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Workmen's Compensation - Evidence - Opinion of Non-Treating Psychiatrist Based on Claimant's Statements Held Inadmissible - Candella v. Subsequent Injury Fund

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RECENT DEVELOPMENTS

WORKMEN'S COMPENSATION — EVIDENCE — OPINION OF NON-TREATING PSYCHIATRIST BASED ON CLAIMANT'S STATEMENTS HELD INADMISSIBLE. *CANDELLA V. SUBSEQUENT INJURY FUND*, 277 Md. 120, 353 A.2d 263 (1976).

When the Maryland General Assembly first enacted the Workmen's Compensation Article,[1] it directed, in what is now Section 11,[2] that

> the Commission shall not be bound by the usual common law or statutory rules of evidence . . . but may make the investigation in such a manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act.[3]

However, at the same time that the legislature granted this greater latitude to the Commission with respect to the admission of evidence, it also provided for a review of Commission decisions by

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1. The original Workmen's Compensation Act appears in Law of April 16, 1914, ch. 800, §§ 1-66, [1914] Laws of Md. 1429. The current version of the Workmen's Compensation Act is codified in MD. ANN. CODE art. 101, §§ 1-102 (1964) *as amended*, (Supp. 1976).
2. MD. ANN. CODE art. 101, § 11 (1964). The present language in Section 11 formerly appeared in Section 10 of the original Act. See note 3 *infra*.
3. Law of April 16, 1914, ch. 800, § 10, [1914] Laws of Md. 1429 (current version at MD. ANN. CODE art. 101, § 11 (1964)).

   In a further effort to effectuate the benevolent purpose of the Workmen's Compensation Article, the legislature directed that "[t]he rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article . . . ." MD. ANN. CODE art. 101, § 63 (1964). The Maryland Court of Appeals has on several occasions stated that the article is social legislation and its provisions are to be liberally construed. However, the rule of liberal construction has not been applied specifically to the issue of admission of evidence. Instead, it has been applied in various situations as a general rule of construction for the Workmen's Compensation Article. *See* Tavel v. Bechtel Corp., 242 Md. 299, 219 A.2d 43 (1966) (rule applied in determination that injury while driving to work was not within the course of employment); Mureddu v. Gentile, 233 Md. 216, 196 A.2d 82 (1964) (loss of use of leg due to knee injury could constitute permanent total disability despite specific statutory compensation for loss of leg); Bayshore Indus., Inc. v. Ziats, 232 Md. 167, 192 A.2d 487 (1963) (worker's claim, initiated after deadline for filing, allowed where delay was induced by threats and promises by agents of employer); Watson v. Grimm, 200 Md. 461, 90 A.2d 180 (1952) (rule applied in determination that injury while being transported from work by employer was within the course of employment); Bethlehem-Fairfield Shipyard v. Rosenthal, 185 Md. 416, 45 A.2d 79 (1945) (rule applied in determining whether or not wife who had been separated from her husband was totally dependent on him for support).

the circuit courts[4] in a proceeding which is essentially a trial de novo.[5] If the circuit courts,[6] in reviewing Commission decisions, are required to adhere strictly to the common law rules of evidence, then the evidentiary freedom allowed to the Commission by statute would be substantially undermined. Specifically, a party who relies on hearsay testimony to obtain an award from the Commission confronts the possibility that the very evidence used to support that award can later be held inadmissible by the circuit court in a trial de novo. This possibility became harsh reality for the claimant in *Candella v. Subsequent Injury Fund.*[7]

Florence D. Candella was working as a hotel maid, when she received a severe electrical shock[8] while attempting to turn off a vacuum cleaner. She sustained no physical injury but claimed that the shock caused emotional problems for which she sought compensation. The only expert medical testimony to support her claim before the Commission was given by a psychiatrist, Dr. Teitelbaum. Mrs. Candella had seen the psychiatrist on four occasions for the purpose of qualifying him as an expert rather than for the purpose of treatment. Dr. Teitelbaum's testimony, based solely on the medical history given by Mrs. Candella, was that she suffered from

4. Law of April 16, 1914, ch. 800, § 55, [1914] Laws of Md. 1429 (current version at MD. ANN. CODE art. 101, § 56(a) (Supp. 1976)), originally provided that:

> Any employer, employe, [sic] beneficiary or person feeling aggrieved by any decision of the Commission affecting his interest under the Act may have the same reviewed by a proceeding in the nature of an appeal and initiated in the Circuit Court of the County or in the Common Law Courts of Baltimore City having jurisdiction over the place where the accident occurred or over the person appealing from such decision, and the Court shall determine whether the Commission has justly considered all the facts concerning injury, whether it has exceeded the powers granted it by the Act, whether it has misconstrued the law and the facts applicable in the case decided. . . . Upon the hearing of such appeal the Court shall, upon motion of either party, . . . submit to a jury any question of fact involved in such case. The proceedings in every such an appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced.

5. Abell v. Albert F. Goetze, Inc., 245 Md. 433, 226 A.2d 253 (1967); Richardson v. Home Mutual Life Ins. Co., 235 Md. 252, 201 A.2d 340 (1964). The trial in the circuit court encompasses a review of both the law and the facts.
6. In this casenote the term circuit court includes the common law courts of Baltimore City.
7. 277 Md. 120, 353 A.2d 263 (1976). Florence D. Candella filed a claim with the Workmen's Compensation Commission which granted an award on April 27, 1973, based on a finding of permanent partial disability. The employer, insurer and Subsequent Injury Fund appealed to the Circuit Court for Anne Arundel County, which in a trial without a jury reversed the decision of the Commission. Mrs. Candella appealed to the court of special appeals. The court of appeals granted certiorari prior to consideration by the court of special appeals and affirmed the decision of the circuit court. *Id.* at 122, 353 A.2d at 264.
8. Although the court of appeals does not mention the duration or extent of the shock, it appears that the shock was severe enough to require a fellow worker to disconnect the vacuum cleaner from its socket with a mop handle. Brief for Appellant at 3, Appendix to Appellant's Brief at E. 42.

