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.

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The formalities of qualification and the hypothetical question are not prerequisites to the receipt of opinion testimony from an expert. They are, nevertheless, frequently used techniques as they understandably buttress the opinion testimony in question.[1]

A third factor which differentiates arbitral from judicial expert testimony is the fundamental one that the arbitrator differs greatly from a jury. Both in respect to supposed ability to look critically at opinion evidence and in respect to expertise in the general area of the dispute, arbitrators are usually in a better position than jurors. In the words of the National Academy of Arbitrators:

> One cornerstone of labor arbitration is the supposed expert knowledge of the arbitrator himself concerning the issues in dispute. Hence, the value of expert witnesses correspondingly diminishes, and the probability of substantial error involving misplaced reliance on expert testimony is minimized. This logic does not apply where the expert is discussing medical or other non-industrial specialities.[2]

As the last sentence indicates, the expert knowledge of the arbitrator may be a less important factor in certain kinds of testimony. It is therefore probably not too surprising that many of the problems which arbitrators encounter concerning expert testimony arise in precisely those areas where they can make no claim of expertness, notably in the field of medicine. However, an arbitrator may give lip service to the testimony of a medical expert and still decide the case based upon his own view of the equities of the situation. For example, in *Wheeling Steel Corporation*,[3] one question was whether or not exceptions should be made to the company's safety program, which required the wearing of safety glasses with side shields. At the hearing, the reasons why safety glasses had to be worn throughout the plant were given by an ophthalmologist and industrial consultant from whom the company had sought advice when instituting the program. In commenting on the effect he was giving to this testimony, the arbitrator said:

> The Umpire cannot and should not take issue with the well-supported opinion of Dr. Novak. Indeed, it would be a serious violation

[1] See "Problems of Proof in the Arbitration Process: Report of Chicago Area Tripartite Committee," *Problems of Proof in Arbitration*, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), pp. 94-95 [hereinafter referred to as 19th Annual Meeting].
[2] *Id.*, p. 253.
[3] 48 LA 1378 (1967).

> of his obligations to both the Union and the Company were he to substitute his own judgment for that of a recognized expert in the field of industrial eye safety. For this reason, he must find that the Company's program of requiring all employees to wear safety glasses with side shields—even those employees who operate cranes or drive tractors—is a reasonable one.

However, it is most interesting that the principal objections of the tractor drivers were directed to the mesh-type of side shield, which, according to the expert, did not impair peripheral vision. Despite this testimony and the deference paid the expert, the arbitrator directed the company to make available safety glasses with clear plastic side shields to all employees upon request.

Very few reported cases involve psychiatric problems. One can only speculate as to why this is the case. Perhaps the concern of a company about an employee's mental condition may be matched by the union's concern, and the parties may reach some satisfactory settlement of the matter prior to arbitration, such as sick leave for the employee and psychiatric treatment.

Another reason for the dearth of reported cases involving psychiatric problems may be the reluctance on the part of the employee involved to raise his mental condition as a defense. Indeed, proof of a serious mental problem might even cause the employee to lose his case.

One reason for the lack of these cases may not be so readily apparent. Does the company have the right to insist on a psychiatric examination? Or is its only recourse to discharge the employee and argue the matter before the arbitrator on a "just cause" basis? Dr. Andrew Watson has addressed himself to the problem raised by an examination that does not have the wholehearted cooperation of the patient. He has written:

> A subject who knows that his revelations may be used against him will certainly not be so expressive as one who expects help in the form of treatment from a physician. This can raise deep conflicts for psychiatrists, since they can be placed squarely between the Scylla of what they may conceive as their confidential relationship to a patient, and the Charybdis of their obligation as an investigator when a court or institution retains them.[4]

[4] Watson, *Mental Illness and the Law*, Ch. XI, p. 237 (at this writing, the book is not yet published, but the author has kindly consented to its reference).

One interesting case involving psychiatric testimony was heard by Arbitrator Killingsworth. In *Youngstown Sheet & Tube Co.*,[5] he held that the employer did not violate the labor agreement by demoting the grievant, referred to as X, who became ill while working overtime and remained on sick leave for some three months. The evidence indicated that the demotion was not disciplinary or based on temporary illness but rather resulted from the employee's incapability of fulfilling the requirements of a cost-clerk position. In the year preceding the demotion, the employee had received three written reprimands for serious errors in job performance and two for refusal to work overtime, and twice became ill while working overtime, and had incurred lengthy absences including the one during which he was demoted.

