losing party is to seek the proverbial "second bite of the apple."⁶⁰⁶ Researchers, in interviewing system participants of various states, including Michigan,⁶⁰⁷ Missouri,⁶⁰⁸ Oregon,⁶⁰⁹ and Virginia,⁶¹⁰ over recent decades invariably received such reports.

⁶⁰⁴ *Id.*

⁶⁰⁵ Comments of David Menchetti, Esq. to Author (Nov. 28, 2011) (on file with Author) (indicating that with *de novo* review from Arbitrator to Commission in Illinois, a lawyer's instinct is to seek review); Comments of Kim Presbrey, Esq., Chicago, IL, to the Author (Nov. 28, 2011) (same). *See also* Malcom B. Parsons, *The Substantial Evidence Rule in Florida Administrative Law*, 6 U. FLA. L. REV. 481, 518 (1953) ("[T]he sheer volume of appellate cases in Florida is greatest in those procedural areas in which the substantial evidence rule has been so formulated as to foster the greatest likelihood of upsetting administrative findings, and that here the petitioners have usually not been individuals of limited means but rather corporations engaged in the transportation or insurance businesses.").

⁶⁰⁶ DUNCAN S. BALLANTYNE & CAROL A. TELLES, *WORKERS' COMPENSATION IN MISSOURI: ADMINISTRATIVE INVENTORY* 70 (Workers Compensation Research Institute ed., 1993).

⁶⁰⁷ HUNT, *supra* note 268, at 43 (referring to both the policymakers' frustrations that, as of 1985, a "five-year backlog of cases" existed at the Appeal Board and the aggravating effect of *de novo* review which meant that "the loser at the hearing level could get another chance on appeal.").

⁶⁰⁸ BALLANTYNE, *supra* note 606, at 70.

⁶⁰⁹ *See* BALLANTYNE, *supra* note 398.

WCRI researcher, Ballantyne, commenting on pre-reform Georgia practice, stated:

A combination of factors account for the 46 percent rate of appeals to the board. Insurers, attorneys, and board officials state that *de novo* review encourages appeals by permitting a “second bite of the apple”; an appeal stays the judge’s decision; there is little cost to appeal; and the outcomes suggest that there is a reasonable chance (thirty three percent) that appeal will result in a different outcome.⁶¹¹

Further, with the availability of *de novo* review, some lawyers view the failure to seek such review as malpractice.⁶¹²

This phenomenon strongly suggests that where the commission *lacks* such power, and the WCJ is the final fact-finder, the losing party will be *less* likely to entertain and accept a recommendation for an appeal. This dynamic may, however, be impacted if appeal results in an automatic stay.

In any event, in Pennsylvania, where the WCJ is the final fact-finder, counsel for the losing party usually counsels the client against an appeal when the loss has turned on a negative credibility determination.⁶¹³ This is because the law establishing the Pennsylvania WCJ as the final fact-finder has been around for decades, and the Pennsylvania Appeal Board is obedient to that rule and ignores demands that credibility be reassessed.⁶¹⁴ Appeal rates from Pennsylvania WCJ awards are minimal and reversals on

⁶¹⁰ DUNCAN S. BALLANTYNE & CAROL A. TELLES, WORKERS’ COMPENSATION IN VIRGINIA: ADMINISTRATIVE INVENTORY 14 (Workers Compensation Research Institute ed., 1994).

⁶¹¹ BALLANTYNE, *supra* note 425, at 73.

⁶¹² Comments from Frank Gallucci, Esq. to Author (Dec. 7, 2011) (on file with Author) (stating also that in light of the successive levels of *de novo* review in Ohio, “If there’s denial on it, my staff knows to appeal.”).

⁶¹³ Comments to the Author of Barbara E. Holmes, Esq. (April 16, 2012) (on file with Author).

⁶¹⁴ This statement is based on the Author’s experience.

credibility are unheard of.⁶¹⁵ WCRI researcher Peter Barth made a similar finding in his 1987 study of the Connecticut system:

Few appeals are successful. . . . Many denials of appeals have been based on the CRD's [*viz.*, Compensation Review Division's] consistent position that a commissioner's conclusion cannot be reviewed when it rests on the weight of the evidence and the credibility of the witnesses. This view, perhaps in conjunction with the low rate of success, largely explains the small number of appeals to the CRD.⁶¹⁶

Perhaps Georgia practice may be contrasted. There, the ALJ of the Georgia Board is not the final fact-finder.⁶¹⁷ Upon the losing party's appeal, the three-member Board of the Appellate Division, though not undertaking *de novo* review, may reassess credibility.⁶¹⁸ According to the Chief ALJ, in a recent year, 800 final decisions were issued and a full 689 were subject to an appeal to the Appellate Division.⁶¹⁹ (Most decisions were ultimately affirmed. Still, it is not unheard of for the well-regarded Georgia Board to reassess the facts.)⁶²⁰

The most prominent example of streamlining adjudication through reform is, of course, the abolition of the Texas trial *de novo* procedure.⁶²¹ Investing the Hearing Officer's decision with finality,

⁶¹⁵ The Author has been a Pennsylvania WCJ since 1993, and he has been reversed by the Appeal Board on credibility grounds only once during that period. On that occasion, the writer had awarded benefits to a claimant, and the Commonwealth Court, on the worker's *further* appeal, restored the award.

⁶¹⁶ PETER S. BARTH, *supra* note 22, at 24.

⁶¹⁷ *See supra* Section VI(B).

⁶¹⁸ *See id.* At the Appellate Division, the award of the ALJ must be upheld if supported by the law, and by a preponderance of the evidence. GA. CODE ANN. § 34-9-103 (2011).

⁶¹⁹ Hon. Melodie Belcher, Chief ALJ, Remarks at the National Association of Workers' Compensation Judiciary College Comparative Law Panel (Aug. 22, 2011).

⁶²⁰ *See supra* Section VI(B).

⁶²¹ *See supra* Section V.

and restricting the availability of trial, eliminated the acute litigation crisis in the Texas system.⁶²²

Making the WCJ the final fact-finder should also streamline dispute resolution by promoting voluntary settlement, compromise or otherwise, as early as possible during the litigation. In general, of course, if both sides to a contested case possess a reasonable belief, or anxiety, that they may not prevail, they will likely be amenable to the idea of settlement. If this risk of loss is one potentially to be dealt by a first-level WCJ whose critical findings are *final*, the likelihood of early willingness to consider voluntary settlement should be enhanced.⁶²³ This is so as no “second bite of the apple” – that is, commission reassessment of the facts – will be available to delay the voluntary settlement decision. Under the Pennsylvania practice, this assertion seems to be borne out. The parties are much more likely to want to enter into a compromise settlement *before* the WCJ makes his or her ruling than *after* the same – that is, while the losing side’s likely fruitless appeal to the Board is pending.

The Author is not of the school that believes that every workers’ compensation case should be compromise-settled, and too many such settlements can and have subverted a workers’ compensation system.⁶²⁴ Still, many cases that are subject to a *bona fide* dispute can and should be settled as soon as possible. Injecting

⁶²² See *supra* Section V(F). As discussed above, eliminating the jury trial *de novo* in Texas was intended to address a litigation crisis. See *id.* Some critics have charged that the restrictions on attorney’s fees, when coupled with the limitations on trial remedies, has unfairly leveraged injured workers. See *id.*

⁶²³ For a theoretical discussion of this phenomenon, see BALLANTYNE, *supra* note 30, at 29-30. Among other things, the authors state:

Economic theory gives us a fundamental insight into the decision to settle: The parties’ expectations about the outcome at formal hearing determine their willingness to settle. Two forces seem to be at work here. First, the higher expected cost of a formal hearing, the more likely the settlement. Second, the greater the disparity in the parties’ expectations, the more likely a formal hearing.

Id. (footnotes omitted).

⁶²⁴ See Torrey, *supra* note 157, at 443-44 (pointing out negatives in the Pennsylvania C&R scheme).

finality into the *initial* fact-finding and adjudication should promote this goal.⁶²⁵

B. Advantages in Making the WCJ the Fact-Finder

The Florida and Arizona courts that ruled that the first-level compensation judge should be the final arbiter of credibility did so, in part, based on the reasoning that it was the judge, not some remote board, that actually saw and heard the witnesses.⁶²⁶ Of course, this preference finds its heritage in the common law, which generally calls for deference to the fact-findings of the individual who heard the witnesses and assessed their demeanor.⁶²⁷ This factor endures as an additional benefit of investing the WCJ with final fact-finding authority. Having the WCJ as final fact-finder should, in short, enhance the *accuracy* of decision-making.⁶²⁸

To this Author, two values – efficiency and accuracy – are the most powerful arguments for making the WCJ the final fact-finder. Two further arguments, however, exist in favor of investing the judge with this power. These are the values of independence in the judging process and promoting transparency and fairness. The Author has discussed the efficiency value above. The values of accuracy, independence, and transparency are discussed below.

1. Finality and Accuracy in Decision-making

Courts reviewing workers' compensation cases have endorsed the common-law view⁶²⁹ that the credibility determinations of the first-

⁶²⁵ It is important to remember, however, that many factors go into the parties' decision whether or not to settle and at what point to settle in the litigation process.

⁶²⁶ See *supra* Section V(D).

⁶²⁷ *Timony*, *supra* note 8, at 903. See *Universal Camera Corp.*, 340 U.S. at 496 (indicating that an agency, though not bound by ALJ decision, should not ignore the findings of fact and credibility determinations contained in initial federal ALJ order).

⁶²⁸ See generally *Rossi*, *supra* note 603, at 6 (identifying accuracy as a benefit of ALJ adjudicatory finality).

⁶²⁹ *Colby v. Klune*, 178 F.2d 872, 872 (2nd Cir. 1949) ("Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most

level hearing officer should be accorded deference, if not finality. This is so because of the WCJ's advantage of having seen and heard the witnesses. To so venture in the workers' compensation context was unremarkable even in the 1930s.⁶³⁰

As a 1966 Arizona court declared, in holding that the WCJ was the final fact-finder:

It is the referee who hears the testimony, observes the demeanor of the petitioner, and is best able to judge the reliability and credibility of the witnesses who have testified at the hearing. Absent testimony before them, the Industrial Commission in reviewing the hearings before the referee, is in the same position as an appellate court in that both the Commission and the appellate court must evaluate the evidence from the record presented.⁶³¹

valuable features of the common-law system For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor – absent, of course, when trial is by affidavit or deposition – is recognized as an important clue to witness' credibility.”)

For a *tour de force* treatment of the importance of demeanor evidence, see James P. Timony, *Demeanor Credibility*, 49 CATH. U.L. REV. 903 (2000). The author questioned the ability of the district court judge to reverse the credibility determinations of a federal magistrate. This is a “more dubious exception to the modern trend of live testimony” He noted the Supreme Court's comment that a “district court's reversal of those findings that are based upon the magistrate's observation of the witness's demeanor ‘could well give rise to serious questions’ of due process.” *United States v. Raddatz*, 447 U.S. 667 (1980). See also Note, *Replacing Finders of Fact – Judge, Juror, Administrative Hearing Officer*, 68 COLUM. L. REV. 1317 (1968).

⁶³⁰ See CAMPBELL, *supra* note 95, at 970 (1935) (“It is the most trite of all observations that the impression received by one who has presided at the trial . . . may be altogether different from that received by one from a mere perusal of a transcript and a record of the trial [The] trial court. . . is thus in a better position to pass upon the weight or sufficiency of the evidence.”)

⁶³¹ *Powell v. Indus. Comm'n*, 418 P.2d 602, 606 (Ariz. Ct. App. 1966), *reversed*, 423 P.2d 348 (Ariz. 1967). The Court of Appeals' decision was, after reversal, ratified by the legislature, and the above declaration is now in the law. See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (U.S. 1951) (indicating that an agency should not ignore the findings of fact and credibility determinations contained in an initial federal ALJ order).