" 'psychoneurosis, post-traumatic, with severe emotional disturbance following electric shock'."[9] The employer and insurer produced a psychiatrist who testified that the claimant "suffered from 'a very severe personality disorder' which was not causally related to the electric shock and, in fact, antedated it."[10] Based on Dr. Teitelbaum's opinion, the Commission awarded compensation, finding that Mrs. Candella had incurred a 60% permanent partial industrial disability.[11] The employer, insurer and Subsequent Injury Fund[12] appealed to the circuit court. That court, without a jury, heard substantially the same testimony as the Commission. At the end of the trial de novo, the circuit court struck Dr. Teitelbaum's testimony because it was based solely on the medical history furnished by the claimant, not for the purpose of treatment but solely to qualify him as an expert. Without this testimony there was no medical evidence on which to base the findings and order of the Commission. Accordingly, the circuit court reversed the decision of the Commission.[13]

On certiorari,[14] the Maryland Court of Appeals affirmed the decision of the circuit court for two reasons. First, the court held that the opinion of a non-treating psychiatrist based on medical history related to him for the purpose of qualifying him as an expert is hearsay which does not come within any recognized ex-

9. 277 Md. at 122, 353 A.2d at 264.
10. *Id.* at 122, 353 A.2d at 265. Although the psychiatrist who testified for the employer never treated the claimant, his opinion was admissible because it was based not only on statements from the claimant but also on notes made by a treating psychiatrist and on tests performed by a clinical psychologist. Appendix to Appellant's Brief at E. 80.
11. Of the total 60% permanent partial industrial disability, the Commission attributed 50% to the accidental injury. This became the responsibility of the insurer and employer. The remaining 10% was charged to the Subsequent Injury Fund because the Commission found that Mrs. Candella suffered from a congenital heart impairment. The combined effects of the previous heart condition and the injury resulted in a disability which was substantially greater than would have ensued from the accidental injury alone. 277 Md. at 122, 353 A.2d at 265.
12. The Subsequent Injury Fund was established to make payments to employees who have a previous permanent impairment and who suffer a subsequent accident resulting in personal injury for which compensation is required. To qualify for payment from the fund the claimant must suffer an injury resulting in a permanent partial or a permanent total disability which is substantially greater, by reason of the previous condition, than that which would have resulted from the subsequent injury alone. The employer and insurer pay for the portion of the disability attributable to the subsequent injury. The fund pays that portion of the award attributable to the combined effects of the subsequent injury and the prior disability. The Subsequent Injury Fund has the right to appeal from a decision of the Commission awarding payment from the fund. MD. ANN. CODE art. 101, § 66 (Supp. 1976).
13. 277 Md. at 123, 353 A.2d at 265.
14. The court of appeals granted certiorari prior to consideration of the case by the court of special appeals. See note 7 *supra*.

ception to the hearsay rule.[15] Second, the court held that, notwithstanding the legislative intent to liberalize the admission of evidence in compensation cases, Mrs. Candella's statements to the psychiatrist were so lacking in indicia of reliability as to deprive them, and consequently the psychiatrist's conclusions based thereon, of the probative value essential to admission.[16]

Maryland follows the generally recognized rule that a physician consulted for treatment may testify to the medical history given to him by his patient.[17] He may also state conclusions based on that history.[18] This exception to the hearsay rule is permitted because the patient is likely to believe that the effectiveness of the treatment he receives will depend on the accuracy of what he tells the physician. The patient's belief is deemed sufficient to ensure the trustworthiness of his statements.[19] Maryland has applied the same rule when the medical witness was a psychiatrist.[20]

The situation is quite different, however, when the medical history is given to the physician solely to qualify him as an expert witness. Since the patient does not expect medical treatment to be based on his statements, the underlying rationale for the exception is absent. Indeed, since the patient is conscious of the pending litigation he may be motivated to falsify his symptoms

15. 277 Md. at 123–24, 353 A.2d at 265–66.
16. *Id.* at 124–26, 353 A.2d at 266–67.
17. Fisher Body Div. v. Alston, 252 Md. 51, 249 A.2d 130 (1969) (physician who was visited for treatment was allowed to testify concerning history given by patient even though no treatment was administered); Adams v. Bensen, 208 Md. 261, 117 A.2d 881 (1955); *see* Yellow Cab Co. v. Hicks, 224 Md. 563, 168 A.2d 501 (1961). The majority of states allow a treating physician to testify to statements made by his patient. *See, e.g.,* People v. Grant, 58 Ill. 2d 178, 317 N.E.2d 564 (1974) (rule followed in criminal as well as civil cases); Arabia v. John Hancock Mut. Life Ins. Co., 301 Mass. 397, 17 N.E.2d 202 (1938); Greenfarb v. Arre, 62 N.J. Super. 420, 163 A.2d 173 (1960); Baker v. Industrial Comm'n, 440 Ohio App. 539, 186 N.E. 10 (1933); Cody v. S.K.F. Indus., Inc., 447 Pa. 558, 291 A.2d 772 (1972); Lemmon v. Denver & Rio Grande R.R., 9 Utah 2d 195, 341 P.2d 215 (1959); C. McCormick, Handbook of the Law of Evidence § 292 (2d ed. 1972) [hereinafter cited as McCormick]; 4 J. Wigmore, Evidence § 1721, at 73 (3d ed. 1940).
18. Adams v. Bensen, 208 Md. 261, 266–67, 117 A.2d 881, 883 (1955); *see* State v. Orsini, 155 Conn. 367, 232 A.2d 907 (1967); Cody v. S.K.F. Indus., Inc., 447 Pa. 558, 291 A.2d 772 (1972); Hammond v. Industrial Comm'n, 84 Utah 67, 34 P.2d 687 (1934); Smith v. Earst Hardware Co., 61 Wash. 2d 75, 377 P.2d 258 (1962).
19. 277 Md. at 123–24, 353 A.2d at 265; McCormick, *supra* note 17, at § 292. *See* Stewart v. Baltimore & O.R.R., 137 F.2d 527 (2d Cir. 1943); Brown v. Blauvelt, 152 Conn. 275, 205 A.2d 773 (1964); Bober v. Independent Planting Corp., 28 N.J. 160, 145 A.2d 463 (1958); Baker v. Industrial Comm'n, 440 Ohio App. 539, 186 N.E. 10 (1933); Cody v. S.K.F. Indus., Inc., 447 Pa. 558, 291 A.2d 772 (1972); Hammond v. Industrial Comm'n, 84 Utah 67, 34 P.2d 687 (1934).
20. *See* Wilhelm v. State Traffic Comm'n, 230 Md. 91, 97, 185 A.2d 715, 717 (1962); Connor v. State, 225 Md. 543, 556–57, 171 A.2d 699, 706–07, *cert. denied,* 368 U.S. 906 (1961).

