closely related matters, such information may be helpful to the arbitrator's understanding of a case and should be admitted and considered.

Conclusion

In conclusion, I suggest that these points are worthy of consideration by an arbitrator who is faced with the problem of evaluating medical evidence:

1. Conflict in medical *fact,* as opposed to medical opinion, is generally susceptible to resolution by approved methods of observation or some accepted laboratory or clinical procedure. When an arbitrator is unable to resolve an important conflict in fact to his satisfaction, he should make every effort to persuade the parties to engage a third qualified medical expert to ascertain the facts and report his findings.

2. Conflict in medical *opinion,* as opposed to medical fact, is not generally susceptible to objective resolution by referral to a third expert, where the opposing opinions are each shown to be supported by a recognized body of medical authority. The arbitrator must then look to resolution of the case by application of appropriate standards of equity and fairness rather than force himself into choosing between two apparently legitimate schools of medical thought.

3. The arbitrator need not defer to the opinion of a medical witness whose judgment on the matter goes beyond the scope of his professional expertise. In accepting such evidence, the arbitrator should recognize its limitations and weigh it accordingly in deciding the issue before him.

II. SHOULD THE ARBITRATOR KNOW THE SCORE?

THOMAS T. ROBERTS *

There may be some in attendance this afternoon who would answer the query which I have selected as the title for these brief remarks by suggesting that the institution of labor arbitration

* Member, National Academy of Arbitrators, Rolling Hills, Calif.

would be most fruitfully utilized were the parties to undertake a deliberate scheme of withholding substantially all of the facts of industrial life from the percipient experience of the individual who sits as their arbitrator. Perhaps a majority of you would immediately respond by stating a belief that whatever characteristics should ideally be possessed by one who serves as a trier of fact, arbitrators are occupationally incapable of "knowing the score." Hopefully, there are a few among you who would express a timid defense of the entire process by declaring that from time to time arbitrators somehow manage to at least guess at reasonably appropriate findings.

It may well be that one who undertakes to address you amid the pleasures and distractions of the setting here at Colorado Springs is himself guilty of a failure to comprehend the score. Nevertheless, I dutifully record the fact that results achieved by employees who have undergone a testing program are frequently proffered in labor arbitration as evidence in support of the propriety of personnel actions initiated by management. It is in this context, i.e., the admissibility of such results, that I undertake this modest effort at evaluating the wisdom of permitting the arbitrator the opportunity to "know the score." I leave to others a consideration of the role of testing in programs aimed at creating job opportunities for the hard-core unemployed and other disadvantaged segments of our population.

If the published reports of proceedings before arbitrators represent a reasonably accurate cross section of the varied types of issues litigated in the arbitral forum, the propriety of admitting in evidence scores attained through testing constitutes a matter of more than passing interest. Indeed, the frequency of the attacks upon the admissibility of such data is most surprising, particularly when it is noted that the outcome is so predictable.

I hasten to observe, however, that no matter how strong may be the temptation to accept in an out-of-hand fashion an employee evaluation derived from modern testing techniques, the arbitrator must first look to the collective bargaining agreement before undertaking a definition of the consideration, if any, that he will afford such empirical evidence. If the agreement specifically denies management the option of imposing examinations upon members of

the bargaining unit, the entire issue is put to rest. Similarly, an express grant of such authority must be honored. But contractual language of this sort is most unusual. The question of what is to be the disposition of test results is more typically presented in the absence of any reference to testing in the labor agreement.

Postemployment Testing

The type of testing which arbitrators are most frequently asked to weigh in their deliberations is that designed to measure in some way either the present or potential abilities of candidates for job openings. To be more specific, management seeks to make use of written, oral, or "job performance" testing techniques in an effort to identify the employee or employees most likely to succeed should a promotional opportunity occur. I point out, however, that no matter how warm an empathy with the goals of such a program may be generated in the otherwise unresponsive heart of the arbitrator, test results have no proper place in evidence if the contract requires the selection of employees for promotion solely on the basis of seniority. In that situation, alternative standards are simply not available.

The promotional clause which makes seniority controlling only if "skills and ability are substantially equal" (or some such similar wording) is quite another matter. Where that type of contractual language exists, supervision has some leeway. The foreman under those circumstances has the opportunity to decide if the skills of employees eligible for promotion are distinguishable and, if they are, to what degree.

In my judgment, the prerogatives of management include the right (if not the duty) to promote, transfer, or otherwise advance those men and women who will best fulfill the economic needs of the enterprise—and that right must be recognized so long as the mandate of the labor contract is observed. In the absence of a "straight seniority" promotional clause, management is entitled to measure the skills, aptitudes, and potentialities of the workforce by whatever reasonable means it may select, including the administration of tests.

Given the customary management prerogatives clause and a seniority provision which recognizes the fact that employee skills

and aptitudes may differ, only the accuracy of the testing program utilized or the method of its implementation in a particular circumstance are subject to challenge in the grievance procedure. It is solely in that posture that we observe arbitrators admitting evidence of test results. The reasonableness (if not the necessity) of a submission to medical examination before placement in certain jobs involving known safety considerations is universally recognized. I can find no logic to support a distinction between that form of scientific examination and the sophisticated testing techniques now available to industry. Before the thought occurs to you, however, I specifically reject any claim that arbitrators are ill-equipped to evaluate objective data of this type. Our credentials demonstrate otherwise. We are renowned for our ability to add hocs, divide findings, multiply "days of study," and subtract the efforts of counsel. Truly, we are scientists of the first order!

Not only does each and every reported arbitral award endorse the right of an employer to impose one or more tests (even if not specifically permitted to do so by the labor agreement), the decisions further permit a unilateral implementation of such programs where none had previously existed. Quite expectedly, arbitrators will view an unchallenged history of the utilization of test procedures as persuasive authority for sustaining such methods. Even in the absence of precedent and acquiescence, however, the establishment of reasonable testing procedures is sustained.

