INTRODUCTION

The Nebraska Workmen's Compensation Act\(^1\) is administered and enforced\(^2\) by the Nebraska Workmen's Compensation Court.\(^3\) In the recent decision of *Fite v. Ammco Tools, Inc.*,\(^4\) the Nebraska Supreme Court clarified the evidentiary rules applicable to hearings before the Nebraska Workmen's Compensation Court. *Fite* involved a plaintiff's attempt to show that her husband's death in an airplane crash occurred in the course of his employment, therefore entitling her to compensation.\(^5\) Three statements made by the decedent on the date of his death were offered to show that he intended to go to work, thereby tending to prove that the decedent's subsequent death was in the course of his employment.\(^6\) The compensation court received these statements of intent only to show that they were made, and not to prove the truth of the matters asserted therein.\(^7\)

On appeal, the supreme court determined that the statements were fully admissible under the Nebraska Evidence Rules.\(^8\) Although the compensation court is not bound by the Nebraska Evidence Rules,\(^9\) the supreme court held that, in view of the beneficent purposes of the Workmen's Compensation Act, the compensation court could not be more restrictive than Nebraska trial courts in its admission of evidence.\(^10\) *Fite*’s holding and implications can best be understood in light of statutory history, prior evidentiary and policy decisions, and changing standards of appellate review.

---

5. 199 Neb. at 355, 258 N.W.2d at 923.
6. *Id.* at 355-58, 258 N.W.2d at 923-24.
7. *Id.* at 356-58, 258 N.W.2d at 924.
9. 199 Neb. at 358, 258 N.W.2d at 925.
10. *Id.* at 360-61, 258 N.W.2d at 926.
Facts and Holding

Fite was an action brought by the widow of Larry I. Fite to recover compensation from his employer, defendant Ammco Tools, Inc. The decedent, who was a district sales manager for the defendant, owned a light airplane which he used almost exclusively to cover his sales territory of Nebraska, South Dakota and western Iowa. The defendant knew and approved of this use of the plane. Fite was killed in the crash of his aircraft on July 2, 1975. His widow, in an attempt to show that he died in the course of his employment, introduced three statements of intent he had made on the date of his death. These statements were the only evidence of the decedent’s actions on that day.

The first statement was made in a telephone conversation between Fite and his father on the morning of July 2, 1975, in which Fite, in parting, said he had to go to work. The second statement of intent, made by Fite to his wife as he was leaving home, was that he was busy and had to go to Lincoln and Omaha, Nebraska. Finally, a friend of Fite’s spoke with him at the Fremont, Nebraska airport. The two men occasionally worked together and the friend had previously accompanied Fite on a business flight. Fite asked his friend to come with him on this flight, but the latter declined, saying he had work to do. Fite’s response was “so do I,” and that they would go another time.

Objections were made to the introduction of all three statements on hearsay grounds. In each instance, the presiding judge admitted the statements on a restricted basis—to show that they were made, but not to prove the truth of the matters asserted therein. The compensation court held that the plaintiff did not meet her burden of proving that her husband died in the course of his employment. Plaintiff appealed to the Nebraska Supreme Court, claiming that the restricted admission of the statements was erroneous.

11. Id. at 355, 258 N.W.2d at 923.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id. at 356-57, 258 N.W.2d at 924.
17. Id. at 355-56, 258 N.W.2d at 923-24.
18. Id. at 357, 258 N.W.2d at 924.
19. Id.
20. Id.
21. Id. at 357-58, 258 N.W.2d at 924.
22. Id. at 356-58, 258 N.W.2d at 924.
23. Id. at 355, 258 N.W.2d at 923.
24. Id. This was an appeal from a three-judge hearing, id. at 361, 258 N.W.2d at
In his opinion for a unanimous court, Judge White considered two main issues: (1) whether the three statements of intent were admissible under the Nebraska Evidence Rules hearsay exceptions; and (2) if the statements were admissible, what was the effect of excluding them in a hearing before the Nebraska Workmen’s Compensation Court?