or at least to exaggerate.[21] For these reasons Maryland has not extended the exception to non-treating physicians.[22] In *Candella*, the court of appeals recognized that some states do allow the non-treating physician both to state medical conclusions and to relate the patient's history on which those conclusions are based.[23] Those states admit the patient's history not as substantive evidence, but for the non-hearsay purpose of explaining the conclusion reached by the physician. The *Candella* court declined to adopt this approach and reaffirmed its prior decisions on this point.[24]

Having decided that Dr. Teitelbaum's testimony did not come within any exception to the hearsay rule, the court next addressed the question of whether the testimony should have been admitted by the circuit court in light of the legislature's directive in Section 11 that the Commission not be bound by the common law rules of evidence.[25] In the past the court of appeals has recognized the import of this directive and in some cases has sanctioned the admission of hearsay in the trial de novo. The court has allowed awards to be based on hearsay, but only where the circumstances provided special assurance that the evidence was trustworthy.[26]

The basic approach which Maryland has adopted in determining the admissibility of hearsay in compensation cases was first articulated in *Standard Oil Co. v. Mealy*.[27] In *Mealy*, the court of appeals upheld the circuit court's admission of statements which a deceased

21. 277 Md. at 124, 353 A.2d at 265–66; McCormick, *supra* note 17, at § 293. *See* Brown v. Blauvelt, 152 Conn. 275, 205 A.2d 773 (1964); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959).
22. 277 Md. at 124, 353 A.2d at 265–66; *see* Riddle v. Dickens, 241 Md. 579, 217 A.2d 304 (1966); Yellow Cab Co. v. Hicks, 224 Md. 562, 168 A.2d 501 (1961); Parker v. State, 189 Md. 244, 55 A.2d 784 (1947); *accord*, Brown v. Blauvelt, 152 Conn. 275, 205 A.2d 773 (1964); Gotfrey v. Sakurada, 169 Neb. 879, 101 N.W.2d 470 (1960); Baker v. Industrial Comm'n, 440 Ohio App. 539, 186 N.E. 10 (1933); Hammond v. Industrial Comm'n, 84 Utah 67, 34 P.2d 687 (1934).
23. 277 Md. at 124, 353 A.2d at 266. *See, e.g.*, Groat v. Walkup Drayage & Warehouse Co., 14 Cal. App. 2d 350, 58 P.2d 200 (1936); Cronin v. Fitchburg & L. St. Ry., 181 Mass. 202, 63 N.E. 335 (1902); Johnson v. Bangor Ry. & Elec. Co., 125 Me. 88, 131 A. 1 (1925); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 448, 420 P.2d 853 (1967); Waldroop v. Driver-Miller Plumbing & Heating Corp., 61 N.M. 412, 301 P.2d 521 (1956); Chicago R.I. & P. Ry. v. Jackson, 63 Okla. 32, 162 P. 823 (1917); Kraetti v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609 (1932).
24. 277 Md. at 124, 353 A.2d at 266.
25. *Id.*
26. *See* Commercial Transfer Co. v. Quasny, 245 Md. 572, 227 A.2d 20 (1967); Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1938); Standard Oil Co. v. Mealy, 147 Md. 249, 127 A. 850 (1925). In other cases hearsay has also been held admissible, but for different reasons. *See* Horn Ice Cream Co. v. Yost, 164 Md. 24, 163 A. 823 (1933); Waddell George's Creek Coal Co. v. Chisholm, 163 Md. 49, 161 A. 276 (1932); Bethlehem Steel Co. v. Traylor, 158 Md. 116, 148 A. 246 (1930), which are more fully discussed in notes 42–46 *supra* and accompanying text.
27. 147 Md. 249, 127 A. 850 (1925).

workman had made to his wife and attending physicians to the effect that he had fallen at work and struck his side at a spot where a malignant growth later developed. There was no other evidence of accidental injury.[28] The court noted that the statute which provides for appeals from the Commission to the circuit courts does not direct those courts to relax their established rules of evidence "in any degree or under any conditions."[29] Yet in the court's view, to apply the same evidentiary rules to these appeals which are usually applied in the circuit courts would deprive claimants of the benefit of the investigative freedom granted to the Commission by Section 11.[30] The court concluded that

> [T]he courts are required to adapt themselves somewhat to the increased latitude allowed to the commission, and that this adaptation must at the same time, and as far as it can consistently be done, avoid abandonment of cautions and safeguards which seem necessary, not only for constitutional due process of law, but also for the assurance of reliability in the basis of adjudication. We conclude that the courts are not intended to withdraw from litigants under the act all the precautions which in the course of time have been worked out as essentials of orderly, certain justice. And whatever foundation there may be for objections to the rule excluding hearsay in its full extent, it must be admitted that there is still a large residuum of necessary precaution embodied in it.[31]

The court declined to fix any absolute standard for the admissibility of hearsay in compensation cases, but decided that the statements of the deceased worker were admissible. The statements were repeated by three or four witnesses, referred to a simple fact and left no room for substantial misunderstanding. These circum-

28. *Id.* at 252–53, 127 A. at 851.