Perhaps it was on this reasoning that the National Commission, in its 1972 report, admonished that the “decision of the hearing examiner. . . should be presumed correct”⁶³²

Many further articulations of this benefit may be found in court precedent. A leading New Mexico court opined, in this regard:

An appellate court does not observe the demeanor of live witnesses, cannot see a shift of the eyes, sweat, a squirm, a tear, a facial expression, or take notice of other signs that may mean the difference between truth and falsehood to the fact finder. Even an inflection in the voice can make a difference in the meaning. The sentence, “She never said she missed him,” is susceptible of six different meanings, depending on which word is emphasized.⁶³³

It is not only demeanor that supports the common-law view. “A live witness, facing a possible attack on his credibility, serves two significant purposes. First, the trier of fact can observe the witness’s demeanor, and second, he can inspire the witness to testify truthfully to ‘ensur[e] the integrity of the fact-finding process.’”⁶³⁴ This may be called the “deterrent effect” of live testimony, “as it may prevent the dishonest witness from testifying untruthfully, and thus, increases the acceptability of trial outcomes.”⁶³⁵

Of interest are the rulings of Pennsylvania courts. In this regard, no constitutional mandate exists that the fact-finder must personally see and hear the witness in every administrative law case.⁶³⁶ However, in a workers’ compensation case, if a party seeks

⁶³² NAT’L COMM’N ON STATE WORKMEN’S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKERS’ COMPENSATION LAWS108 (1972).

⁶³³ Tallman v. ABF, 767 P.2d 363, 366 (N.M. Ct. App. 1988).

⁶³⁴ Timony, *supra* note 8, at 918 (quotation omitted).

⁶³⁵ *Id.* at 933.

⁶³⁶ Peak v. Unemployment Comp’n Bd. Rev., 501 A.2d 1383 (Pa. 1985).

In this case, the claimant contended that “an administrative decision based on . . . a [transcript only] finding is arbitrary governmental action in violation of due process” *Id.* at 1385 The claimant advanced “the proposition that the legislature can constitutionally entrust an administrative power to find facts resolving conflicting evidence on grounds of credibility only to the board or official who conducts the

cross-examination of a witness, he or she is entitled to have the WCJ be present. The judge may not oblige the parties to take depositions.⁶³⁷

Not all are, however, convinced that assessment of witness credibility is dispositive of the issue of whether the ALJ should be the final arbiter of credibility:

[One] study . . . raises questions about the principal advantage of ALJs, often cited in support of their final order authority in either limited or full form, the ALJ's presence during the witnesses' testimony. While intuition suggests that the person who hears the witness testify is in a better position to judge credibility, the results of cases reviewed on appeal in North Carolina do not support it. ALJ recommendations (presumably based in part on credibility determinations) are affirmed at about the same rate as agency decisions, even when the key issue is one of fact. This is consistent with research that establishes that viewing the appearance and demeanor of the witness does not improve the fact finder's ability to identify deception on the stand Moreover, any advantage derived from hearing the witness relates primarily to "adjudicative" facts of who, what, when, and where. Demeanor evidence is less likely to be persuasive when expert testimony is at issue.⁶³⁸

hearing at which the record is made" *Id.* The court rejected this argument. If the UCBR provides some level of reasons for its decision, thus accommodating substantial evidence review, due process is afforded; no constitutional right exists to have one's property rights determined by a fact-finder who has actually seen and heard the testimony. Indeed, such is not required by the federal Administrative Procedures Act. In so ruling, the court limited the import of another precedent. *See Treon v. Unemployment Comp'n Bd. Rev.*, 453 A.2d 960 (Pa. 1982).

⁶³⁷ *Otis Elevators v. Workers' Comp. Appeal Bd. (Harding)*, 651 A.2d 667 (Pa. Commw. Ct. 1994). *See TORREY, supra* note 70, § 13:103.

⁶³⁸ Flanagan, *supra* note 16, at 1397 (citing, among other things, Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 J. NAT'L ASSOC. ADMIN. L. JUDICIARY 1

These are thoughtful comments. And, of course, with regard to expert medical testimony, many courts put them into practice.⁶³⁹ Further, other factors like plausibility, corroboration, consistency, and lack of secondary motivations, all of which can be gained by a cold record, can be critical to the final credibility determination.⁶⁴⁰

Still, it is difficult to conceptualize the increasingly remote commission being in a better position than the WCJ to judge credibility in workers' compensation cases. Even those content with appellate panel reassessments of credibility will allow as a fiction the idea that an absent party can accurately judge lay witness credibility.

The superiority of judge finality is especially manifest in workers' compensation cases. The omnipresent issue is, after all, the presence or absence of pain and impairment and the consequent alleged inability to work. Determinations on these issues are, by their very nature, dependent on direct interface with the injured worker. Many, if not most, contested cases deal with subjective factors that are resistant to determination from transcripts.

Further, under the Pennsylvania practice, and those of a number of states,⁶⁴¹ the WCJ actually encounters the claimant – and on occasion other critical witnesses – in a *series* of hearings. The WCJ gains a benefit from this process: the opportunity to see and hear the witnesses on a number of occasions. The benefit accrues because the witness' testimony at an initial hearing may well be coached, whereas at a subsequent meeting he or she may be more natural. By the third and final hearing, an insincere witness may have totally “forgotten the script” and the WCJ may then be presented with a more truthful picture of the events in question. This “re-evaluative,” live, fact-finding experience, cannot be replicated by review of a cold record. The Author has defended this series of

(2000) (finding that state ALJs do not rely on demeanor evidence)) (citation omitted).

⁶³⁹ See *supra* Section VII(B).

⁶⁴⁰ See generally John L. Kane, *Judging Credibility*, 33 LITIGATION No. 3, A.B.A. Spring, 2007, available at <http://apps.americanbar.org/abapubs/lrc/pdfs/kane.pdf>.

⁶⁴¹ BALLANTYNE, *supra* note 18, at 50 (identifying fifteen jurisdictions “that typically hold multiple formal hearing sessions.”).

hearings⁶⁴² against the reasonable charge that, if not tightly administered, the procedure can lead to delay and excessive attorney costs. “The only gift the killer Time bestows,” however, “is to allow us to see, on later viewings, what it was that we missed the first time around.”⁶⁴³ The WCJ, in short, lives with his or her cases,⁶⁴⁴ and is in the best position to find the facts.

2. Assuring Independence in Fact-Finding

“The banners of judicial dignity,” it has been said, are the related principles of independence and impartiality.⁶⁴⁵ These values could be enhanced by making the WCJ the final fact-finder. If a system removes the fact-finding task from a politically-appointed commission, and places the responsibility with an independent, professional judge, any inappropriate politics in the adjudication process should be ameliorated.

In the workers’ compensation context, the traditional independence concern has been that executive branch officials, lobby groups, or individuals, will try to pressure commissions or judges to make findings or legal conclusions in some particular way, to in turn vindicate some internal or external goal. Such efforts deprive the fact-finder of “decisional” independence,⁶⁴⁶ and certainly the commission or ALJ that rolls over in the face of such pressure will commit an ethical violation. The traditional impartiality concern,

⁶⁴² TORREY, *supra* note 70, § 13:124.

⁶⁴³ GORE VIDAL, PALIMPSEST 578-79 (1995) (invoking Proust).

⁶⁴⁴ Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

⁶⁴⁵ Symposium, Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 715 (1997) (“The independence of the judiciary ensures the rule of law, and ensures that validly enacted laws are enforced and given their full scope. If judges implement an agenda, pursuant to legislative or other lobbying, the result would be “to substitute political will for the rule of law.”). *See also* John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33 (2002).

⁶⁴⁶ *See* Harrison v. Coffman, 35 F. Supp.2d 722, 725 (E.D. Ark. 1999). In this case, an Arkansas workers’ compensation ALJ was fired by the Commission, and she alleged “that her exercise of quasi-judicial independence and impartiality, as reflected in her written opinions, caused her to be discharged.” *Id.* According to the federal court, “This case . . . plainly involves quasi-judicial ‘decisional independence.’” *Id.* at 724-25.

meanwhile, has been that a judge or commissioner will find facts one way or the other because of politically-motivated factors or other bias. Iowa system participants, for example, told a WCRI researcher in 2004 “that the politically appointed appellate person (the division commissioner) can influence the value of cases depending in the leanings of the appointing governor.”⁶⁴⁷

Of course, no adjudicatory system can possess or maintain its integrity without a commitment to the values of independence and impartiality.⁶⁴⁸ A distinguished Colorado ALJ admonishes, “The decisional independence of judges, including judges of the administrative law judiciary, is the cornerstone of our constitutional separation of powers....” “The administrative law judge’s obligation to be decisionally independent,” he posits, “is the same as the obligation of a judicial branch judge.”⁶⁴⁹ This is certainly the case in workers’ compensation adjudication. To recall Larson’s admonition, the commission “while deciding controverted claims . . . is as far toward the judicial end of the spectrum as it is possible to go without being an outright court.”⁶⁵⁰

Under many administrative structures, the commission is by design a political entity.⁶⁵¹ In theory, the commission knows that, when sitting as fact-finder in a contested case, its political role is set aside. It becomes an impartial fact-finder no less than the common pleas court. Still, experience suggests that commissions can be

⁶⁴⁷BALLANTYNE, *supra* note 374, at 92.

⁶⁴⁸ Judicial ethics codes invariably admonish that the ALJ is to preserve judicial independence. The Ethics Code of the Pennsylvania Workers’ Compensation Act, for example, mandates, in a hortatory tone, “A workers’ compensation judge shall . . . (13) Uphold the integrity and independence of the workers’ compensation system.” 77 PA. STAT. ANN. § 2504(13).

⁶⁴⁹ Edwin L. Felter, *Accountability in the Administrative Law Judiciary: The Right and Wrong Kind*, 86 DENV. U. L. REV. 157, 162 (2008). *See also generally* Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT’L ASS’N. ADMIN. L. JUDICIARY 1 (2005).

⁶⁵⁰ LARSON, *supra* note 1, § 79:90.

⁶⁵¹ *See, e.g.*, Mich. Civ. Serv. Comm’n v. Mich. Dept. of Labor, 384 N.W.2d 728, 749 (Mich. 1986) (“Members of boards and commissions are generally appointed by the Governor and sometimes by the Legislature. The members are accountable only to the appointing authority . . .”).

subject to external pressures or, of their own accord, act politically in the judging process.

The issue is a delicate one. In a renowned Michigan episode of the 1980s, for example, civil service-protected referees, who had been dismissed from their employment, sued for their jobs. They alleged that it was unlawful, as injecting politics into the fact-finding process, for the legislature to substitute in their place a “Board of Magistrates,” who were subject to political appointment and time-limited terms. The court, in a bit of irony, held that it was in fact unremarkable for someone in the position of judge to be subject to political accountability. The court, indeed, found that the enhanced fact-finding authority of the Magistrate, one of the innovations of the 1983 amendments, argued for further political accountability:

The legislative decision to constitute persons whose decisions have that importance as members of a board or commission who serve by gubernatorial appointment for fixed terms for the purpose of removing them from civil service and subjecting their appointment and retention to the political process is entirely consistent with constitutional principles that contemplate that persons exercising certain kinds of power shall or may be made politically accountable. That legislative decision making workers’ compensation hearing officers more accountable in the political process was made in conjunction with the legislative decision to make their decisions more final and hence more important.⁶⁵²

In any event, a rare public example of a threat to independence – admirably resisted – occurred in South Carolina. There, pro-business reforms had failed to enact strict adherence to the *AMA Guides* by the South Carolina commissioners.⁶⁵³ Instead, the commissioners were not prohibited from considering other factors to

⁶⁵² *Id.*

⁶⁵³ *Governor says order did not change law on awarding disability benefits*, RISK AND INSURANCE ONLINE (Nov. 6, 2007), <http://www.riskandinsurance.com/story.jsp?storyId=152421737>.

potentially increase an award.⁶⁵⁴ The Governor, however, in 2007 issued an order to the commissioners “in all contested cases to strictly apply either [the] *AMA Guides* or any other accepted medical treatise or authority in making their injury compensation determinations”⁶⁵⁵ Many observers correctly viewed this directive, Executive Order 2007-16, to constitute an assault on the judicial independence of the commissioners.⁶⁵⁶ An attorney representing claimants filed a federal court lawsuit over the order.⁶⁵⁷ And, in fact, the commissioners unanimously refused to comply with the order, replying that “it will continue to apply the standards set forth in the act, and that adjudications under the state comp system will be conducted with ‘impartiality, independence and in accord with law.’”⁶⁵⁸ A law professor, meanwhile, authored a deft criticism in the journal of the South Carolina Bar.⁶⁵⁹ Ultimately, the Governor abandoned his effort to leverage the commissioners to strictly apply

⁶⁵⁴ *Id.*

⁶⁵⁵ 31-10 S.C. Reg. 4 (Oct. 26, 2007).