With regard to the first issue, Judge White cited the Nebraska Evidence Rules hearsay exception relating to a declarant’s statements of a then existing state of mind, including intent or plan, and noted that the Federal Rule of Evidence from which it was drawn had not changed previous Nebraska law which allowed the admission of statements evidencing an intent or plan to do a specific act in the future. Such a statement of intent about a journey, however, was admissible in Nebraska only if made at or near the time of departure. Applying these rules to the facts of the case, he determined that “the statements offered were clearly exceptions to the general prohibition against hearsay,” and were admissible.

After disposing of a collateral issue, Judge White proceeded to consider the effect of excluding the admissible statements, utilizing both statutes and public policy derived from case law. He noted that sections 48-168 and 27-1101(4)(d) of the Nebraska statutes render the Nebraska Evidence Rules inapplicable in compensation court proceedings. Judge White stated that “his jurisdiction has repeatedly held that [the] Workmen's Compensation Act is one of general interest, not only to the workman and his employer, but as well to the state and it should be so construed that technical refinements of interpretation will not be permitted

926, i.e., a rehearing after an initial one-judge hearing. See text at notes 54-57, 78-79 infra.
25. 199 Neb. at 358, 258 N.W.2d at 925.
26. Id. at 358-59, 258 N.W.2d at 925 (citing Neb. Rev. Stat. § 27-803(2) (Reissue 1975)).
27. Id. at 359, 258 N.W.2d at 925 (citing Fed. R. Evid. 803(3)).
29. 199 Neb. at 359, 258 N.W.2d, at 925 (citing Gering v. School Dist., 76 Neb. 219, 107 N.W. 250 (1906)).
30. Id. at 359-60, 258 N.W.2d at 925.
31. Defendant's counsel contended that, as an offer of proof was not made on the statements, error could not be raised on appeal. This position was rejected on the ground that since the record provided the elements of an offer of proof, no formal offer was needed. Id. at 360, 258 N.W.2d at 925-26 (citing In re Estate of Johnson, 100 Neb. 791, 161 N.W. 429 (1917)).
to defeat it."^{33}

Referring to the beneficient purpose behind the compensation court's exemption from the Nebraska Evidence Rules, Judge White asserted that while the compensation court could admit evidence that a regular trial court could not, it could not exclude evidence admissible in a trial court.^{34} He concluded: "We do hold that the parties litigating before a compensation court are permitted to introduce evidence which is admissible in the trial courts in this state. The evidentiary rules established by the compensation court may not be more restrictive than those of the trial courts."^{35}

Under the supreme court's standard of review in compensation cases,^{36} Judge White determined that the compensation court acted without or in excess of its powers in failing to admit the statements of intent as probative of the truth of the matters asserted therein.^{37} The case was remanded for reconsideration by the compensation court with instructions that the statements be fully admitted.^{38}

**BACKGROUND**

**LEGISLATIVE HISTORY**

Nebraska's original workmen's compensation act was passed in 1913.^{39} Disputed claims for compensation were submitted to the district court, which heard the case as one in equity.^{40} Appeals to the supreme court were allowed in a manner similar to that in other cases.^{41} The act contained no provisions on the admissibility of evidence in such cases, nor was there any mention of a stan-

\begin{itemize}
  \item^{33} 199 Neb. at 360, 258 N.W.2d at 926 (citing Speas v. Boone County, 119 Neb. 58, 227 N.W. 87 (1929)).
  \item^{34} Id. at 360-61, 258 N.W.2d at 926.
  \item^{35} Id. at 361, 258 N.W.2d at 926.
  \item^{37} 199 Neb. at 361, 258 N.W.2d at 926.
  \item^{38} Id. The case has now been reconsidered by the compensation court and, in a 2-1 decision, the previous order of dismissal has been reaffirmed. Fite v. Ammco Tools, Inc., Doc. 55, No. 347 (Neb. Workmen's Comp. Ct. Feb. 6, 1978). The compensation court emphasized that the site of the crash did not indicate that the decedent was headed for Lincoln or Omaha, that decedent's invitation for his friend to join him indicated a pleasure flight, and that any business the decedent had to do would probably have been conducted later in the day than the time of his flight. Id.
  \item^{39} Workmen's Compensation Law of 1913, ch. 198, 1913 Neb. Laws 578 (codified then at Rev. Stat. Neb. 1913 §§ 3642 to 3696 (ch. 35, art. VIII)).
  \item^{40} Id. § 37 at 595 (codified then at Rev. Stat. Neb. 1913 § 3678).
  \item^{41} Id. § 38 at 595-96 (codified then at Rev. Stat. Neb. 1913 § 3680). This section also provided time limitations within which such appeals had to be perfected by the parties and acted upon by the court. Id.
\end{itemize}
A standard of review on appeal.42