29. *Id.* at 254, 127 A. at 851. In the court's view, the allowance of an appeal must intend a review of the Commission decisions with some advantage from the special training of the circuit court judges. It is interesting to note that, at the time *Mealy* was decided, Commissioners were not required to be lawyers. The requirement that they "be selected from those who have been admitted to the practice of law in this State" was added in Law of April 10, 1957, ch. 584, § 1(c), [1957] Laws of Md. 969 (current version at MD. ANN. CODE art. 101, § 1(c) (1964)). Now that Commissioners have legal training, they should be better able to use safely the broad discretion given to them by the legislature. Their decisions seemingly should require less oversight by circuit court judges on questions of law.

30. Standard Oil Co. v. Mealy, 147 Md. at 254, 127 A. at 851–52. Here the court of appeals impliedly recognized the futility of allowing evidence, which would not meet common law competency standards, to support a finding before the Commission if the same evidence is to be excluded on review de novo. Such a double standard would ensure that the party who successfully relies on such evidence at the commission hearing would face reversal on review de novo. Thus, any benefit provided to a claimant by Section 11 would be lost.

31. *Id.* at 254, 127 A. at 852.

stances, the court concluded, provided adequate assurance of reliability even though the statements were hearsay.[32]

Mealy was decided in 1925, eleven years after the creation of the Workmen's Compensation Commission. Since then the court of appeals has expressly avoided issuing a binding rule for the admissibility of hearsay in compensation cases. Instead, it has directed that each case be decided on its particular facts.[33] A review of the pertinent cases reveals that the court has been very reluctant to extend the admission of hearsay much beyond the limits defined by the circumstances in *Mealy*.

In *Spence v. Bethlehem Steel Co.*,[34] the workman died of pneumonia. The only evidence that the disease was caused by an accidental injury consisted of statements by the workman, testified to by his wife and his doctor, that he had been exposed to poisonous gas while working in burning tar. The wife also testified to the physical appearance of her husband when he returned from work the day of the incident.[35] In addition to repeating the deceased's statement, the doctor testified that lobar pneumonia could be induced by exposure to gas.[36] The court of appeals upheld the admissibility of the statements,[37] and at the same time declared, "[t]his court has not said . . . that the safeguards against the admission generally of hearsay evidence in compensation cases should be disregarded, but that [hearsay] should be received *with great caution*. . . ."[38] Here as in *Mealy*, the court found the deceased's statements were sufficiently reliable to permit their admission. The statements were made by a workman whose subsequent death had prevented his testimony, were closely related to the physical condition of the workman and were made promptly after the injury.[39]

The most recent case to rule on the admissibility of hearsay in a compensation case was *Commercial Transfer Co. v. Quasny*.[40] In *Quasny*, the workman suffered a fatal heart attack when a barrel he was loading onto a truck slipped. Unusual exertion was required to return the barrel to its upright position. The hearsay was

32. *Id.* at 255, 127 A. at 852.
33. Commercial Transfer Co. v. Quasny, 245 Md. 572, 580, 227 A.2d 20, 24 (1967).
34. 173 Md. 539, 197 A. 302 (1938).
35. *Id.* at 543–44, 197 A. at 304.
36. *Id.* at 544–45, 197 A. at 304–05.
37. The Commission originally denied a claim by the workman's widow. Her appeal to the circuit level court was heard on the record made before the Commission. The circuit court also denied the widow's claim and instructed a verdict for the employer. The court of appeals reversed and remanded the case for trial. *Id.* at 553, 197 A. at 308.
38. *Id.* at 549, 197 A. at 307 (emphasis added).
39. *Id.* at 550–52, 197 A. at 307–08.
40. 245 Md. 572, 227 A.2d 20 (1967).

similar to that in *Mealy* and in *Spence*. The testimony of Quasny's widow consisted of her husband's statements to her about how the accident had occurred. Both the Commission and the circuit court admitted her testimony and awarded compensation. In affirming, the court of appeals noted that Quasny was hospitalized immediately after the accident, received last rites from a priest, and was physically unable to make statements until he spoke to his wife about six hours after the accident. In this totality of circumstances, the court found sufficient indicia of reliability to admit Quasny's hearsay statement.[41]

In other cases, the court of appeals has sanctioned the admission of hearsay when it was merely cumulative. In *Horn Ice Cream Co. v. Yost*,[42] the worker was knocked down when an ice cream tub fell against him. He died sometime later. The mother of the deceased worker testified that he said he had suffered a blow to the head.[43] In affirming an award of compensation, the court of appeals noted that the testimony of three eyewitnesses to the accident permitted the inference that the tub had struck the workman on the head. In light of the eyewitness testimony, the court reasoned that it was not apparent how the admission of the mother's hearsay testimony prejudiced the insurer.[44] Similarly, in *Bethlehem Steel Co. v. Traylor*[45] and in *Waddell George's Creek Coal Co. v. Chisholm*,[46] the circuit courts admitted hearsay state-

41. *Id.* at 580, 227 A.2d at 24.
42. 164 Md. 24, 163 A. 823 (1933).
43. *Id.* at 26, 163 A. at 824. The review de novo was based on the record produced at the Commission hearing. The circuit court admitted the hearsay testimony of Yost's mother and affirmed the award of the Commission.
44. *Id.* at 30, 163 A. at 825.
45. 158 Md. 116, 148 A. 246 (1930). In *Traylor*, the issue was whether the pneumonia which caused the workman's death resulted from accidental exposure to gas on the job or from natural causes. The circuit court permitted the wife to testify that on several occasions when her husband returned from work he appeared very ill and complained that he had been gassed. Other workers testified to seeing the deceased on the occasions in question working in an engine pit full of gas. The court of appeals said that the statements from the deceased were merely cumulative when considered with other direct evidence tending to sustain the theory that death resulted from the exposure. The court found that the considerations which influenced the admission of hearsay in *Mealy* were weightier than those present in the facts of *Traylor*. Nevertheless, the court concluded that it would frustrate the remedial purpose of the Workmen's Compensation statute to hold that the admission of Traylor's statement was reversible error. *Id.* at 124, 148 A. at 249.
46. 163 Md. 49, 161 A. 276 (1936). In *Chisholm*, the workman died as a result of an operation necessitated by a hernia. At issue was whether the hernia resulted from an accident in the mine where the workman was employed. The workman's wife and co-workers testified before the Commission that the deceased told them he sustained the hernia when he accidentally slipped while moving a rock. The testimony on the record from the Commission hearing was admitted before the circuit court which granted an award. In affirming, the court of appeals found no reason to exclude the hearsay because, in addition to the hearsay, other testimony supported the conclusion of accidental injury.