⁶⁵⁶ John Freeman, *Ethics Watch: Executive Order 2007-16*, 19 SOUTH CAROLINA LAWYER 8 (November 2007).

⁶⁵⁷ *Monaco v. South Carolina Workers’ Compensation Commission*, No. 6:07-cv-4150-GRA, 2008 WL 163059 (D.S.C. Jan. 15, 2008).

⁶⁵⁸ *Id.*

⁶⁵⁹ John Freeman, *Ethics Watch: Executive Order 2007-16*, 19 S.C. LAWYER 8 (Nov. 2007):

[I]f the Order’s intent is to pressure or intimidate the commissioners as judges hearing public legal disputes, then it is a most disturbing document. People who are involved in the administration of justice are not to be threatened. This is central to having a nation that operates under a credible rule of law. . . . If the Order’s intent was to pressure commissioners – that is, judges – to change the law quietly on a case-by-case basis out of fear for their jobs, it would represent conduct prejudicial to the administration of justice and would be highly improper if not illegal. . . .

An attempt to change existing law by executive order puts the commissioners in an untenable ethical position, for it asks them to forsake their obligation to follow the law, which they are sworn to do, and move in another direction, which for them is unethical territory.

the *AMA Guides* and he agreed that he did not have the authority to do so.⁶⁶⁰

This South Carolina episode was a rare public exposition of politics and the politically-appointed commission. The more common charge is that the proclivities of the commission members have caused them to rule, upon appeal of the WCJ's decision, in a pre-conceived or otherwise biased manner.⁶⁶¹ As noted above, for example, members of the claimants' bar insist that the Mississippi Commission is biased in favor of the employers' side.⁶⁶² A similar assertion was made by an Arkansas claimants' attorney, who filed a legal ethics complaint against two Arkansas Commission members, claiming that they and other commission officials were "excessively pro-employer and [were] trying to drive him out of workers comp practice."⁶⁶³

The superior design would also feature the final fact-finder WCJ being invested with employment protections. Every judge can and should be accountable in terms of ethics, skill, and productivity.⁶⁶⁴ Still, via employment protections, he or she can exercise the fact-finding function unconcerned about discharge or discipline by a politically-motivated agency displeased with his or her decisions.⁶⁶⁵

Id.

⁶⁶⁰ *Governor drops move to require comp commission to accept new standards*, RISK AND INSURANCE ONLINE (Aug. 26, 2008), <http://www.riskandinsurance.com/story.jsp?storyId=144386416> (last visited Mar. 31, 2012); *Governor Comes Around to Commission's View*, WORKERS' COMP NEWS (Summer 2008), <http://www.scsselfinsurers.com/newsletters/2008-summer.pdf>.

⁶⁶¹ See discussion *supra* Section VI (preliminary comments).

⁶⁶² *Id.*

⁶⁶³ Doug Smith & Max Brantley, *Lawyer Files Ethics Complaint Against Workers Comp Commission*, Arkansas Times, Apr. 7, 2005, <http://www.arktimes.com/arkansas/lawyer-files-ethics-complaint-against-workers-comp-commission/Content?oid=868487>.

⁶⁶⁴ See *infra* Section IX(C)(1).

⁶⁶⁵ See generally *Harrison v. Coffman*, 35 F. Supp. 2d 722 (E.D. Ark. 1999). In this case, an Arkansas ALJ was fired by the Commission, and she alleged "that her exercise of quasi-judicial independence and impartiality, as reflected in her written opinions, caused her to be discharged." *Id.* at 724.

The most familiar device is, as discussed above, the creation of a “central panel” of executive branch judges that is independent of the various agencies of state government and, hence, free of the political pressures that may exist within the agency.⁶⁶⁶ As noted above, workers’ compensation adjudicators have not typically been included in a central panel.⁶⁶⁷ The states of Colorado, Michigan (a recent development), Minnesota, and Wyoming are notable exceptions.⁶⁶⁸

An approach in lieu of a central panel is erection of a “firewall” in the state agency between administration and adjudication.⁶⁶⁹ In a 1996 Pennsylvania reform, for example, the legislature established within the Department of Labor & Industry an “Office of Adjudication” that operates separately from the “Bureau of Workers’ Compensation.”⁶⁷⁰ The latter is responsible for enforcing the statute, providing oversight, and executing policy, while the former is responsible for mediation and adjudication.

3. Promoting Transparency

The transparency of the workers’ compensation process, that is, its “openness and comprehensibility,”⁶⁷¹ is promoted by having the WCJ as the fact-finder. Certainly this is so for the injured

⁶⁶⁶ Edwin L. Felter, *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403 (2001) (arguing for central panels, and enumerating things the legislature can do to ensure ALJ independence); Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1641 (2001) (explaining that the North Carolina “Office of Administrative Hearings is established to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases . . . and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.”).

⁶⁶⁷ *See id.*

⁶⁶⁸ *See supra* Section V(A).

⁶⁶⁹ *See generally* Jeff Bush & Kristal Wiitala Knutson, *The Building and Maintenance of “Ethics Walls” in Administrative Adjudicatory Proceedings*, 24 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1 (2004).

⁶⁷⁰ *See* 77 PA. STAT. ANN. §§ 2501-2502.

⁶⁷¹ MASHAW, *supra* note 24, at 90.

workers and employers that are the parties to the contested case.⁶⁷² For most people, it is counterintuitive to believe that someone reading a cold transcript can do better at finding the facts than the judge who sat through the testimony. “[P]ersonal contact between fact finders and witnesses is deeply ingrained in the American legal system,”⁶⁷³ but such contact is also an *expectation* in a society where citizens take their rights seriously.

Adjudication based on live testimony of witnesses is also important in engendering confidence in the public about adjudication. “The function of a trial,” after all:

is not only to ensure the correct and just resolution of a dispute, but to serve as a substitute for self-help so that the government may maintain its monopoly on the use of force. A trial serves this function best to the extent it satisfies the expectations of the litigants involved. Thus the appearance of scrupulous fairness may be as important as fairness itself and a litigant may consider a trial more fairly conducted where the judge who hears the evidence also makes the decision.⁶⁷⁴

The idea that a board or commission far removed, physically and temporally, from the trial can overthrow the fact findings of the same surely strikes the layman as strange. It is an unfair cliché to posit that workers’ compensation proceedings are Kafkaesque. However, if in so saying we mean that an individual may begin “to see himself as an object, susceptible to infinite manipulation by ‘the system,’”⁶⁷⁵ proceedings involving *de novo* review seem to fit the bill.

⁶⁷² *See id.*

⁶⁷³ Neil Fox, *Telephonic Hearings in Welfare Appeals: How Much Process is Due?*, 1984 U. ILL. L. REV. 445, 453 (1984) (rejecting idea that telephone hearings are sufficient to protect due process, asserting that credibility cannot be assessed over the phone).

⁶⁷⁴ Note, *Replacing Finders of Fact – Judge, Juror, Administrative Hearing Officer*, 68 COLUM. L. REV. 1317, 1325-26 (1968).

⁶⁷⁵ MASHAW, *supra* note 24, at 91.

*C. The Challenge of Making the WCJ the Fact-Finder:
Accountability*

A significant challenge, judge accountability, accompanies investing a single individual with the extraordinary authority of final fact-finding. A number of approaches to ensuring accountability exist and have been discussed at length in the legal literature.⁶⁷⁶

1. Accountability via Hiring Assessment, Performance Evaluation, and Ethical Codes

The traditional method of assuring judicial accountability is, of course, the *appeal*.⁶⁷⁷ Many commentators, however, have pointed out that in “mass justice” programs presided over by administrative agency personnel, appellate review alone is not sufficient to satisfy the accountability goal.⁶⁷⁸ The first additional

⁶⁷⁶ The Author, notably, is routinely subject to efforts at ensuring his accountability. These include (1) the import of an aggrieved party’s appeal – or the prospect of the same; (2) an initial employment interview to determine the potential for impartiality and even temperament; (3) ongoing yearly performance evaluations; (4) evaluation by the local bar association; (5) compliance with the Pennsylvania Act’s requirements for continuing education in the field; and (6) fidelity to the law’s ethical code.

⁶⁷⁷ Assuring accountability is addressed, of course, via diligent employment by intra-agency and judicial review of the substantial evidence, whole record, and “clearly erroneous” standards of review. See Rossi, *supra* note 603, at 12 (“properly applied, standards of review can restore the constitutional balance that may be lost by the increasing trend towards ALJ final order authority.”). LARSON, *supra* note 164, § 130.05[6] *et seq.* (identifying various formulations applied in workers’ compensation statutes).

⁶⁷⁸ This assertion is a major proposition of the classic article by social insurance scholar Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974). The article focuses on processes such as first-level examiner review of SSDI and other claims, but the analysis transfers to the present context. Among other things, Mashaw states that:

the elements of fairness or fair procedure normally associated with due process of law in adjudicatory proceedings are inadequate to produce fairness in social welfare claims adjudications. Due process in the social welfare context therefore

approach is to ensure at the outset that the potential judge is one of high caliber. As Justice Frankfurter commented in precisely this context, “The ultimate reliance for the fair operation of any [appellate review] standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.”⁶⁷⁹

Toward this end, the potential judge must be of such a personal disposition, that is, temperament, that he or she can be trusted to treat the parties in an impartial manner. It is critical that a candidate hired for a WCJ position can preside over contested case proceedings in a professional manner that will instill in the parties a feeling that they are being treated fairly.⁶⁸⁰ An individual invested with final fact-finding power in cases that involve both sensitive personal issues and large amounts of money must possess these qualities.

Another approach is for the judge’s administrative superiors to annually assess performance in a corporate-style employee performance evaluation.⁶⁸¹ Under the Pennsylvania Act, authority

requires redefinition to include management processes which will tend to assure the accuracy of claims adjudications.

Id. at 775. Those attributes include “specific notice of adverse factual and legal claims, opportunity to produce testimony and argue orally, opportunity to cross-examine adverse witnesses, a neutral adjudicator, [and] a decision based wholly upon the evidentiary record compiled.” *Id.* See also Koch, *supra* note 3, at 284 (1994).

⁶⁷⁹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Under the Michigan reforms of 1985, the legislature sought to professionalize the process. The Michigan Act provides for magistrates’ written exams, interviews of magistrate candidates, and the criteria of evaluating the performance of magistrates. See MICH. COMP. LAWS § 418.210; MICH. COMP. LAWS § 418.212. See generally *Mich. Civ. Serv. Comm’n v. Mich. Dept. of Labor*, 384 N.W.2d 728, 730 (Mich. 1986).

⁶⁸⁰ See generally Koch, *supra* note 3, at 295 (“The way one approaches the process of judging irrevocably affects the fairness and accuracy of the ultimate determination . . . The selection process must be made sensitive to behavior and personality factors . . .”).

⁶⁸¹ See Penny J. White, *Judging Judges: Securing Judicial Independence by use of Judicial Performance Evaluations*, 29 *FORDHAM URB. L. J.* 1053 (2002). The Model State Administrative Procedures Act, notably, supplies the Office of Administrative Hearings with the power “to establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges . . .”

for such assessments was, as an example, added to the law as part of 1996 reforms which sought to fully professionalize the WCJ corps.⁶⁸² Under this EPR process, judges are rated annually on the criteria of job knowledge and skills, work results (which would cover such things as the ability to be impartial), effective communication, “initiative/problem solving,” interpersonal relations, and work habits.⁶⁸³ The evaluation is recorded on a general-use state form, and the judge’s administrative superior completes the form by reference to an extensive document, “Performance Expectations: Workers’ Compensation Judge.”⁶⁸⁴ This form categorizes performance into management of cases, conduct of hearing and ADR proceedings, issuance of decisions, and compliance with continuing education requirements.

Another type of WCJ evaluation are those by bar associations and industry groups. These have been undertaken in Pennsylvania and in Colorado (by the bar)⁶⁸⁵ and Montana (by industry),⁶⁸⁶ and certainly others. In Allegheny County, Pennsylvania (the City of Pittsburgh), the local bar developed a concern that a number of the WCJs displayed significant deficits in terms of legal skills, work ethic, and temperament. The bar maintained a liaison committee through which lawyer complaints about judge performance could be communicated to the chief judge, but this effort had not unfolded with success.⁶⁸⁷ The bar felt that it had “no other outlet” to communicate its dissatisfaction, and in 2008 it included the eight

Model State Admin. Procedures Act § 4-301(4) (1981). *See also* McNeil, *supra* note 101, at 539.