A 1917 statute provided for major amendments to the 1913 act.43 A Compensation Division in the Bureau of Labor was created.44 The State Commissioner of Labor was made the Compensation Commissioner, and provisions were made for a deputy commissioner, and assistant commissioners.45 Compensation disputes were to be submitted to the Compensation Commissioner for determination; a party dissatisfied with the result could then submit the case to the district court for a hearing as a suit in equity.46 Appeals from the district to the supreme court were allowed as before.47

As part of these amendments, the ancestor of present section 48-16848 first made its appearance.49 It provided:

The compensation commissioner shall not be bound by
the usual common law or statutory rules of evidence or by

---

42. A standard of review was soon evolved by the courts. In an action brought under the 1913 version of the compensation act, it was said:

The case was heard in the district court upon conflicting evidence, and it appears to have been competent and quite sufficient to sustain the finding and judgment of the district court. We do not feel at liberty to set aside the judgment, and cannot do so under the rule established, unless it is clearly wrong.

Miller v. Morris & Co., 101 Neb. 169, 173, 162 N.W. 417, 418-19 (1917). This continued to be the rule after the 1917 amendments made the district court an appellate court in compensation proceedings (see text at note 46 infra):

It is the settled law of this state that a finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong.

Simon v. Cathaye Co., 106 Neb. 535, 536; 184 N.W. 130, 131 (1921). It was not until 1929 that the legislature established a standard of review for use in the supreme court. See text at note 51 infra.

44. Id. § 26 at 218 (later codified at COMP. STAT. NEB. 1922 § 3078).
45. Id. §§ 27, 28 at 218-19 (later codified at COMP. STAT. NEB. 1922 §§ 3076, 3079).
46. Id. § 13 at 210 (amending REV. STAT. NEB. 1913 § 3678). This section was further amended in Act of April 17, 1919 ch. 91, § 5, 1919 Neb. Laws 228 (later codified at COMP. STAT. NEB. 1922 § 3080) to state that the district court hearing would be as in equity.

In Lewis v. Allied Contractors, Inc., 118 Neb. 605, 610, 225 N.W. 770, 772 (1929), it was made clear that such appeals to the district court were to be tried de novo. In such a trial de novo, the district court could "increase or diminish the commissioner's awards in the same manner as if [the action had been] originally brought in that court" and in doing so the district court would "receive evidence on all matters relevant to the injury and the amounts of compensation." Id. at 606, 225 N.W. at 771.

49. Act of April 24, 1917, ch. 85, § 29(b), 1917 Neb. Laws 199 (later codified at COMP. STAT. NEB. 1922 § 3080(b)).
any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of Article 8, Chapter 35, Revised Statutes of Nebraska for 1913, and any act or acts amendatory thereof.\(^5\)

A 1929 law specified that appeals from the district court in workmen's compensation cases were to be tried de novo in the supreme court.\(^51\) Also in 1929, a new compilation of Nebraska statutes was issued and the provisions of the workmen's compensation law were renumbered accordingly.\(^52\)

The Nebraska Workmen's Compensation Court was created pursuant to a 1935 enactment.\(^53\) A three-judge panel was set up to

\(^{50}\) Id.