ments made by workmen who subsequently died. The statements were each made to a relative concerning a simple fact of how the injury was incurred and therefore the statements closely fit the factual pattern of *Mealy*. The court of appeals allowed the hearsay to stand largely because there was other testimony to the same effect as the hearsay. Thus the court did little more than find that any error committed was harmless and that the Commission and the trier of facts on appeal could have made the same inference of accidental injury even without the challenged statements. In this sense, *Yost, Traylor* and *Chisholm* do not represent a digression from the common law rules of evidence.

When the court of appeals has not found sufficient assurance of reliability, it has approved the exclusion of hearsay evidence in compensation cases at the trial de novo. In *Bethlehem Steel Co. v. Ziegenfuss*,[47] the claimant sought compensation for a hernia allegedly caused by an accidental injury on the job. One of the prerequisites for compensation for a hernia is proof that the hernia did not exist prior to the injury.[48] To meet this requirement the claimant offered her own testimony as to what the employer's physician had told her during a medical examination eight months prior to the alleged injury.[49] In holding this testimony inadmissible before the circuit court, the court of appeals ruled that despite the relaxation of the ordinary rules of evidence in compensation cases, a person with no medical education could not meet the requirement of definite proof by testifying to a medical opinion given to her by a doctor. The court reasoned that the admission of this testimony would carry the relaxation of the rules too far.[50] In *Standard Gas Equipment Co. v. Baldwin*,[51] the court of appeals held it was error to allow the reading of the official death certificate of the deceased workman at the trial in the circuit court. The information concerning the cause of death on the certificate was provided by the widow who did not see her husband alive after his alleged injury. She could not have gotten the information from her husband and she was not present at the accident herself. The court decided this hearsay lacked the indicia of reliability which had persuaded the court to admit hearsay in other cases.[52]

47. 187 Md. 283, 49 A.2d 793 (1946).
48. *Id.* at 288–89, 49 A.2d at 795; MD. ANN. CODE art. 101, § 36(5) (1964).
49. The commission denied compensation on the grounds that the claimant failed to show she had no pre-existing hernia. The circuit court, with a jury, decided the issue in her favor and reversed the order of the Commission. The court of appeals reversed the judgment of the circuit court and affirmed the order of the Commission. Bethlehem Steel Co. v. Ziegenfuss, 187 Md. at 285, 49 A.2d at 794.
50. *Id.* at 294–95, 49 A.2d at 798–99.
51. 152 Md. 321, 136 A. 644 (1927).
52. *Id.* at 326–27, 136 A. at 646.

These compensation cases in which hearsay testimony was offered at the circuit court trial indicate that such evidence may be admissible, but only if the circumstances provide special assurance that the testimony is trustworthy. The court of appeals, in *Candella*, found that the testimony of Dr. Teitelbaum lacked this assurance.[53] In reaching this conclusion the court emphasized certain facts. The psychiatrist's opinion was based entirely on statements made by Mrs. Candella.[54] She had been referred to him by her attorney to assist in preparing her case. She realized she would not be treated by the psychiatrist and related her history solely to qualify him as an expert.[55] The court found a great distinction between the reliability of the statements made by Mrs. Candella and the reliability of the hearsay statements held admissible in prior compensation cases. In those prior cases the statements related to simple facts which left " 'no room for substantial misunderstanding,' "[56] while the subject matter of Dr. Teitelbaum's opinion involved a complex area of medical science. Therefore, the court found that "the statements on which the [psychiatrist's] conclusions were based cannot withstand the close scrutiny of hearsay testimony mandated by our prior decisions."[57]

In scrutinizing the testimony of Dr. Teitelbaum, the court emphasized the unreliability of statements made to a non-treating psychiatrist. Alternatively the court might have analyzed more closely the nature of psychiatry and found a similarity between statements to a non-treating psychiatrist and the physical examination by a non-treating physician. Even in jurisdictions like Maryland where a non-treating physician is not permitted to give an opinion based on statements from the patient,[58] he *is* permitted to give an opinion based on his personal observations and measurements of the patient's physical condition.[59] His opinion is admissible because his special training qualifies him to interpret these physical conditions[60] and because it is not based on any statements.

53. 277 Md. at 126, 353 A.2d at 267.
54. *Id.* at 122, 353 A.2d at 264.
55. *Id.* at 126, 353 A.2d at 267.
56. *Id.* Here the court quoted from the leading case, *Standard Oil Co. v. Mealy*, 147 Md. 249, 255, 127 A. 850, 852 (1925).
57. 277 Md. at 126, 353 A.2d at 267.
58. *See* note 22 *supra*.
59. In *Adams v. Bensen*, 208 Md. 261, 117 A.2d 881 (1955), the court ruled that it would have been error to allow the non-treating physician to give an opinion based on the history recited by the patient, but it was not error for him to testify that the patient winced and was in obvious discomfort when the physician flexed the patient's wrist. In *Francies v. Debaugh*, 194 Md. 448, 457, 71 A.2d 455, 458–59 (1950), the court permitted a non-treating physician to give an opinion based on observation of both the patient and x-rays of the patient's chest, but the court would not allow an opinion based on statements from the patient himself.
60. *See* Langenfelder v. Thompson, 179 Md. 502, 505–06, 20 A.2d 491, 493 (1941).