⁶⁸² *See* 77 PA. STAT. ANN. § 2501(h).

⁶⁸³ Pennsylvania WCJ Performance Evaluation (State Form) (completed sample on file with Author).

⁶⁸⁴ “Performance Expectations” (on file with Author).

⁶⁸⁵ *See* CAROL A. TELLES & SHAWN E. FOX, WORKERS’ COMPENSATION IN COLORADO: ADMINISTRATIVE INVENTORY 5-6 (1996) (noting that ALJ’s had recently been rated by the bar on the following criteria: Judicial behavior; adequacy of preparation; knowledge of the law; compliance with the rules of evidence and procedure; and completeness and clarity of decisions).

⁶⁸⁶ *See* MONTANA CHAMBER OF COMMERCE, THE 2010 JUDICIAL REVIEW OF THE MONTANA WORKERS’ COMPENSATION COURT (2010), *available at* <http://www.montanachamber.com/uploads/docs/Voting%20Review%202009/2010%20Workers%20Compensation%20Court%20Review.pdf>.

⁶⁸⁷ This statement is made based on the Author’s personal knowledge.

WCJ's in its every-four-year Judicial Evaluation Survey.⁶⁸⁸ In the end, roughly ninety lawyers (presumably the workers' compensation specialists) returned evaluations that rated the WCJs on the criteria of impartiality, legal ability, diligence, and temperament.⁶⁸⁹

Pennsylvania Act amendments of 1996, meanwhile, established a statutory Code of Ethics applicable to WCJs.⁶⁹⁰ Such codes are common among state administrative law adjudicatory schemes, and prior to this 1996 change, indeed, an administratively-imposed ethical code was in place in Pennsylvania.⁶⁹¹ Imposition of and compliance with such codes are critical to ensure WCJ accountability, particularly those with final fact-finding authority.⁶⁹²

2. Accountability via "Reasoned Decisions" and the Pennsylvania Experience

A WCJ who is invested with final fact-finding power should be required to set forth reasons for his or her credibility determinations.⁶⁹³ As the social insurance scholar Jerry Mashaw asserts, the provision of reasons in an adjudication lends legitimacy

⁶⁸⁸ Comments of Christopher Wildfire, Esq., Pittsburgh, PA, to the Author (Aug. 9, 2011).

⁶⁸⁹ ALLEGHENY COUNTY BAR ASSOCIATION 2008 JUDICIAL SURVEY (on file with the Author). The Author is unaware of how the Commonwealth may have viewed and/or responded to these third-party evaluations.

⁶⁹⁰ See 77 PA. STAT. ANN. § 2504.

⁶⁹¹ DAVID B. TORREY & ANDREW E. GREENBERG, PA. WORKERS' COMPENSATION: LAW & PRACTICE, § 1:57 (Lawyers Cooperative 1st ed. 2000) (noting that the 1996 amendment ultimately led to the early 2000 abolition of the 1994 Administrative Code ethical provisions).

⁶⁹² For the Model Code of Judicial Conduct for State ALJs, prepared by the NAALJ, see <http://www.famguardian.org/Subjects/LawAndGovt/Education/mcjcsalj.htm> (last visited Sept. 1, 2011). See generally Felter, *supra* note 649; Krent & DuVall, *supra* note 649; Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WID. J. PUB. L. 7 (2002).

⁶⁹³ See Stephen I. Richman, *Reasoned Decisions In Workers' Compensation Cases*, 63 PA. BAR ASS'N QUARTERLY 32 (1992); Stephen I. Richman, *Struggle for Reason and Accountability: Current Concepts of Causation, Aggravation and Substantial Evidence in Occupational Disease Claims*, 90 DICK. L. REV. 363 (1985-1986).

to decision-making; indeed, “the discourse of whyness and of reason-giving is more important [in administrative law] . . . than anywhere else in American law.”⁶⁹⁴ And, indeed, several state workers’ compensation acts have codified the rule that the WCJ must provide reasons for his or her decision. Among these states are Michigan⁶⁹⁵ and Nebraska.⁶⁹⁶

In the present day, due process is the animating force that demands that administrative law adjudicators provide reasons for their decisions. Still, in the workers’ compensation context the preferred method of adjudication has always been to accompany the award or denial with reasons. One of the original Connecticut commissioners recommended, in 1915, a memorandum *giving reasons* for the decision. He set forth this admonition, “however this may violate the injunction of Lord Mansfield to decide without giving reasons . . .” “The memoranda,” he added, perhaps optimistically, “may furnish interesting household literature which

⁶⁹⁴ Jerry L. Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 18 (2001).

A related method of assuring accountability is diligent employment by intra-agency and judicial review of the substantial evidence, whole record, and “clearly erroneous” standards of review. See Rossi *supra* note 603, at 12 (“properly applied, standards of review can restore the constitutional balance that may be lost by the increasing trend towards ALJ final order authority.”). See LARSON, *supra* note 164, § 130.05[6] *et seq.* (identifying various formulations applied in workers’ compensation statutes).

⁶⁹⁵ MICH. COMP. LAWS § 418.847 (providing that “the worker’s compensation magistrate, in addition to a written order, shall file a concise written opinion stating his or her reasoning for the order including any findings of fact and conclusions of law.”).

⁶⁹⁶ Rule 11(A) of the Nebraska Workers’ Compensation Court provides as follows:

Reasoned Decisions. All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

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will be read and possibly translated and often digested at leisure These memoranda are the media also of a good deal of good advice, often rather homiletic in its form of expression, to the parties whose interests are concerned.”⁶⁹⁷

This proposition has been the subject of exhaustive review in the Pennsylvania system, where throughout the 1970s and 1980s a grave concern existed over cursory and unsatisfactory decision making by many workers’ compensation referees. This concern went directly to the reality that fact-finders had been invested with considerable power and were not accountable for the decisions that they were making. At least one lawyer, the indefatigable leader of the reform effort, was of the view that some referees were abusing their power, ignoring evidence and refusing to provide reasons for their decisions.⁶⁹⁸

Under the resulting 1993 reform amendments, Section 422 of the Act was altered to read as follows:

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers’ compensation judge shall specify the evidence upon which the adjudicator relies in conformity with this section. The adjudication shall provide the basis for a meaningful appellate review.⁶⁹⁹

The foregoing language, notably, reflects the model statute proposed in 1992 by the International Association of Industrial

⁶⁹⁷ BRADBURY, *supra* note 14, at 977-78 (remarks of Commissioner George H. Beers).

⁶⁹⁸ Comments of Stephen I. Richman, Esq., to the Author (Aug. 25, 2011) (on file with the Author). *See also* Stephen I. Richman, *Reasoned Decisions In Workers’ Compensation Cases*, 63 PA. BAR ASS’N Q. 32 (Jan. 1992).

⁶⁹⁹ 77 PA. STAT. ANN. § 834 (West 2011).

Accident Boards and Commissions (IAIABC).⁷⁰⁰

Critics of the workers' compensation system were unhappy that the 1993 amendments did not lead to a regime of better fact-finding and more rigorous review, and they called for further reform. The 1996 amendments added an additional clause to Section 422:

When faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the [WCJ] must identify that evidence and explain adequately the reasons for its rejection.⁷⁰¹

These amendments have made a difference in the Pennsylvania practice. WCJs in Pennsylvania who do not abide by the statute and fail to set forth reasons for their decisions will likely receive a remand from the Appeal Board or Commonwealth Court.⁷⁰² It is notable, however, that the state supreme court has not required the Pennsylvania WCJ to set forth specific reasons for crediting or discrediting a witness when he or she has *actually observed* the individual's demeanor. According to the Supreme Court, when the WCJ actually views the witness, a simple, fairly conclusory statement of credibility or non-credibility is sufficient. With regard to expert depositions, however, and presumably depositions of others, some articulation of the bases of the credibility determinations must be set forth.⁷⁰³

⁷⁰⁰ Newsletter of American Bar Association, Tort & Insurance Practice Section, Workers' Compensation and Employers' Liability Law Committee 20 (Winter 1994).

⁷⁰¹ 77 PA. STAT. ANN. § 834.

⁷⁰² See, e.g., O'Donnell v. Workers' Comp. Appeals Bd. (UPS), 831 A.2d 784 (Pa. Commw. Ct. 2003).

⁷⁰³ Daniels v. Workers' Comp. Appeal Bd. (Tristate Transport), 828 A.2d 1043 (Pa. 2003). The dissent believed that all credibility determinations should be explained. *Id.* at 1055 (Newman, J., concurring and dissenting). For commentary, see Corey Iannacone, *Reasoned Decisions Under the Workers' Compensation Act*, 14 WIDENER L.J. 691 (2005).

X. CONCLUSION

A process of evolutionary convergence has resulted in a major change in the role of the workers' compensation judge. To utilize the now familiar analogy, he or she effectively sits, in roughly half the states, not as special master but chancellor.⁷⁰⁴ Of some irony is that the Connecticut Supreme Court, writing in 1915, long ago endorsed such a scheme. "If the Act permits each cause to be appealed and tried *de novo* . . . its objects will be defeated, and more delay, less certainty, and more expense will ensue to the claimant than with the single trial of the old method."⁷⁰⁵

The WCJ has ascended to such status in a number of large states, including Florida, Massachusetts, New Jersey, and Pennsylvania.⁷⁰⁶ Meanwhile, in many states where the commission remains the fact-finder, the WCJ's fact-findings are normally accorded significant deference.⁷⁰⁷ These include such states as Michigan, Missouri, Oregon, and Virginia. Even in a state like Arkansas, where the Commission is said to reassess credibility with some regularity, a justice has remarked upon the notable professionalization and "upgraded" status of the judges who hear workers' compensation cases. "The ALJ," he admonished, "is no longer just an aide to the commission or a referee."⁷⁰⁸

As submitted above, the Author is persuaded that the values of efficiency, accuracy, independence of judging, and transparency make this development a positive one. To so posit is neither bold nor exotic. Chief Justice Hughes, in holding legitimate the Longshore Act's federal Deputy Commissioner as final fact-finder, admonished in 1942, "To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact

⁷⁰⁴ See *supra* Section I (quick reference table categorizing states).

⁷⁰⁵ *Powers v. Hotel Bond Co.*, 93 A. 245, 248 (Conn. 1915) (ratifying statutory scheme under which adjudication of single commissioner was final as to the facts, without review of same on direct appeal to superior court).

⁷⁰⁶ See *supra* Sections V(D), V(E).

⁷⁰⁷ See *supra* Section VI(A).

⁷⁰⁸ *Webb v. Workers' Comp. Comm'n*, 733 S.W.2d 726, 727 (Ark. 1987).

which are peculiarly suited to examination and determination by an administrative agency especially assigned to that task”⁷⁰⁹

Of note is that while the Author has used the phrase “trend” in this article, the gravitation seems to have subsided. The Author’s research does not reveal a change to any major system since West Virginia’s amendments in 1995.⁷¹⁰ This phenomenon is likely to be explained in part because of the coextensive relenting of the worst of the cost and litigation crises that unfolded in the wake of post-National Commission reforms.⁷¹¹

It is a cliché to posit that with significant power comes great responsibility. Still, the aphorism is applicable in this context. The WCJ should be made the fact-finder, but an appropriate structure must be in place to ensure accountability. “Every legal system,” after all, “strives to meet the dual goals of efficiency and fairness. The problem is, of course, that efficiency – quick and sure resolution of claims and disputes – does not always serve the interests of fairness.”⁷¹²

The reader may recall, in this vein, the unique Pennsylvania experience, where the WCJ in 1972 was made final fact-finder and at once accorded broad civil service protections. These positive developments took the politics out of judging, but a pattern of abuse in many regions developed relative to the fact-finding process. This pattern of abuse engendered public and lawyerly distrust of the

⁷⁰⁹ *Crowell v. Benson*, 52 S. Ct. 285, 291, 285 U.S. 22, 46 (U.S. 1942).

⁷¹⁰ According to the Author’s research, Alaska did create, for the first-time, intra-agency review in 2005.

⁷¹¹ See Barry Lipton & Karen Ayres, *Workers’ Compensation Cost Drivers Through the Years*, WORKERS’ COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? 21 (R. Victor & L. Carrubba, eds., WCRI 2010) (addressing costs and referring to 1985 to 1990 as the “Meltdown”; 1991 to 1994 as “Reform”; and 1991 to 2001 as “The Cycle Bottoms Out”).