At the Step 3 meeting between the parties, the union presented a statement dated two months earlier from X's family physician which stated that he had examined X repeatedly during the preceding two months and believed that he was completely disabled by virtue of having a severe anxiety state. The statement concluded, "I think he is organically all right but is quite ill from a psychiatric viewpoint and thus unable to work." Apparently X was also under the care of a second physician, who independently arrived at a diagnosis of a disabling anxiety state. At the hearing, X's testimony established that both physicians (each without consulting the other) had recommended psychiatric treatment, but that he had never sought such assistance.

By the time of the hearing, both X's own doctor and the company's doctor had certified that he was able to return to work. However, the arbitrator concluded that a certification that X was able to work was not the same thing as a certification that he was fully recovered from his psychiatric illness. In view of the facts that this illness produced a total disability for three months, that two physicians independently recommended psychiatric treatment, and that X had never sought any such treatment, the arbitrator concluded that a finding of complete recovery from his psychiatric illness would be justified only by positive medical evidence to that effect.

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[5] 47 LA 146 (1966).

It seems rather obvious that the arbitrator did not give a great deal of weight to the statement by the doctors that X was able to return to work, but instead relied rather heavily on his own personal appraisal of the grievant at the hearing.

In *American Chain & Cable Company,*[6] a female employee absented herself from work without notice and without letting anyone know where she was. She then applied for sick leave through intermediaries without complying with company procedure. The company notified the union and the grievant that she was being terminated. Her application for reinstatement after discharge was denied. At the hearing the regular doctor, not a psychiatrist, testified that she was overcome with a "fear psychosis" which rendered her so distraught that she lost control of her normal faculties. As he described it, the principal symptom was a fear of people and that they might attempt to harm her. The root of her fear, as the doctor described it, was her husband. He, incidentally, at the time worked as night superintendent at the company's plant. Her abrupt flight resulted from her decision to seek a divorce. She was convinced that her husband would retaliate with physical violence.

The arbitrator relied very heavily upon the professional opinion of the doctor in reinstating the grievant with full seniority. He stated that the account of the grievant's actions, as presented factually by the company, was enough to justify her discharge. He then stated:

> However, when weighed against the evidence as to why she so conducted herself, a different conclusion must be reached. In the complexities of modern civilization, emotional distress which disturbs and distorts normal mental stability and reactions is, unfortunately, a very real and common affliction. In this particular case, the professional opinion of Dr. Balice cannot be ignored or set aside. His account of the grievant's condition and expert rationalization of her actions absolves her completely of the charge of trickery or abuse of her responsibilities to the company. It is, indeed, understandable that the company reacted throughout the affair with suspicion as to the cause and motives behind her apparently unreasonable absence. A broken leg, an operation, even a severe and lingering common cold are comprehendable reasons which can support a legitimate sick leave. . . . It is rather difficult to conceive that a person, physically capable and mobile, could, from psychotic reasons, lose the ability to

[6] 48 LA 1369 (1967).

> respond to ordinary responsibilities. Such, however, is the case—and the actuality in this instance. There could be no doubt that the matter must be regarded and treated as legitimate illness.

This may well be another example of an arbitrator's buttressing a decision he already had in mind with the testimony of a general practitioner on psychiatric matters. The doctor's testimony that the female employee was suffering from a "fear psychosis" calls to mind another comment by Dr. Andrew Watson that deserves quoting. He is of the opinion that:

> To state that a person is "schizophrenic," or "irresponsible," or "insane," or "psychopathic," or to use any number of other appellations, has no specific value. . . . The degree to which a psychiatrist can describe accurately the manner in which an individual perceives, remembers, describes and reasons about his experience, and the manner in which unconscious emotional pressures impinge upon these capabilities, will measure his usefulness . . . in his task of determining such issues as responsibility, competence or credibility.[7]

There are several facets to medical evidence as expert testimony. First, there is the fact that frequently the doctor does not appear to testify at the hearing; rather, a statement concerning, for instance, an examination of the grievant is introduced.[8] Not only does the lack of personal appearance deny the opportunity for cross-examination, but also the statements which substitute are often extremely inadequate and provide little or no help in resolving the issue of the grievant's ability to return to work.

Nevertheless, this relative paucity of firsthand medical testimony does not seem to upset most arbitrators. The reasons for this reaction are probably twofold.