The nature of psychiatry, however, is different from other areas of medical science. This fact was at least indirectly recognized by the court in *Candella.*[61] In diagnosing diseases or conditions of the mind, the psychiatrist relies largely on the patient's statements to formulate his opinion.[62] Thus, statements to a psychiatrist are analogous to physical observations by a physician. Because a psychiatrist is trained to analyze not only *what* the patient says but *how* he says it,[63] he is specially qualified to evaluate the credibility of the patient's statements. The Commissioners and judges should be allowed to rely on the psychiatrist's ability to analyze these subjective factors in the formulation of the psychiatric opinion just as they are allowed to rely on the expertise of the physician to analyze physical symptoms.[64]

Of course, statements to a non-treating psychiatrist are still hearsay according to the common law rule,[65] but it has been

61. Concerning the nature of a psychiatric examination, the court said:
> As one might expect in the case of a psychiatrist, his examination consisted solely of hearing the subjective statements furnished by the claimant, and his conclusions were based exclusively on that information.

277 Md. at 126, 353 A.2d at 267.

62. Unlike other medical examinations done with the aid of instruments, blood tests, x-rays, and other modalities, the mental status examination is basically a verbal relationship between patient and psychiatrist.

R. COHEN, TRAUMATIC NEUROSIS IN PERSONAL INJURY CASES 40 (1970).

The end result of this verbal relationship is the formulation of the psychiatric opinion. One writer describes the process as follows:
> Through relatively indirect questions, the psychiatrist seeks to gain a comprehensive picture of the background of the patient, the personality characteristics of the principal members of the family, the nature of the social environment and, most important of all, the emotional attitudes and adaptive techniques of the patient.

A. WATSON, PSYCHIATRY FOR LAWYERS 306 (1968).

63. [T]he matter of factual accuracy is relatively unimportant, since the point of real diagnostic significance is *how* the patient views and evaluates his experiences. We do not expect the "facts" which are presented to be historically accurate. However, they are the *most* accurate presentation of the patient's attitudes about these facts. Since these are the forces which motivate his behavior, they must be regarded as the crucial data. During the course of the interview, the psychiatrist "listens with his third ear"; in other words, he listens for the spoken and unspoken clues to deeper emotional attitudes which the patient holds unbeknownst to himself.

A. WATSON, PSYCHIATRY FOR LAWYERS 306 (1968) (emphasis in original; footnotes omitted).

64. The law recognizes the psychiatrist as an expert, but the rule excluding the opinion of a non-treating psychiatrist fails to take into account the ability of the psychiatrist to analyze not only what the patient says but how he says it. The rule mistakenly presupposes that the non-treating psychiatrist is unaware of the patient's motive to falsify and that he accepts the patient's statements at face value. Moreover, the danger in permitting a non-treating psychiatrist to give an opinion based on possibly falsified statements is not significantly greater than the danger in permitting a non-treating physician to give an opinion based on falsified physical symptoms.

65. *See* Wilhelm v. State Traffic Comm'n, 230 Md. 91, 185 A.2d 715 (1962); Connor v. State, 225 Md. 543, 171 A.2d 699, *cert. denied*, 368 U.S. 906 (1961).

established that the mere fact that testimony is hearsay does not exclude it from compensation cases.[66] Moreover, a minority of states sees no reason to exclude the opinion of a non-treating physician based on the patient's history.[67] By adopting this less restrictive approach, at least for compensation cases, the court of appeals could have found sufficient assurance that Dr. Teitelbaum's opinion was reliable. At the same time, the court would have struck a more even balance between the latitude contemplated by Section 11 and the need for adequate safeguards in the admission of evidence in compensation cases.

Aside from its particular evidentiary conclusion, the court in *Candella* again left unresolved the question of when hearsay testimony is admissible in compensation cases. After analyzing the pertinent cases, one is tempted to conclude that the only hearsay statements that will be admissible are those of a deceased employee describing a simple fact of how he was injured. But the court has repeatedly denied such a narrow interpretation.[68] It continues to reject the adoption of a binding rule to govern hearsay in these cases.[69] Instead, the court has proposed that previous cases be followed and that each future case be decided on its particular facts.[70]

The court's attempt to balance the informality and liberality desirable in Workmen's Compensation cases[71] with the precautions that have come to be essential in any system of orderly justice[72] has produced several recognizable, though vague, guidelines. Generally, the Commissioners are not required to follow closely the rules of evidence.[73] But there must be limits to the discretion allowed to the Commissioners in admitting and excluding evidence in order to achieve a necessary degree of certainty in the administration of the Workmen's Compensation Article.[74] The circuit courts in reviewing compensation cases are required to modify their own criteria for the admission of evidence in light of the

66. *See* notes 27–41 *supra* and accompanying text.
67. *See* note 23 *supra* and accompanying text.
68. *See* Commercial Transfer Co. v. Quasny, 245 Md. 572, 580, 227 A.2d 20, 24 (1967).
69. 277 Md. at 126, 353 A.2d at 266; Commercial Transfer Co. v. Quasny, 245 Md. 572, 580, 227 A.2d 20, 24 (1967); *see* Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1938); Horn Ice Cream Co. v. Yost, 164 Md. 24, 163 A. 823 (1933); Bethlehem Steel Co. v. Traylor, 158 Md. 116, 148 A. 246 (1930); Standard Oil Co. v. Mealy, 147 Md. 249, 127 A. 850 (1925).
70. 277 Md. at 126, 353 A.2d at 266; Commercial Transfer Co. v. Quasny, 245 Md. 572, 580, 227 A.2d 20, 24 (1967); *see* Spence v. Bethlehem Steel Co., 173 Md. 539,
71. *See* Horn Ice Cream Co. v. Yost, 164 Md. 24, 31, 163 A. 823, 826 (1933).
72. *See* Standard Oil Co. v. Mealy, 147 Md. 249, 127 A. 850 (1925).
73. Commercial Transfer Co. v. Quasny, 245 Md. 572, 227 A.2d 20 (1967); Standard Oil Co. v. Mealey, 147 Md. 249, 254, 127 A. 850, 851–52 (1927).
74. Horn Ice Cream Co. v. Yost, 164 Md. 24, 31, 163 A. 823, 826 (1933).