⁷¹² Emily Spieler, *Assessing Fairness in Workers’ Compensation Reform: A Commentary on the 1995 West Virginia Workers’ Compensation Legislation*, 98 W. VA. L. REV. 23, 161 (1995) (continuing on to posit that “[f]airness requires time and resources which provide the litigants an opportunity to be heard on issues of fact and law; fairness also requires attentiveness to maintaining equal access to justice for all litigants.”).

system.⁷¹³ In response, an advocacy developed that would once again restrict WCJ authority and invest intra-agency review with enhanced power. As recounted above, this advocacy in the end produced the requirement of reasoned decisions, an accountability innovation with teeth that has improved adjudication in the state.

This innovation was and is entirely appropriate. The fact-finding process is of immense, even pivotal, importance in the process of adjudication. As an early treatise writer, who was also a California workers' compensation referee, posited, "the power to hear and determine is the power to determine wrongly as well as rightly."⁷¹⁴

⁷¹³ See Stephen I. Richman, *Struggle for Reason and Accountability: Current Concepts of Causation, Aggravation and Substantial Evidence in Occupational Disease Claims*, 90 DICK. L. REV. 363 (1985-1986).

⁷¹⁴ CAMPBELL, *supra* note 95, at 1365.

XI. APPENDICES

A. Table 1: Title, Power, Process

WORKERS' COMPENSATION AND ADJUDICATORY POWER
 FIFTY STATES, DISTRICT OF COLUMBIA, LHWCA (2012)
 ("WC" = Workers' Compensation)

~ David B. Torrey⁷¹⁵

State	Title, 1st Level Hearing Officer (H.O.)	1st Lev. H.O. Final Fact- Finder?	Structure, Adjudication & Appeal, with Judicial Standard of Review of Fact-Findings Reference (Note: All appellate courts review for error of law)
Alabama	Trial Judge of the County Circuit Court	Yes	WC cases litigated in civil court; appeal to Court of Civil Appeals and then, with permission, to state supreme court, where review is substantial evidence. <i>See Ex parte Hayes</i> , 70 So. 3d 1211 (Ala. 2011).
Alaska	WC Board of Dept. of Labor & Workforce Development ⁷¹⁶	Yes	WC cases litigated before WC Board. Since 2005, decisions of the Board appealed to the Alaska WC Appeals Commission (Board remains final fact-finder); judicial review in Alaska Supreme Court, where review is substantial evidence. <i>Lewis-Walunga v. Municipality of Anchorage</i> , 249 P.3d 1063 (Alaska 2011).
Arizona	ALJ of the Industrial Commission	Yes	WC cases litigated before ALJ, with right to an essential reconsideration before same ALJ ⁷¹⁷ ; direct appeal to Court of

⁷¹⁵ Workers' Compensation Judge, Pennsylvania Department of Labor & Industry, Pittsburgh, PA. Contact: dtorrey@pa.gov.

⁷¹⁶ **Alaska:** Two members of a quasi-judicial hearing panel of the Alaska WC Board constitute a quorum for taking action on a disputed benefits claim.

⁷¹⁷ **Arizona:** For a description of this process, authored by the Chief ALJ, see p.8, Indus. Comm'n of Arizona, 2009 ANNUAL REPORT, available at

			Appeals (no intra-agency review); appeal thereafter to state supreme court. Court of Appeals shows deference to Industrial Commission fact-findings. <i>Stewart v. Indus. Comm'n</i> , 2011 Ariz. App. Unpub. LEXIS 756 (Ariz. Ct. App. 2011).
Arkansas	ALJ of the WC Commission	No	WC cases litigated before ALJ, with appeal to full WC Commission, which undertakes <i>de novo</i> review and is final fact-finder; judicial review in Court of Appeals and thereafter, with permission, in state supreme court. Review is substantial evidence. <i>Hudak-Lee v. Baxter County Reg'l Hosp. & Risk Mgmt. Res.</i> , 2011 Ark. LEXIS 31 (Ark. 2011).
California	WCJ of the WC Appeals Board	No	WC cases litigated before WCJ, with appeal to the WC Appeals Board, which may reweigh the evidence. Appeal thereafter is to Court of Appeals and, thereafter, with permission, to state supreme court. Review is "substantial evidence in light of the entire record." <i>County of Kern v. Workers' Comp. Appeals Bd.</i> , 200 Cal. App. 4th 509 (Cal. Ct. App. 2011).
Colorado	ALJ of Office of Administrative Courts	Yes	WC cases litigated before a "central panel" ALJ, with appeal to the Industrial Claims Appeals Office (ICAP or "panel"), which undertakes substantial evidence review. Appeal thereafter is to the Colorado Court of Appeals and then state supreme court. Review is substantial evidence. <i>Hire Quest, LLC v. Indus. Claim Appeals Office</i> , 2011

<http://www.ica.state.az.us/Commissioners/Forms/2009AnnualReport.pdf> (last visited Dec. 16, 2011).

			Colo. App. LEXIS 1522 (Colo. Ct. App. 2011).
Connecticut	Commissioner of the WC Commission	Yes	WC cases litigated before a single Commissioner, with appeal to the Compensation Review Board of the WC Commission; no reweighing of the evidence. Appeal thereafter is to the Court of Appeals (note: state supreme court may hear such appeal via transfer). Review for “clearly erroneous” findings. <i>Brymer v. Town of Clinton</i> , 31 A.3d 353 (Conn. 2011). ⁷¹⁸
Delaware	Industrial Accident Board or, upon consent, hearing officer (all of Dept. of Labor, OWC)	Yes	WC cases litigated before Board or its hearing officer; judicial review in Superior Court and thereafter in state supreme court. Review is substantial evidence. <i>Robbins v. Helmark Steel</i> , 2011 Del. LEXIS 527 (Del. 2011).
Florida	Judge of Comp’n Claims (JCC), Office of JCC’s, Florida Division of Administrative Hearings	Yes	WC cases litigated before JCC, with appeal to 1 st Dist. Ct. Appeals (special jurisdiction over WC cases), with appeal thereafter to state supreme court. Review is substantial evidence. <i>Wintz v. Goodwill</i> , 898 So. 2d 1089 (Fla. Dist. Ct. App. 2005). ⁷¹⁹
Georgia	ALJ of the Legal Division, Board of WC	No	WC cases litigated before an ALJ, with appeal to a three-member Board (the Appellate Division); in their judicial

⁷¹⁸ **Connecticut:** *Brymer v. Town of Clinton*, 31 A.3d 353, 359 (Conn. 2011) (a “factual finding is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made.”).

⁷¹⁹ **Florida:** *Wintz v. Goodwill*, 898 So. 2d 1089 (Fla. Dist. Ct. App. 2005) (the “standard of review in worker’s compensation cases is whether competent substantial evidence *supports* the decision below, *not* whether it is possible to recite contradictory record evidence which supported the arguments rejected below.”).

			capacity, the three members of the Board function as an appellate review panel, which hears and reviews cases when a party files an appeal from an award of an ALJ; appeal thereafter to Superior Court, and then to state supreme court. Review is “any evidence.” <i>Subsequent Injury Trust Fund v. City of Atlanta</i> , 713 S.E.2d 706 (Ga. Ct. App. 2011). ⁷²⁰
Hawaii	Hearings Officer of the Director of the Disability Compensation Division, Dept. of Labor	No	WC cases litigated before Hearings Officer, appeal to Labor & Industrial Relations Appeals Board (LIRAB); judicial review thereafter in Intermediate Court of Appeals, and then in state supreme court. Review for “clearly erroneous” findings. <i>Alkire-Clemen v. Castle Med. Ctr.</i> , 2010 Haw. App. LEXIS 32 (Haw. Ct. App. 2010).
Idaho	Referee or Commissioner of the Industrial Commission	No ⁷²¹	WC cases litigated before the Industrial Commission or its referee – full Commission may grant reconsideration and alter findings; appeal thereafter to Idaho Supreme Court, which undertakes substantial evidence review. <i>Fife v. Home Depot, Inc.</i> , 260 P.3d 1180 (Idaho 2011).

⁷²⁰ **Georgia:** *Subsequent Injury Trust Fund v. City of Atlanta*, 713 S.E.2d 706 (Ga. Ct. App. 2011) (“In the absence of legal error, the factual findings of the State Board of Workers Compensation must be affirmed by a superior court and by the Court of Appeals when supported by any evidence in the administrative record. Erroneous applications of law to undisputed facts, as well as decisions based on erroneous theories of law, however, are subject to the de novo standard of review.”).

⁷²¹ **Idaho:** As a party may appeal directly from a referee’s decision to the Idaho Supreme Court, in some circumstances the first level fact-finder may be the final fact-finder.

Illinois	Arbitrator of the WC Commission	No	WC cases litigated before an Arbitrator of the Commission; review thereafter by Commission, which has “original jurisdiction” and is not bound by credibility determinations of arbitrator; appeal thereafter to district court, then to appellate court (which has a “Workers’ Compensation Commission Division”), and then to state supreme court. Review is for whether findings of fact are “against the manifest weight of the evidence.” <i>Jacobo v. Ill. Workers’ Comp. Comm’n</i> , 2011 Ill. App. LEXIS 1186 (Ill. App. Ct. 2011). ⁷²²
Indiana	“Single Hearing Member” of Workers’ Compensation Board	No	WC cases litigated before a single member of the WC Board; appeal thereafter to full board, which generally does not take further evidence. Judicial review thereafter in Court of Appeals (supreme court may take case by transfer). Review is substantial evidence. <i>Ind. Spine Group, PC v. Pilot Travel Ctrs., LLC</i> , 959 N.E.2d 789 (Ind. 2011).
Iowa	Deputy Commissioner, Division of WC, “Workforce Development” Dept.	No	WC cases litigated before the Deputy Commissioner; any party aggrieved by a decision of Deputy Commissioner may appeal to the Commissioner, who “may affirm, modify, or reverse the decision of a deputy commissioner or the commissioner may remand” Appeal thereafter to District

⁷²² **Illinois:** *Jacobo v. Ill. Workers’ Comp. Comm’n*, 959 N.E.2d 772 (Ill. App. Ct. 2011) (“The Commission’s determination on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent.”).

			Court, and then to Supreme Court; these two courts undertake substantial evidence review. <i>Bell Bros. Heating & Air Conditioning v. Gwinn</i> , 779 N.W.2d 193 (Iowa 2010).
Kansas	ALJ of the Division of WC, Dept. of Labor	No	WC cases litigated before an ALJ. Appeal de novo to WC Appeals Board, which reviews the record made by the ALJ. Appeal thereafter, based on substantial evidence, to Kansas Court of Appeals, and thereafter to state supreme court. <i>Bryant v. Midwest Staff Solutions, Inc.</i> , 257 P.3d 255 (Kan. 2011). ⁷²³
Kentucky	ALJ of the Dept. of Workers' Claims	Yes	WC cases litigated before an ALJ of the Commission; appeal thereafter is to WC Board, which undertakes review for whether decision of ALJ is "clearly erroneous," or whether ALJ has otherwise been arbitrary and capricious; appeal thereafter to Court of Appeals and then to state supreme court. Review is substantial evidence. <i>Abel Verdon Constr. v. Rivera</i> , 348 S.W.3d 749 (Ky. 2011). ⁷²⁴
Louisiana	WCJ of the Office of WC,	Yes	WC cases litigated before a WCJ of the Office of WC;

⁷²³ **Kansas:** *Bryant v. Midwest Staff Solutions, Inc.*, 257 P.3d 255 (Kan. 2011) ("An appellate court's review of questions of fact in a workers compensation appeal is limited to whether, when reviewing the record as a whole, the Board's findings of fact are supported by substantial evidence, which is a question of law.").

⁷²⁴ **Kentucky:** *Abel Verdon Constr. v. Rivera*, 348 S.W.3d 749 (Ky. 2011) ("Legal errors would include whether the ALJ ... made a clearly erroneous finding of fact, rendered an arbitrary or capricious decision, or committed an abuse of discretion. A party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, i.e., that the finding was unreasonable under the evidence. Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.").