One reason for this seeming unconcern on the part of the arbitrator is that he, as the person chosen by the parties to settle the dispute, will usually feel bound to decide the issue on the basis of the evidence presented by the parties. Although the arbitrator will certainly ask questions of those witnesses who do appear, he will not ordinarily demand that other witnesses be called.[9] He may hint in his award that he would have preferred that the doctors appear rather than submit statements, or that the parties ought to submit

[7] Watson, *Mental Illness and the Law*, p. 224.
[8] 19th Annual Meeting, pp. 107-108, 285.
[9] See 19th Annual Meeting, p. 108.

some issue to an impartial doctor, but he will not consult an expert without specific authority from the parties, either in the form of a direction or an acquiescence by the parties in his request.[10] In *Simmons Company*,[11] Arbitrator Arthur Ross had to determine whether the new production standards established by the company were consistent with the production of a normal, proficient operator working at a normal pace. The stipulation to arbitrate signed by both parties stated: "Due to the fact that the subject matter of this dispute is a technical one involving Time Study findings, it is expected by the parties that the arbitrator will avail himself of such technical assistance as may be necessary." The arbitrator did appoint a professor in the Department of Engineering of the University of California with wide experience in time and motion study, teaching, research, and consulting work. The arbitrator indicated that his report was most helpful to him in reaching a decision. However, the arbitrator emphasized that the decision was solely his own and that "[w]hile an arbitrator may obtain technical assistance, he cannot delegate the decision-making authority which has been conferred upon him individually."

The arbitrator's position is different from that of a judge, who, within certain limits, may call or examine witnesses on his own motion if he thinks that evidence critical to the just disposition of the case is being kept from the fact-finder. See, for example, the statement of Arbitrator Leonard:

> Unfortunately, all the qualified medical evidence in this case is in the form of written statements. The Arbitrator fully realizes the difficulty involved in attempting to have medical doctors testify at an arbitration hearing, but he also realizes that an opportunity to question the three medical doctors from whom statements were received would dispel much, if not all, of the ambiguousness and confusion generated by their statements. However the parties have chosen to have the case decided on the evidence before the Arbitrator and this, of course, he shall do.[12]

In some instances, however, an arbitrator's reaction to the situation may be a little more forceful. For example, in *Koppers Company* [13] the issue was whether an employee had come to work in-

[10] *Id.*, p. 108.
[11] 33 LA 725 (1959).
[12] *American Smelting and Refining Co.*, 48 LA 1187, 1190 (1967).
[13] 65-1 ARB ¶8013 (1964).

toxicated, thereby justifying the company's discharging him. The company's evidence as to intoxication consisted partly of hearsay evidence of a telephone conversation between a supervisor and the doctor to whom the employee had been sent upon being told he could not work, and a statement from this same doctor. The arbitrator refused to accept either piece of evidence. The language of the award indicated that under the circumstances the arbitrator was suspicious of the doctor's motive in not testifying in person.

This technique might conceivably be used in those cases where the arbitrator feels that failure to produce a witness borders on bad faith. Such a refusal to consider evidence hardly solves the arbitrator's dilemma of insufficient evidence, although, especially in those labor-management contracts which call for a permanent umpire, action of this sort may persuade the parties to call live witnesses in future proceedings. In fact, this tactic leaves the arbitrator with less evidence upon which to decide the case. However, there appears to be little the arbitrator can do on his own to remedy this situation.

Another facet of medical testimony is that doctors seem rarely qualified to give an opinion going to the supposedly real issue in the case. The grievant must be not only physically fit in general, but also physically able to perform a particular job. The resolution of this issue is thus dependent on testimony concerning both the grievant's physical condition and the physical requirements of the job in question. As to the former, the doctor, be he the company's or the grievant's physician, is obviously qualified to give his expert opinion. His ability to do so as to the latter depends on the circumstances—namely, his knowledge of the job involved.

If the grievant describes the work to a doctor with sufficient detail, there appears to be no reason why that doctor should not be allowed to give his opinion about the grievant's ability to do the work. The fact that knowledge of the job forms part of the basis of the doctor's opinion should be mentioned in his report. That is, a statement, oral or written, describing the job and grievant's physical condition and concluding that the grievant is physically capable of handling the job is entitled to much more weight than a simple statement that "X can return to work." For even though that statement may be made with full awareness of the job requirements,

the arbitrator has little assurance of this. If the testimony is oral, hypothetical questions may substitute for lack of direct knowledge about the job.