latitude allowed to the Commission.[75] More specifically, hearsay testimony will not be barred merely because it is hearsay,[76] but such evidence is only to be admitted with "great caution."[77] There must be circumstances in the case which provide assurance that the evidence is worthy of belief.[78] In adopting this approach the court reasons that caution is necessary to satisfy the requirements of constitutional due process of law and to ensure the reliability of the grounds on which compensation decisions are based.[79]

Maryland is not alone in approaching the admission of hearsay in compensation cases with caution. This fact becomes evident when one considers the manner in which other jurisdictions have treated hearsay testimony in compensation cases.[80] A distinct minority of states retains the common law rules of evidence in compensation cases and treats the admission of hearsay as reversible error.[81] A majority of states employs a less restrictive, though not entirely satisfactory, approach known as the "residuum rule."[82] First propounded by the New York Court of Appeals in

75. Standard Oil Co. v. Mealy, 147 Md. 249, 254, 127 A. 850, 852 (1927).
76. *See* 277 Md. 120, 353 A.2d 263; Commercial Transfer Co. v. Quasny, 245 Md. 572, 227 A.2d 20 (1967); Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1938); Standard Oil Co. v. Mealy, 147 Md. 249, 127 A. 850 (1927).
77. Spence v. Bethlehem Steel Co., 173 Md. 539, 549, 197 A. 302, 307 (1938).
78. *Id.* at 549–50, 197 A.2d at 307; Standard Gas Equip. Co. v. Baldwin, 152 Md. 321, 326, 136 A. 644, 646 (1927).
79. Standard Oil Co. v. Mealey, 147 Md. 252, 254, 127 A. 850, 852 (1927).
80. A thorough treatment of the use of hearsay in compensation cases in the various states is beyond the scope of this note. The discussion of other jurisdictions in the text is intended to show Maryland's relative position on this question. It should be noted that in developing its position the Maryland court acted independently without reliance on the case law of any other state. For a full discussion of the treatment of hearsay in compensation cases see 3 A. LARSON, WORKMEN'S COMPENSATION LAW §§ 79.00–79.42 (1952) [hereinafter cited as LARSON]; Annot., 36 A.L.R.3d 12, §§ 25–29 (1971); for earlier cases see Note, *The Common Law Rules and Rules Governing the Reception of Evidence by Workmen's Compensation Commissions*, 24 IOWA L. REV. 576 (1939); Ross, *The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions*, 36 HARV. L. REV. 263 (1923).
81. Larson notes that this approach is now largely limited to states with court administered compensation systems. LARSON, *supra* note 80, at § 79.22. *See* Truck Ins. Exch. v. Michling, 364 S.W.2d 172 (Tex. 1963); Liljeblom v. Dept. of Labor & Indus., 57 Wash. 2d 136, 356 P.2d 307 (1960).
82. Larson reports that the majority of states follow the residuum rule in compensation cases. LARSON, *supra* note 80, at § 79.22. *But see* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.12, at 313 (1958); Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MT. L. REV. 1, 22 (1972). In these works on general administrative law, Davis warns that it is not clear that the residuum rule actually prevails in most states. Many courts pay lip service to the rule but employ subtle and well concealed methods to avoid the effect of the rule. Thus those courts often reach the same results as the courts which expressly reject the rule. For further analysis of the residuum rule, see Note, *The Residuum Rule and Appellate Fact Review: Marriage of Necessity*, 13 RUTGERS L. REV. 254 (1959).

Carroll v. Knickerbocker Ice Co.,[83] the residuum rule allows the admission of hearsay but requires that an award not be supported by hearsay alone. According to the rule, there must be in addition to the hearsay, a residuum of legally competent evidence on which to base the award.[84] While the residuum rule has been widely accepted,[85] it has also been criticized.[86] This criticism stems mainly from the fact that the states which have adopted it also have statutes which direct that their commissioners not be bound by the common law or technical rules of evidence.[87] The dissenting judge in *Carroll* recognized this apparent contradiction between statute and judicial interpretation, when he questioned whether it was reasonable to believe that the legislature intended to allow the commissioners to admit hearsay evidence but at the same time to prohibit them from making any legal use of it.[88] Remaining are

83. 218 N.Y. 435, 113 N.E. 507 (1916).

84. *Id.* at 440, 113 N.E. at 509. In *Carroll*, the workman's dependents claimed compensation for his death, and offered in evidence statements of the deceased that he had been struck by a block of ice. Eyewitnesses denied that such an injury had been received. The court ruled that while the commission is not limited by the common law rules of evidence and it may in its discretion accept any evidence that is offered, still there must be a residuum of legal evidence to support the claim before an award can be made. The impact of the residuum rule was lessened somewhat in *Altschuller v. Bressler*, 289 N.Y. 463, 46 N.E.2d 886 (1943), which upheld a compensation award based on hearsay statements of an employee. The New York Court of Appeals concluded that the established circumstances in the case left little doubt that the statements were substantially true. In *Altschuller*, the court stated that the necessary residuum can be found in corroborating circumstances which enhance the reliability of the hearsay. Thus the gap between the residuum rule and the approach taken by Maryland may not be as great as it first appears. *See* LARSON, *supra* note 80, at § 79.24. Nonetheless the *Carroll* case has not been overruled by the New York Court of Appeals and later cases show that the residuum rule is still in force. *See, e.g.*, Comstock v. Goetz Oil Corp., 286 App. Div. 132, 142 N.Y.S.2d 217 (1955).