	Workforce Commission		appeal thereafter to Court of Appeals and then to state supreme court. Review is for whether the fact-findings are in manifest error or clearly wrong. <i>Poissenot v. St. Bernard Parish Sheriff's Office</i> , 56 So. 3d 170 (La. 2011).
Maine	Hearing Officer of the WC Board	Yes	WC cases litigated before a hearing officer of the WC Board. Full board review may be acquired of the decision of hearing officer if the decision involves an issue that is of significance to the operation of the workers' compensation system. Potential appeal thereafter is to the state supreme court, which is not obliged to accept such appeal. <i>Doucette v. Hallsmith/Sysco Food Servs.</i> , 21 A.3d 99 (Me. 2011). ⁷²⁵
Maryland	Commissioner of the WC Commission	No	WC cases litigated before a single Commissioner of the Commission. Appeal thereafter to trial court (county circuit court), where trial (including jury trial) de novo is possible; under statute, "the decision of the Commission is presumed to be prima facie correct." Review is substantial evidence. <i>Wal-Mart Stores, Inc. v. Holmes</i> , 7 A.3d 13 (Md. 2010).
Massachusetts	Administrative Judge (AJ) of the Dept. of Industrial Accidents, Labor and Workforce Development	Yes	WC cases litigated before the Division of Dispute Resolution. If no agreement is reached at Conciliation, AJ convenes an informal conference and thereafter issues a temporary order; either party may thereafter appeal and request a

⁷²⁵ **Maine:** *Doucette v. Hallsmith/Sysco Food Servs.*, 21 A.3d 99 (Me. 2011) ("For purposes of a workers' compensation hearing, a hearing officer's decision, in the absence of fraud, on all questions of fact is final. Me. Rev. Stat. Ann. tit. 39-A, § 322(3) . . .").

			formal de novo hearing with the AJ; appeal thereafter to Reviewing Board, made up of six Administrative Law Judges (ALJs). Two panels of three ALJs function as appellate body of the DIA; appeal thereafter to state supreme court. Review of fact-findings is under the “arbitrary and capricious” test. DiFronzo's Case, 945 N.E.2d 350 (Mass. 2011). ⁷²⁶
Michigan	Magistrate, WC Board of Magistrates, Michigan Administrative Hearing System	Yes	WC cases litigated before a Magistrate; appeal thereafter to the Michigan Compensation Appellate Commission, ⁷²⁷ and then to the Michigan Court of Appeals and state supreme court. Review is “any competent evidence.” Bennett v. Mackinac Bridge Auth., 808 N.W.2d 471 (Mich. Ct. App. 2010) .
Minnesota	Compensation Judge of the WC Division, Dept. of Administrative Hearings	Yes	WC cases litigated before a compensation judge. Appeal thereafter to a special Workers’ Compensation Court of Appeals, and supreme court thereafter. Review is whether findings are “manifestly contrary to the evidence or unless the evidence clearly requires reasonable minds to adopt a contrary conclusion.” Falls v. Coca Cola Enters., 726

⁷²⁶ **Massachusetts:** DiFronzo's Case, 945 N.E.2d 350 (Mass. 2011) (“The court may thus reverse or modify a decision of the board when . . . it is based upon an error of law or is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law The court accordingly considers whether the decision is factually warranted and not arbitrary or capricious, in the sense of having adequate evidentiary and factual support and disclosing reasoned decision making.”).

⁷²⁷ **Michigan:** Effective August 1, 2011, the Workers' Compensation Appellate Commission became the Michigan Compensation Appellate Commission.

			N.W.2d 96 (Minn. 2007).
Mississippi	ALJ of the Workers' Compensation Commission	No	WC cases litigated before ALJ of the Commission. Appeal thereafter to Commission, and then to Circuit Court and state supreme court. Review is substantial evidence, which is equated with review for arbitrary and capricious findings. <i>Gregg v. Natchez Trace Elec. Power Ass'n</i> , 64 So. 3d 473 (Miss. 2011).
Missouri	ALJ of the Division of WC, Dept. of Labor	No	WC cases litigated before an ALJ of the Division. Appeal thereafter to the Labor and Industrial Relations Commission, and then to Court of Appeals and state supreme court. Review is substantial evidence. <i>Hampton v. Big Boy Steel Erection</i> , 121 S.W.3d 220 (Mo. 2003). ⁷²⁸
Montana	WCJ of the Workers' Compensation Court	Yes	WC cases litigated before the WC Court (one judge). A direct appeal thereafter may be taken to the Montana Supreme Court, which exercises substantial evidence review. <i>Wright v. Ace Am. Ins. Co.</i> , 2011 Mont. LEXIS 45 (Mont. 2011). ⁷²⁹

⁷²⁸**Missouri:** *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (“A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence.... Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.”).

⁷²⁹**Montana:** *Wright v. Ace Am. Ins. Co.*, 249 P.3d 485 (Mont. 2011). (“In reviewing the Montana Workers’ Compensation Court’s [WCC’s] factual findings ... the supreme court confines its review to determining whether substantial credible evidence supports the findings actually made by the [WCC] ... Because the supreme court is in as good a position as the ... [WCC] to assess testimony presented ... by way of deposition, it reviews deposition testimony de

Nebraska	Trial Judge of the Workers' Compensation Court (WCC)	Yes	WC cases litigated before a single trial judge of the seven-member WCC, with appeal on substantial evidence review to three-member review panel of the WCC. Appeal thereafter to Court of Appeals and/or to state supreme court. Review: findings of trial judge have "the effect of a jury verdict and will not be disturbed unless clearly wrong." <i>Straub v. City of Scottsbluff</i> , 784 N.W.2d 886 (Neb. 2010).
Nevada	Hearing Officer of the Department of Administration	No	WC cases litigated before a Hearing Officer. Appeal thereafter de novo to the Appeals Officer, who is the final fact-finder. Judicial review follows in the district court and then in state supreme court. Review is substantial evidence. <i>Vredenburg v. Sedgwick CMS</i> , 188 P.3d 1084 (Nev. 2008).
New Hampshire	Hearing Officer of the Commissioner	No	WC cases litigated before a hearing officer; de novo review thereafter before Compensation Appeal Board (CAB), which hears evidence. Judicial review thereafter in state supreme court. Review is "whether the findings are supported by competent evidence in the record." <i>Appeal of S. N.H. Health Sys., Inc.</i> , 2011 N.H. LEXIS 96 (2011). ⁷³⁰

novo. However, even [in this situation], it is ultimately restricted to determining whether substantial credible evidence supports the [WCC's] findings.").

⁷³⁰ **New Hampshire:** *Appeal of S. N.H. Health Sys., Inc.*, 2011 N.H. LEXIS 96 (2011) ("The Supreme Court ... will overturn a [WC] Board's decision only for errors of law, or if the Court is satisfied by a clear preponderance of the evidence before it that the decision is unjust or unreasonable. The Board's factual findings are prima facie lawful and reasonable. ... In reviewing the Board's findings, the Court's task is not to determine whether it would have found

New Jersey	Judge of Compensation, Division of WC, Dept. of Labor & Workforce Development	Yes	WC cases litigated before JWC; judicial review in Superior Court and thereafter in state supreme court. Review is “sufficient credible evidence.” <i>Sager v. O.A. Peterson Constr. Co.</i> , 862 A.2d 1119 (N.J. 2004). ⁷³¹
New Mexico	WCJ, WC Administration	Yes	WC cases litigated before the WCJ. Appeal thereafter to Court of Appeals, and then by permission to state supreme court. Review is substantial evidence on the “whole record.” <i>Ortiz v. Overland Express</i> , 237 P.3d 707 (N.M. 2010). ⁷³²
New York	Workers’ Compensation Law Judge of the WCB	No	WC cases litigated before WCLJ. Appeal thereafter to Board, and then to Appellate Division of Supreme Court (trial court). Review thereafter, on substantial evidence basis, in New York Court of Appeals. <i>Matter of Conyers v. Van</i>

differently than did the Board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record...”).

⁷³¹ **New Jersey:** *Sager v. O.A. Peterson Constr. Co.*, 862 A.2d 1119 (N.J. 2004) (“Whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility and, in the case of agency review, with due regard also to the agency’s expertise where such expertise is a pertinent factor.”).

⁷³² **New Mexico:** *Ortiz v. Overland Express*, 237 P.3d 707 (N.M. 2010) (“The ... Supreme Court reviews factual findings of the [WC] judge under a whole record standard of review. A whole record standard of review mandates that the ... court reviews both favorable and unfavorable evidence to determine whether there is evidence that a reasonable mind could accept as adequate to support the conclusions reached by the fact finder. The purpose of findings of fact is to set out the ultimate facts of the case, and they must be read together and the conclusions of law flow therefrom. To determine whether a challenged finding is supported by substantial evidence, the reviewing court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence. To warrant reversal, the supreme court must be persuaded that it cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the whole record furnishes.”).

			Rensselaer Manor, 914 N.Y.S.2d 439 (N.Y. App. Div. 2011).
North Carolina	Deputy Commissioner of the Industrial Commission	No	WC cases litigated before the Deputy Commissioner. Appeal thereafter to the Full Commission, which is the final fact-finder. Judicial review in Court of Appeals and, thereafter, in state supreme court. Review is “any competent evidence.” <i>Mauldin v. A.C. Corp.</i> , 719 S.E.2d 110 (N.C. Ct. App. 2011).
North Dakota	ALJ of the Office of Administrative Hearings	No	WC cases litigated before ALJ, who makes a recommendation to Workforce Safety & Insurance (WSI) on whether WSI’s decision is correct; WSI conducts review “to ensure that the facts and the law support the decision” and issues final order; appeal thereafter to district court, and then to state supreme court. Review is “whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” <i>Landrum v. Workforce Safety & Ins. Fund</i> , 798 N.W.2d 669 (N.D. 2011).
Ohio	District Hearing Officer (DHO) of the Industrial Commission ⁷³³	No	WC cases litigated before DHO, with appeal to Staff Hearing Officer (SHO), and then, with permission, to Industrial Commission. Appeal available thereafter to trial court, which will convene jury or bench trial; at this level, facts may be found again. Appeal thereafter to Court of Appeals and state

⁷³³ **Ohio:** The decision of the “Staff Hearing Officer” (SHO) of the Industrial Commission, however, can be final as to the fact-findings if the Commission denied review.

			supreme court; said courts will not “disturb the decision of the common pleas court ... unless that decision is against the manifest weight of the evidence.” <i>Coleman v. City of Hamilton</i> , 2011 Ohio App. LEXIS 3920 Ct. (Ohio Ct. App. 2011).
Oklahoma	Trial Judge of the Workers’ Compensation Court	Yes	WC cases litigated before a single judge; awards are final unless appealed to a panel of three WC Court judges, or directly to the Supreme Court; an order of the three-judge panel may be appealed to the Supreme Court. Review, since 2010, is under the “clear weight of the evidence” standard. <i>HAC, Inc. v. Box</i> , 245 P.3d 609 (Okla. 2010).
Oregon	ALJ of the Hearing Division of the Board	No	WC cases litigated before ALJ, with appeal to the Board, which can make new or additional findings; judicial review in Court of Appeals, then to state supreme court. Review is substantial evidence. <i>Dynea USA, Inc. v. Fairbanks (In re Comp. of Fairbanks)</i> , 250 P.3d 389 (Or. Ct. App. 2011).
Pennsylvania	WCJ of the Dept. of Labor & Industry, Office of WC Adjudication	Yes	WC cases litigated before WCJ; appeal thereafter to WC Appeal Board, which reviews for substantial evidence and error of law. Appeal thereafter to Commonwealth Court and then, with permission, to state supreme court. Review is substantial evidence. <i>City of Philadelphia v. WCAB (Kriebel)</i> , 29 A.3d 762 (Pa. 2011).
Rhode Island	Trial Judge of the	Yes ⁷³⁴	WC cases litigated before trial

⁷³⁴ **Rhode Island:** Appellate Division may be able to reassess credibility if it first finds that trial judge has made findings of fact that are “clearly erroneous.”

	Workers' Compensation Court		judge of the WCC, with appeal on "clearly erroneous" standard to Appellate Division of WCC. Judicial review in state supreme court. Review is "legally competent evidence." <i>McGloin v. Trammellcrow Servs.</i> , 987 A.2d 881 (R.I. 2010).
South Carolina	Commissioner of the Industrial Commission	No	WC cases litigated before a single commissioner; appeal thereafter to a panel of three commissioners, then to a panel of six commissioners ("Full Commission"); for injuries after 2007, judicial review is to Court of Appeals, and then state supreme court. Review is substantial evidence. <i>Johnson v. BMW Mfg. Corp., LLC</i> , 2011 S.C. App. Unpub. LEXIS 594 (S.C. Ct. App. 2011). ⁷³⁵
South Dakota	ALJ of the Department of Labor	No	WC cases litigated before an ALJ with appeal to the Secretary of the state DOL; judicial review in circuit court and then state supreme court, which undertakes "clearly erroneous" review and reserves the right to reweigh credibility, particularly when the evidence is documentary in nature, including testimony by deposition. <i>McQuay v. Fischer</i>

The Supreme Court does not exercise such review. *McGloin v. Trammellcrow Servs.*, 987 A.2d 881 (R.I. 2010) ("The Supreme Court's review on certiorari is limited to examining the record to determine if an error of law has been committed. The ... Court does not weigh the evidence, but rather reviews the record to determine whether legally competent evidence supports the findings").