Perhaps the most intriguing of all the aspects of medical testimony is that it may not be nearly so crucial to the arbitrator's decision as one might think. Although the resolution of the "battle of the experts" may determine the amount of damages recoverable by a plaintiff in a negligence action, the "battle of the medical experts" may be largely irrelevant to the award in arbitration proceedings. The arbitrator usually seems to place his decision on the sounder of the positions presented to him and his view of the equities of the situation. A recent study on this subject concludes that arbitrators deal quite well with conflicting medical testimony and, consequently, there is no need for special handling of this problem in the labor agreement.[14]

Discussion—

Panel members were asked to respond to questions concerning procedural problems with regard to expert testimony, an arbitrator's alternatives in the absence of a third expert's testimony on medical facts, and the weight an arbitrator should give to a prior workmen's compensation award.

The first of the procedural problems posed was whether there should be any requirement that a medical document be furnished before a hearing so that it might be the basis for a settlement or serve to notify the parties that they will be faced with uncontestable evidence.

Mr. Roberts responded that the concept of due process demands something close to what the questioner was suggesting, and he went on to say that he always afforded the other side the opportunity to examine complex medical-psychiatric evidence. Mr. Miller commented that it might be "worthwhile to take that sort of evidence and others unrelated to medical evidence for pretrial examination." He added, however, "Many parties attempt to do that by the way they go into their procedure prior to arbitration, but more often than not, they do not."

[14] Linda Lafferty, "Conflict of Medical Evidence in Labor Arbitration," 23 *Arbitration Journal* 175 (1968).

Another questioner, seeking elaboration of the due process concept, asked the panel to comment on the situation where doctors' reports are introduced with the doctors not present and an objection is made that there is no opportunity to cross-examine: "Would due process require that there be the presence of the doctor at the hearing?"

Mr. Roberts replied that it would: "My own view is that if one party insists upon the right to cross-examine the doctor who is testifying to written documents, that right should be guaranteed and granted. . . . It is unfortunate that the economic practicability weighs so heavily against it, and I think for that reason the parties themselves create the atmosphere in which the hearing is conducted, namely, through written evidence. That is typically the way these matters are approached because it is so expensive to call doctors to testify. Then you have the very real problem of privilege between patient and doctor that would have to be considered."

Mr. Miller took a slightly different view of the problem: ". . . I would regard that evidence somewhat like our affidavit evidence and weigh it accordingly, so informing the parties. Then, if the parties introducing it care to go to the cost of bringing in that doctor to make this evidence more valid, or at least to present him for cross-examination, they could do it."

Mr. Sears mentioned that the only time he was faced with the problem, he continued the hearing and made an appointment at the office of the doctor in question.

Subpoena procedure was raised by the question, "Where one side requests a subpoena from the arbitrator for a doctor's appearance with his medical records, does the side not requesting the subpoena have the right to be notified that a subpoena has been requested of the arbitrator, or does the party who is requesting the subpoena have the right of surprise, in the sense that that party has the right not to have its request disclosed by the arbitrator?"

Mr. Miller and Mr. Sears agreed that if a subpoena is issued, as a matter of fairness the other party should be advised that an expert would be coming in. Mr. Roberts responded that he issued five or six subpoenas a week, by telephone or written request. "Being a lawyer myself, I am not at all surprised that most of these

requests come in about 10 hours before the commencement of a hearing, so there isn't time to tell anybody anyhow. But, assuming that posture and the appearance of the doctor at the hearing in response to that subpoena, . . . if the opposing party makes a request for time to collect its wits and plan its strategy, again I have avoided the problem of privilege. It may be that the other side will argue to the arbitrator that he should not permit this doctor to testify because of the question of privilege. That is another side of it." When asked if he had ever notified the other party, he replied, "I never have, but I cannot tell you why I have not. I think a couple of years ago I drew an analogy to a civil court proceeding and the issuance of subpoenas in that tribunal."

In response to a question of an arbitrator's function in cases where medical facts are in dispute, Mr. Miller stated that he believed an arbitrator would not be justified in regarding a case as not arbitrable unless the parties provided some third medical opinion or data. The arbitrator's function, he said, is to decide the case, and after he makes every effort to ascertain the facts, he has to deal with the situation in terms of the evidence he has, and he probably would have to put considerable weight on the equities.

A member of the audience suggested that a refusal by both sides to call a third expert after each had submitted medical testimony might be considered failure to give proof. Mr. Miller responded that the calling of a third expert would be a matter for the parties rather than the arbitrator to decide, and Mr. Sears commented that differences in diagnoses might be avoided if there were examinations by doctors or psychiatrists of both sides at the same time under the same circumstances.

The panel members agreed that they would not give an award by a workmen's compensation tribunal special weight as expert testimony outside the area of medical testimony.