85. *See, e.g.*, Johnson v. Industrial Comm'n, 137 Colo. 591, 328 P.2d 384 (1958); Zawisza v. Quality Name Plate, Inc., 149 Conn. 115, 176 A.2d 578 (1961); Valentine v. Weaver, 191 Ky. 37, 228 S.W. 1036 (1921); Hackford v. Industrial Comm'n, 11 Utah 2d 312, 358 P.2d 899 (1961); Ramey v. State Compensation Comm'r, 150 W. Va. 402, 146 S.E.2d 579 (1966). Pennsylvania has incorporated the concept of the residuum rule into its Workmen's Compensation Statute, providing that the board shall not "be bound by the common law or statutory rules of evidence . . . but all findings of fact shall be based upon sufficient competent evidence to justify same." PA. STAT. ANN. tit. 77, § 834 (Purdon Supp. 1976-77).

86. Wigmore notes that the residuum rule assumes that all legally admissible evidence is reliable and that all other evidence is unreliable. Common experience belies both assumptions. Deceptive evidence often gets into trials conducted under strict evidence rules, while some evidence, upon which a prudent person would base decisions in his private affairs, is barred. 1 J. WIGMORE, EVIDENCE § 4(b), at 41-42 (3d ed. 1940).

87. *See, e.g.*, ALASKA STAT. § 23.30.135 (1962); ARIZ. REV. STAT. § 23-941 (Supp. 1976-77); CONN. GEN. STAT. § 31-298 (West 1958); N.J. STAT. ANN. § 34:15-56 (West 1959); N.Y. WORK. COMP. LAW § 118 (McKinney 1965); UTAH CODE ANN. § 35-1-88 (1953); W. VA. CODE § 23-1-15 (1973).

88. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 446, 113 N.E. 507, 511 (1916) (Seabury, J., dissenting).

those states which admit hearsay and impliedly or specifically reject the residuum rule. These states take the least restrictive view of the use of hearsay in compensation cases. In their view, hearsay evidence is not only admissible, but under certain circumstances an award can be supported by hearsay alone.[89]

Although Maryland adheres to the least restrictive of these three approaches,[90] the method used by the court of appeals to set a standard for the admissibility of hearsay can be criticized on the grounds that the guidelines are so general that they provide little real direction to the Commissioners, judges or parties. The court of appeals attempted to answer this criticism in *Horn Ice Cream Co. v. Yost.*[91] The court conceded that the problem of reconciling the latitude allowed to the Commission by Section 11 with the necessity for reliability in the admission of evidence has not been satisfactorily solved.[92] The court questioned, however, whether the problem is susceptible to final resolution.[93] The court said that while it could set the outer limits of the discretion given to the Commission, it would be difficult to define those limits with any greater precision.[94]

89. The Virginia Supreme Court of Appeals has ruled that hearsay statements are properly admissible in evidence before the Commission and the Commission has the discretion to give weight to the hearsay statements in arriving at its finding of facts. Williams v. Fuqua, 199 Va. 709, 101 S.E.2d 562 (1958). The Virginia court had previously decided that hearsay evidence is admissible under the Workmen's Compensation Act and could be used as the basis of an award. Derby v. Swift & Co., 188 Va. 336, 49 S.E.2d 417 (1948). In *American Furniture Co. v. Graves,* 141 Va. 1, 126 S.E. 213 (1925), the court noted that other courts with similar statutes had held that, although hearsay evidence is admissible, an award can be set aside if other non-hearsay evidence is not sufficient to support the award. The Virginia court rejected this approach, stating that such an interpretation would make the statutory provision allowing hearsay a senseless and useless thing.

The California Workmen's Compensation Act provides that "[n]o order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure." CAL. LAB. CODE § 5709 (West 1971). This provision appears to be designed specifically to negate the residuum rule. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.12, at 319 (1958). California has adopted a rule that hearsay standing alone may support an award if the Commission finds that the evidence carries sufficient convincing force. *See, e.g.,* Sada v. Industrial Accident Comm'n, 11 Cal. 2d 363, 78 P.2d 1127 (1938); Hendricks v. Industrial Accident Comm'n, 25 Cal. App. 2d 534, 78 P.2d 189 (1938); State Compensation Ins. Fund v. Industrial Accident Comm'n, 195 Cal. 174, 231 P. 996 (1924).

90. The Maryland Court of Appeals has impliedly rejected the residuum rule by upholding awards of compensation even when the only evidence of an accidental, work-related injury was hearsay. *See* notes 27–41 *supra* and accompanying text.

91. 164 Md. 24, 163 A. 823 (1933).

92. *Id.* at 31–32, 163 A. at 826.

93. *Id.*

94. *Id.*

In *Candella*, the court of appeals neither added new guidelines nor clarified the existing ones. The case simply provides yet another example of a type of hearsay which will not be permitted in compensation cases — the opinion of a non-treating physician or psychiatrist based solely on the history recited by the patient. The result is that in future compensation cases when hearsay evidence arises under any different set of facts, the guidelines are as unclear as ever.

Perhaps more disturbing is whether the court of appeals in *Candella* and in previous cases has adequately carried out the intent of the legislature embodied in Section 11 that the Commission not be bound by the common law rules of evidence. The court has recognized the import of that section in holding that the mere fact that testimony is hearsay will not bar its admission.[95] But the court has subjected this type of evidence to such close scrutiny that the hearsay rule is substantially intact in compensation cases. In light of the court's own admonition that the statute is social legislation and should be liberally construed to achieve its general purpose,[96] a less stringent standard is preferable. Despite assertions to the contrary, one might even argue that the court has done little more than carve out a new exception to the hearsay rule, that exception being statements of deceased workmen concerning a simple fact related to the accidental injury in a compensation case. Admittedly, under these circumstances a strict adherence to the hearsay rule would have a devastating effect on the claim of a deceased workman's dependents. Thus, the court's prior decisions have at least partially reduced the harsh effect of the hearsay rule in compensation cases. But, as *Candella* demonstrates, there is still a wide gap between the bold directive in the statute and the close scrutiny which has been applied by the court.

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95. *See* notes 27–46 *supra* and accompanying text.
96. *See* note 4 *supra* and accompanying text.