⁷³⁵ **South Carolina:** *Johnson v. BMW Mfg. Corp., LLC*, 2011 S.C. App. Unpub. LEXIS 594 (S.C. Ct. App. 2011) ("Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.").

			Furniture, 808 N.W.2d 107 (S.D. 2011). ⁷³⁶
Tennessee	Trial Judge of the Circuit Court	No	WC cases litigated before a trial judge of the circuit court; appeal to state supreme court, including the Special WC Appeals Panel; credibility can be reassessed on appeal: “The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise.” Griffin v. Walker Die Casting, Inc., et al., 2010 Tenn. LEXIS 1020 (Tenn. Sp. WC App. Panel at Nashville 2010).
Texas	Hearing Officer of the WC Commission	No	WC cases litigated before hearing officer after mandatory benefit review conference, with appeal to Appeals Panel. On basic issues of compensability and eligibility, appeal de novo to district (trial) court for bench or jury trial; in such cases, trial court is final fact-finder. On collateral issues, court undertakes substantial evidence review. Appeal thereafter to Court of Appeals, and then to state supreme court. Review of a jury verdict is “legal sufficiency.” Transcon. Ins. Co. v. Crump, 274 S.W.3d 86 (Tex. App. 2008), reversed on other

⁷³⁶ **South Dakota:** McQuay v. Fischer Furniture, 808 N.W.2d 107 (S.D. 2011) (“We review an agency’s factual findings under the clearly erroneous standard.... However, when ‘an agency makes factual determinations on the basis of documentary evidence, such as depositions or medical records,’ our review is de novo.”) (quoting, among other things, S.D. CODIFIED LAWS § 1-26-36).

			grounds, 330 S.W.3d 211 (Tex. 2010). ⁷³⁷
Utah	ALJ of the Utah Labor Commission, Adjudication Division	No	WC cases litigated before ALJ, with appeal to Utah Labor Commission Appeals Board; judicial review thereafter in Court of Appeals, and then in state supreme court. Review is substantial evidence in light of the whole record. <i>Carradine v. Labor Comm'n</i> , 258 P.3d 636 (Utah Ct. App. 2011).
Vermont	Hearing Officer, Vermont Department of Labor (for the Commissioner)	No	WC cases litigated before Commissioner, though hearing officer makes record for Commissioner, Department of Labor, who is the initial fact-finder. Appeal <i>de novo</i> to trial court on certified issues, which may include factual issues. Appeals on legal issues only are prosecuted directly to supreme court. Appeal beyond jury trial is to state supreme court. Review from Commissioner is (this writer's interpretation) any evidence. <i>Colson v. Town of Randolph</i> , 2011 Vt. LEXIS 130 (Vt. 2011). ⁷³⁸ Review from jury

⁷³⁷ **Texas:** *Transcon. Ins. Co. v. Crump*, 274 S.W.3d 86 (Tex. App. 2008), *reversed on other grounds*, 330 S.W.3d 211 (Tex. 2010) (“In a legal sufficiency review, we view the evidence in the light most favorable to the verdict and indulge every reasonable inference that supports the verdict.... We must credit evidence that supports the judgment if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not.... If the evidence falls within the zone of reasonable disagreement, we cannot substitute our judgment for that of the fact finder.... Unless there is no favorable evidence, or if the contrary evidence renders supporting evidence incompetent or conclusively establishes the opposite, we must affirm.... ‘The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.’”).

⁷³⁸ **Vermont:** *Colson v. Town of Randolph*, 2011 Vt. LEXIS 130 (Vt. 2011) (“[the] appellate court is bound by the Commissioner’s findings so long as they are supported by the evidence. The appellate court will affirm if the Commissioner’s conclusions are rationally derived from the findings and based on

			trial is whether the evidence taken in the most favorable light for the prevailing party fairly and reasonably tends to support the verdict. <i>Rae v. Green Mountain Boys Camp</i> , 175 A.2d 800 (Vt. 1961).
Virginia	Deputy Commissioner of the WC Commission	No	WC cases litigated before Deputy Commissioner, with appeal to Full Commission; judicial review thereafter in the Court of Appeals and the state supreme court. Review is whether findings are “plainly wrong or without credible evidence.” <i>Gilbane v. Guzman</i> , 717 S.E.2d 433 (Va. Ct. App. 2011).
Washington	Industrial Appeals Judge (IAJ), of the Bd. of Indus. Ins. Appeals (BIIA)	No	WC cases litigated before IAJ (who issues a proposed D&O), with appeal to BIIA. Appeal thereafter to superior court (trial court), which may involve a jury trial. Judicial review to Court of Appeals, and then to state supreme court. Review is substantial evidence. <i>Rogers v. Dep't of Labor & Indus.</i> , 210 P.2d 355 (Wash. Ct. App. 2009).
West Virginia	ALJ of the Office of Judges, Insurance Commission	Yes	WC cases litigated before ALJ, with recourse thereafter to Board of Review, which is essentially appellate review. Appeal, with permission, to state supreme court. Review is whether findings are “clearly wrong.” <i>Casdorph v. W. Va. Office Ins. Comm'r</i> , 690 S.E.2d 102 (W. Va. 2009). ⁷³⁹

a correct interpretation of the law. It will overrule only if no evidentiary support exists for the findings or if the decision is based on evidence so slight as to be an irrational basis for the result reached.”).

⁷³⁹ **West Virginia:** *Casdorph v. W. Va. Office Ins. Comm'r*, 690 S.E.2d 102 (W.V. 2009) (“decision of the board may be reversed or modified by the supreme court ... only if the decision is [*inter alia*] ... so clearly wrong based upon

Wisconsin	ALJ of the WC Div., Dept. of Workforce Development	No	WC cases litigated before ALJ, with appeal to the Labor & Industry Review Commission. Judicial Review in the circuit court, with appeal thereafter to Court of Appeals and then to state supreme court. Review is substantial evidence. <i>DeBoer Transp., Inc. v. Swenson</i> , 804 N.W.2d 658 (Wis. 2011).
Wyoming	Hearing Examiner of the Office of Administrative Hearings	Yes	WC cases are litigated before Hearing Examiner, then judicial review in District Court; appeal thereafter to state supreme court. Review is substantial evidence. <i>McCall-Press v. State</i> (In re Worker's Comp. Claim of McCall-Press), 247 P.3d 505 (Wyo. 2011).
District of Columbia	ALJ of the D.C. Dept. of Employment Services (DES)	Yes	WC cases litigated before ALJ, appeal to Compensation Review Bd. (CRB), DC DES; judicial review thereafter in D.C. Court of Appeals. Review is substantial evidence. <i>Asylum Co. v. D.C. Dep't of Empl. Servs.</i> , 10 A.3d 619 (D.C. 2010).
LHWCA	ALJ of the US Department of Labor, Office of ALJ's (OALJ)	Yes	WC cases litigated before ALJ, with appeal to Benefits Review Board; judicial review in U.S. Court of Appeals and then, with permission, to U.S. Supreme Court. Review is substantial evidence based on the whole record. <i>P&O Ports Tex., Inc. v. Dir., OWCP</i> , 446 Fed. Appx. 724 (5th Cir. 2011). ⁷⁴⁰

the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.").

⁷⁴⁰ **LHWCA:** *P&O Ports Tex., Inc. v. Dir., OWCP*, 446 Fed. Appx. 724 (5th Cir. 2011) ("court reviews the decisions of the ... (BRB) for errors of law and applies the same substantial evidence standard that governs the BRB's review of the ... (ALJ)'s ... factual findings. The findings of the ALJ must be accepted unless they are not supported by substantial evidence in the record considered as a

B. Table 2: Law Regarding Stay and Selected Authorities

WORKERS' COMPENSATION AND ADJUDICATORY POWER
FIFTY STATES AND DISTRICT OF COLUMBIA, LHWCA (2012)
("WC" = Workers' Compensation)

State	Title, 1st Level Hearing Officer	1st Lev. H.O. Fact- Finder ?	Stay on Appeal to Comm'n or Ct?	Selected Statute(s)	Illustrative Case
Alabama	Trial judge of the County Circuit Court	Yes	No	ALA. CODE § 25-5- 81(1), § 25-5-81(2) (LexisNexis 2012).	DeShazo Crane Co., LLC v. Harris, 2009 Ala. Civ. App. LEXIS 489 (Ala. Civ. App. 2009).
Alaska	WC Board of Dept. of Labor & Workforce Develop. ⁷⁴¹	Yes	No	ALASKA STAT. § 23.30.128 (LexisNexis 2012).	Pietro v. Unocal Corp., 233 P.3d 604 (Alaska 2010).
Arizona	ALJ of the Industrial Comm'n	Yes	No ⁷⁴²	ARIZ. REV. STAT. § 23-942, § 23-943 (2012).	Vandever v. Indus. Comm'n, 714 P.2d 866 (Ariz. Ct. App. 1985).
Arkansas	ALJ of the WC Comm'n	No	Yes	ARK. CODE § 11-9- 205, § 11-9- 711 (Lexis	Wilson v. Cargill, Inc., 873 S.W.2d 171 (Ark. Ct. App. 1994).

whole or unless they are irrational. Substantial evidence ... considered as a whole is a strict and limiting standard of review. Substantial evidence is evidence that provides a substantial basis of fact from which the fact in issue can be reasonably inferred or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”)

⁷⁴¹ **Alaska:** Two members of a quasi-judicial hearing panel of the Alaska WC Board constitute a quorum for taking action on a disputed benefits claim.

⁷⁴² **Arizona:** An automatic stay *does* apply upon a party's request for reconsideration; no stay on further appeal to Court of Appeals.

				Nexis 2012).	
California	WCJ of the WC Appeals Board	No	No	LAB. CODE § 5310, § 5315 (LexisNexis 2012).	Coast Framing, Inc. v. WCAB (Palacio), 2005 Cal. Wrk. Comp. LEXIS 293 (Cal. Ct. App. 2005).
Colorado	ALJ of Office of Admin. Courts	Yes	Yes	COLO. REV. STAT. § 8-43-301(8) (2012).	Wecker v. TBL Excavating, 908 P.2d 1186 (Colo. Ct. App. 1995).
Connecticut	Comm'r of the WC Comm'n	Yes	Yes	CONN. GEN. STAT. § 31-298, § 31-280b LexisNexis (2011).	Healey v. Hawkeye Construction, 4 A.3d 858 (Conn. App. Ct. 2010).
Delaware	Industrial Accident Board or, upon consent, hearing officer (all of Dept. of Labor, OWC)	Yes	Yes	19 DEL. CODE ANN. § 2301A § 2301B (LexisNexis 2012).	Steppi v. Conti Elec., Inc., 991 A.2d 19 (Del. 2010).
Florida	Judge of Comp. Claims (JCC), Office of JCC's, Florida Division of Admin. Hearings	Yes	No	FLA. STAT. ANN. § 440.271, § 440.33, § 440.45 (LexisNexis 2012).	James W. Windham Builders, Inc. v. Van Overloop, 951 So. 2d 40 (Fla. Dist. Ct. App. 2007).
Georgia	ALJ of the Legal Division, Board of WC	No	Yes	GA. CODE ANN. § 34-9-47, § 34-9-48, § 34-9-103 (LexisNexis 2011).	Georgia Mountain Excavation, Inc. v. Dobbins, 710 S.E.2d 205 (Ga. Ct. App. 2011).