In the search for the employee who is "qualified" or who possesses "substantially greater skills and abilities," we must not permit our arbitral insight to be blinded by the purported scientific infallibility of written examinations. Test results cannot and should not be viewed as reflecting an absolute and clinically demonstrable scientific conclusion. (As is well known, only the practitioners of the profession of arbitration are capable of such immutable judgments!) No matter how objective and sophisticated a particular test or series of tests may be, those factors which define skill and ability become most elusive when we undertake precise measurement. Attaining the highest score on a test is not necessarily sufficient to win a promotion. The impact of seniority may never be ignored. Nor may we brush aside certain other considerations admittedly based upon intangibles but which take on substance when projected against the sounds, smells, and stress of a given work environment.

The validity of a specific test as a tool to be utilized when evaluating a group of employees will depend upon the surroundings in which the test is administered, the relationship of the subject matter of the examination to the job openings available, and the objectivity with which the test results are graded. Sudden and unannounced "tests" of performance on a given piece of machinery which are thereafter evaluated by a method solely within the knowledge of the foreman should be given short shrift. Nor should an arbitrator overlook the propensity of many individuals to "freeze" when first subjected to almost any form of test or examination.

The educational background and the additional training opportunities available to those who are eligible for promotion are most important. What is the reasonable level of literacy required by the job? Has it been exceeded in the test? Is there really justification for exploring promotional capabilities applicable to jobs three or four steps higher in the employer's occupational structure rather than the immediate vacancy at issue? Has the union been afforded knowledge of the test contents and procedures? These and other considerations must be included in the deliberations of the arbitrator.

In addition to the foregoing, what other components of a complete and fair evaluation should be considered? We have touched upon the importance of noting the educational level attained by the examinee. Also of importance is past work performance on jobs previously held, as well as training and experience which may be transferable from earlier employment opportunities. Finally, in my view, great weight should be given to the opinions of the supervisors involved, so long as those opinions are free of bias. If the arbitrator is convinced of the objectivity of the foreman, he serves his office best by not introducing personal judgments unrelated to industrial realities.

Preemployment Testing

If what has been said above is true of postemployment testing, so also is it true of preemployment testing. The right of management to place the best available talent in existing job vacancies necessarily includes applicants for employment as well as those already on the active payroll. This being true, an individual who

falls within either of those categories should be regarded as having failed a test he refuses to take, the only possible exception being that of lie detector tests, a subject beyond the scope of our attention today. In passing, however, I note for what it is worth my concurrence with the overwhelming majority of my colleagues that the results of a polygraph examination are never admissible as evidence in an arbitral proceeding.

Summary

In summary of what has been said above, it can be stated that the results of tests administered to employees may be ultilized as an aid in judging the qualifications of candidates for a particular job vacancy if:

1. The test is reasonably indicative of an ability to meet the requirements of the job at issue.
2. The test is administered in a fair and uniform manner.
3. The results of the testing are not made the sole criteria, but rather are evaluated and considered along with other available evidence of the employee's qualifications.

I close with a personal experience illustrative of the difficulties encountered when one attempts to define the totality of those elements which comprise any job assignment. This past fall I was returning to Southern California from the Middle West following the conclusion of a series of hearings. It happened that the flight I was on was running late. Every seat was occupied, the cabin was overheated, and I noticed more than the usual number of crying children and irritable businessmen. I occupied a seat opposite the galley, from which vantage point I could observe the considerable amount of activity required of the stewardesses. As we approached Los Angeles, I put aside the transcript I was reading and noticed that one of the girls was positioned on her hands and knees on the galley floor. Her hair was in disarray, her blouse was no longer neatly inserted in her skirt, and she had a run in her hose, all obviously due to the demands of her job. The impact of her appearance was such that I impulsively asked her what she was doing on the floor. Without hesitating, and from the very depths of her frustration, she responded, "I'm looking for the glamour in this damned job!"

It is my hope that the young lady did, indeed, find the glamour she felt was an inherent part of her employment relationship. It is my belief that arbitrators will continue to examine test results where the record before them demonstrates a proper utilization of yet another modern scientific technique.

III. OBSERVATIONS ON PSYCHIATRIC TESTIMONY IN ARBITRATION

DON W. SEARS*

In certain categories of cases, the use of expert and opinion testimony at arbitration proceedings is rather widespread. The consideration and effect given this testimony by the arbitrator in making his award is, however, seldom articulated. Arbitrations tend to be much less bound than judicial proceedings by the rules of evidence, a tendency which results in this sort of testimony being admitted without having any special attention called to its nature. Moreover, arbitrators, in reaching their decisions, generally do not feel compelled to indicate exactly how the evidence was used. With virtually no possibility of appeal on evidentiary issues, the arbitrator is not compelled to articulate what use he makes of evidence. In this respect he resembles the jury, which of course does not have to justify its evidentiary actions. These two factors may account for the failure on the part of arbitrators to comment extensively on their use of expert and opinion testimony.

The atmosphere in arbitration proceedings is one of informality; the emphasis is on the admission of all relevant testimony rather than its limitation in accordance with the exclusionary rules of evidence. Accordingly, the result of objections to testimony as hearsay, opinion, and the like is not a refusal to receive the evidence; rather the arbitrator usually takes its objectionable nature into account when deciding what weight to give it. Thus almost all evidence is freely admissible, the principal criterion being relevancy.

* Member, National Academy of Arbitrators; Dean, School of Law, University of Colorado, Boulder, Colo. I am indebted to James R. McCotter, senior law student at the University of Colorado, for his research and editorial assistance.