Hawaii	Hearings Officer of the Director of the Disability Comp. Division, Dept. of Labor	No	No	HAW. REV. STAT. § 386-87 (LexisNexis 2012).	Freedle v. City and County of Honolulu, 2007 Haw. App. LEXIS 602 (Haw. Ct. App. 2007).
Idaho	Referee or Comm'r of the Industrial Comm'n	No	Yes	IDAHO CODE ANN. § 72-506(1), § 72-717 (LexisNexis 2012).	Stewart v. Sun Valley Co., 94 P.3d 686 (Idaho 2004).
Illinois	Arbitrator of the WC Comm'n	No	No	820 ILL. COMP. STAT. ANN. § 305/19 (e), § 305/19 (f) (LexisNexis 2012).	R&D Thiel v. Illinois Workers' Comp. Comm'n (Robledo), 923 N.E.2d 870 (App. Ct. Illinois 2010).
Indiana	"Single Hearing Member" of Workers' Comp. Board	No	Yes	IND. CODE § 22-3-1-3 (LexisNexis 2012). IND. ADMIN. CODE § 1-1-15.	AG One Co-Op v. Scott, 914 N.E.2d 860 (Ind. Ct. App. 2009).
Iowa	Deputy Comm'r, Division of WC, Workforce Devel.	No	Yes	IOWA CODE § 86.2, § 86.24, § 86.26 (LexisNexis 2011).	Beef Prod., Inc. v. Rizvic, 806 N.W.2d 294 (Iowa Ct. App. 2011).
Kansas	ALJ of the Division of WC, Department of Labor	No	No	KAN. STAT. ANN. § 44-555c, § 44-556 (LexisNexis 2011).	Rausch v. Sears Roebuck & Co., 263 P.3d 194 (Kan. Ct. App. 2011).
Kentucky	ALJ of the Department	Yes	Yes	KY. REV. STAT.	Jefferson County Pub.

	of Workers' Claims			§ 342.215, § 342.275, § 342.285, § 342.290 (LexisNexis 2012).	Sch. v. Stephens, 208 S.W.3d 862 (Ky. 2006).
Louisiana	WCJ of the Office of WC, Workforce Comm'n	Yes	Yes	LA. REV. STAT. ANN. § 23:1291(c), § 23:1310.1, § 23:1310.50 (LexisNexis 2012).	Chaisson v. Philip Servs. Corp., 917 So. 2d 514 (La. Ct. App. 2005).
Maine	Hearing Officer of the WC Board	Yes ⁷⁴³	No	ME. REV. STAT. ANN. tit. 39-A, § 152, § 318, § 320, § 322(3) (LexisNexis 2011).	Higgins v. H.P Hood, Inc., 926 A.2d 1176 (Me. 2007).
Maryland	Comm'r of the WC Comm'n	No	No	LABOR & EMPL. § 9-745(b), (c) (LexisNexis 2012).	Gen. Motors Corp. v. Bark, 555 A.2d 542 (Md. Ct. Spec. App. 1989).
Mass.	Admin. Judge (AJ) of the Department of Industrial Accidents, Labor and Workforce Devel.	Yes	No	MASS. GEN. LAWS ch. 152, § 11C MASS. GEN. LAWS ch. 30A, § 14(7) (c), (g) (LexisNexis 2012).	Murphy v. Comm'r, 612 N.E.2d 1149 (Mass. 1993).
Michigan	Magistrate, WC Board of Magistrates	Yes	No	MICH. COMP. LAWS SERV. § 418.206, § 418.861a	Mudel v. Great Atl. & Pac. Tea Co., 614 N.W.2d 607 (Mich. 2000).

⁷⁴³ **Maine:** If Hearing Officer makes a special request, review by the Full Board may be undertaken. See 39-A ME. REV. STAT. ANN. § 320.

				(LexisNexis 2012).	
Minnesota	Comp. Judge of the WC Division, Department of Admin. Hearings	Yes	Yes	MINN. STAT. § 176.421 (LexisNexis 2012).	Stately v. Red Lake Builders et al., 2010 MN Wrk. Comp. LEXIS 99 (Minn. WC Ct. App. 2010).
Mississippi	ALJ of the Workers' Comp. Comm'n	No	Yes	MISS. CODE ANN. § 71-3-85, § 71-3-51 (LexisNexis 2012).	Short v. Wilson Meat House, 36 So. 3d 1247 (Miss. 2010).
Missouri	ALJ of the Division of WC, Department of Labor	No	Yes	MO. REV. STAT. § 287.495 (LexisNexis 2012).	Vice v. Advantage Waste Servs., Inc., 298 S.W.3d 145 (Mo. Ct. App. 2009).
Montana	WCJ of the Workers' Comp. Ct.	Yes	No	MONT. CODE ANN. § 39-71-2901 § 39-71-2904 (LexisNexis 2011).	Michalak v. Liberty Nw. Ins. Corp., 175 P.3d 893 (Mont. 2008).
Nebraska	Trial Judge of the Workers' Comp. Court (WCC)	Yes	No	NEB. REV. STAT. § 48-152, § 48-156, § 48-177, § 48-178, § 48-179, § 48-18 (LexisNexis 2012).	Al-Saddi v. Tecumseh Poultry, 2010 NE Wrk. Comp. LEXIS 1232 (Neb. WCC 2010).
Nevada	Hearing Officer of the Department of Admin.	No	No	NEV. REV. STAT. § 616C.315, § 616C.330, § 616C.340, § 616C.370 (LexisNexis	Vredenburg v. Sedgwick CMS and Flamingo Hilton-Laughlin, 188 P.3d 1084 (Nev. 2008).

				2012).	
New Hampshire	Hearing Officer of the Comm'r	No	No	N.H. REV. STAT. ANN. § 281-A:42-b, § 281-A:42-a, § 281-A:43 (LexisNexis 2012).	Appeal of Carnahan, 993 A.2d 224 (N.H. 2010).
New Jersey	Judge of Comp., Division of WC, Department of Labor & Workforce Devel.	Yes	No	N.J. STAT. ANN. § 34:15-49 (LexisNexis 2012).	Sager v. O.A. Peterson Constr. Co., 862 A.2d 1119 (N.J. 2004).
New Mexico	WCJ, WC Admin.	Yes	No	N.M. STAT. ANN. § 52-5-2, § 52-5-8 (LexisNexis 2012).	Ortiz v. Estate of Baros, 237 P.3d 707 (N.M. 2010).
New York	Workers' Comp. Law Judge of the WCB	No	No	N.Y. WORKERS' COMP. § 140, § 142, § 150 (LexisNexis 2012).	Jones v. N.Y. State. Dept. Corr., 825 N.Y.S.2d 316 (N.Y. App. Div. 2006).
North Carolina	Deputy Comm'r of the Industrial Comm'n	No	Yes	N.C. GEN. STAT. § 97-85, § 97-86 (LexisNexis 2012).	Johnson v. S. Tire Sales & Serv., 599 S.E.2d 508 (N.C. 2004).
North Dakota	ALJ of the Office of Admin. Hearings	No	No	N.D. CENT. CODE. § 28-32-46 (LexisNexis 2012).	Rojas v. Workforce Safety and Ins. and Holland Enterprises, Inc., 703 N.W.2d 299 (N.D. 2005).
Ohio	District Hearing Officer	No	No	OHIO REV. CODE ANN. § 4123.512	Luckett v. Ryan, 2011 Ohio App.

	(DHO) of the Industrial Comm'n ⁷⁴⁴			(LexisNexis 2012).	LEXIS 2545 (Ohio Ct. App. 2011).
Oklahoma	Trial Judge of the Workers' Comp. Ct.	Yes	No	85 OKLA. STAT. § 340 (LexisNexis 2012).	Dunkin v. Instaff Personnel (American Home Ass.), 164 P.3d 1057 (Okla. 2007).
Oregon	ALJ of the Hearing Division of the Board	No	Yes	OR. REV. STAT. § 656.295(5), § 656.295(6) (LexisNexis 2009).	Pietrzykowski v. Albertsons, Inc., 157 P.3d 1268 (Or. Ct. App. 2007).
Penna.	WCJ of the Dept. of Labor & Industry Office of Adj'n	Yes	No	Section 423(a) of the WC Act, 77 PA. STAT. ANN. § 853, Section 423(c) of the WC Act, 77 PA. STAT. ANN. § 854.2 (West 2011).	Kasper v. WCAB (Perloff Brothers, Inc.), 769 A.2d 1243 (Pa. Commw. Ct. 2001).
Rhode Island	Trial Judge of the Workers' Comp. Ct.	Yes	No	R.I. GEN LAWS § 28-35-28(a), § 28-35-28(b) (Lexis Nexis 2012).	Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996).
South Carolina	Comm'r of the Industrial Comm'n	No	Yes	S.C. CODE ANN. § 42-3-20(C) (LexisNexis	Hargrove v. Titan Textile Co., 599 S.E.2d 604 (S.C. Ct. App. 2004).

⁷⁴⁴ **Ohio:** The decision of the "Staff Hearing Officer" (SHO) of the Industrial Commission, however, can be final as to the fact-findings if the Commission denies review.

				2011).	
South Dakota	ALJ of the Department of Labor	No	No	S.D. CODIFIED LAWS § 62-7-19 (LexisNexis 2011).	Vollmer v. Wal-Mart Store, Inc., 729 N.W.2d 377 (S.D. 2007).
Tennessee	Trial Judge of the County Circuit Court	No	No	TENN. CODE ANN. § 50-6-203, § 50-6-236 (LexisNexis 2012).	Griffin v. Walker Die Casting, Inc., et al., 2010 Tenn. LEXIS 1020 (Tenn. Sp. WC App. Panel at Nashville 2010).
Texas	Hearing Officer of the Dept. of Insurance, DWC	No	No	TEX. LAB. CODE ANN. § 410.165, § 410.168, § 410.203, § 410.304 (LexisNexis 2012).	State Office of Risk Mgmt. v. Trujillo, 267 S.W.3d 349 (Tex. App. 2008).
Utah	ALJ of the Utah Labor Comm'n, Adj'n Div.	No	Yes	UTAH CODE ANN. § 34A-2-801, § 34A-1-303 (LexisNexis 2012).	Carter v. Labor Comm'n Appeals Bd., 153 P.3d 763 (Utah Ct. App. 2006).
Vermont	Hearing Officer, Vermont Department of Labor (for the Comm'r)	No	No	21 VT. STAT. ANN. § 670, § 671 (LexisNexis 2012).	Estate of George v. Vt. League of Cities and Towns, 993 A.2d 367 (Vt. 2010).
Virginia	Deputy Comm'r, WC Comm'n	No	Yes	VA. CODE ANN. § 65.2-201, § 65.2-203 (LexisNexis 2012).	Karban v. Universal Fiber Sys., LLC, 2010 Va. App. LEXIS 274 (Va. Ct. App. 2010).
Washington	Industrial Appeals	No	No	WASH. REV. CODE	Chunyk & Conley/Quad C

	Judge (IAJ), of the Bd. of Indus. Ins. Appeals (BIIA)			§ 51.52.104, § 51.52.106, § 51.52.110, § 51.52.115 (LexisNexis 2012).	v. Williams, 2008 Wash. App. LEXIS 1595 (Wash. Ct. App. 2008).
West Virginia	ALJ of the Office of Judges, Insurance Comm'n	Yes	No	W. VA. CODE § 23-5-12, § 23-5-15 (LexisNexis 2011).	Fenton Art Glass Co. v. W. Va. Office of Ins. Comm'r, 664 S.E.2d 761 (W. Va. 2008).
Wisconsin	ALJ of the WC Div., Dept. of Workforce Devel.	No	Yes	WIS. STAT. § 102.18, § 102.23 (LexisNexis 2012).	Luetkens v. Wis. Dept. of Corr., 2010 WI Wrk. Comp. LEXIS 117 (Wis. LIRC 2010).
Wyoming	Hearing Examiner of the Office of Admin. Hearings	Yes	No	WYO. STAT. ANN. § 27-14-601, § 27-14-614 (LexisNexis 2012).	Herrera v. State, 236 P.3d 277 (Wyo. 2010).
District of Col. ⁷⁴⁵	ALJ of the D.C. Dept. of Employ'm't Services (DES)	Yes	No	D.C. CODE § 32-1521.01 (LexisNexis 2012).	Washington Metro. Area Transit Auth. v. DC DES (Browne), 926 A.2d 140 (D.C. 2007).
LHWCA	ALJ of the US Department of Labor, Office of ALJ's (OALJ)	Yes	No	33 U.S.C. § 921 (2012).	Bath Iron Works v. Fields, 599 F.3d 47 (1 st Cir. 2010).

⁷⁴⁵ **District of Columbia:** Law referenced is "DC Workers' Compensation Act of 1979, *as amended*, D.C. CODE § 32-1501 et. seq. (private sector)." Law regarding review was amended in 2004.