\(^{51}\) Act of April 22, 1929, ch. 81, § 1, 1929 Neb. Laws 273 (amending Comp. Stat. Neb. 1922 § 3060). Such a review de novo was made on the record, independently of the district court's findings and judgment. Siedlik v. Swift & Co., 122 Neb. 98, 101, 239 N.W. 466, 467 (1931). The supreme court would enter a final judgment, determining all questions of law and fact. However, where there was conflicting evidence, consideration would be given to the fact that the district court had heard the witnesses testify, and that it had accepted one version of the facts rather than another. Southern Sur. Co. v. Parmely, 121 Neb. 146, 148-49, 236 N.W. 178, 180 (1931).

\(^{52}\) This new compilation was the Compiled Statutes of Nebraska 1929, in which the workmen's compensation act occupied §§ 48-101 to -161. The renumbering, from Comp. Stat. Neb. 1922 to Comp. Stat. Neb. 1929, respectively, was as follows: § 3060 (all disputed claims go to compensation commissioner; appeal to district and supreme courts) became § 48-137; § 3062 (procedure for hearing and appeal) became § 48-139; § 3078 (compensation division) became § 48-155; § 3076 (compensation commissioner and deputy) became § 48-153; § 3079 (assistant commissioners) became § 48-156; and § 3080(b) (exemption from strict evidentiary and procedural rules) became § 48-157(b).


administer and enforce the compensation law, and all controversies over compensation were to be submitted to it. The initial step was to hold a one-judge hearing on a dispute. Parties had two options for review following the one-judge hearing.

The first option was to obtain a rehearing before the compensation court; such a rehearing would be de novo. After rehearing, the case could be appealed to the district court by filing a petition and submitting a transcript of the compensation court proceedings. The district court would then hear arguments on the petition and render its judgment. An adjudication of the compensation court could be set aside only on the grounds that: the court acted without or in excess of its powers; the award or order was obtained by fraud; the court's findings of fact were not supported by the record; or the court's findings of fact did not support its order or award.

The second option allowed the rehearing to be waived and appeal taken directly to the district court where a trial de novo was had in equity. Under either option, an appeal was then allowed

55. Id. § 11 at 191 (codified then at COMP. STAT. NEB. 1929 § 48-172 (Cum. Supp. 1935)).
56. Id. § 13(4) at 193 (codified then at COMP. STAT. NEB. 1929 § 48-174(4) (Cum. Supp. 1935)).
57. Id. § 13(5) at 193-94 (codified then at COMP. STAT. NEB. 1929 § 48-174(5) (Cum. Supp. 1935)). Although the statutory language was less than precise about the number of judges required for a rehearing, id., there was apparently no confusion as to its meaning. As part of a general discussion of the compensation court act, the Nebraska Supreme Court said: "[S]ection 13 of the act provides for a preliminary trial by a single member of the [compensation] court, but . . . either party at interest may refuse to accept such judge's decision, and . . . the rehearing or retrial shall proceed before the court of three judges as an entirety." City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 232, 274 N.W. 576, 580 (1937). The statutory provision was clarified in 1949. See text at note 70 infra.
59. Id.
60. Id. "It will be noted, that where a retrial has been had before the full compensation court, the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding." Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 870, 284 N.W. 352, 354 (1939).
62. Problems arose as to which of the two options, rehearing before the compensation court, or waiver of rehearing and direct appeal to the district court, took precedence. In City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 274 N.W. 576 (1937), neither party accepted the result of the one-judge hearing. Id. at 225-27, 274 N.W. at 577-78. The employee filed for a rehearing, but the employer waived rehearing and filed for a direct appeal to the district court. Id. In resolving the dispute, the supreme court stated: "[W]e hold that . . . the right to a rehearing by the [compensation] court . . . is preeminent, and the rights of appeal
to the supreme court. That court could set aside a district court determination only on the grounds that: the court acted without or in excess of its powers; the result was obtained by fraud; the court's findings of fact were not conclusively supported by the evidence in the record, in which case the cause was to be considered de novo upon the record; or the findings of fact by the court did not support the order or award.

The 1943 Statute Commission made various revisions in the laws under discussion here, mainly in the form of reorganization and renumbering. The exemption of the compensation court provided...exist only in subordination thereto." Id. at 233, 274 N.W. at 581. This holding was qualified the next year in Shamp v. Landy Clark Co., 134 Neb. 73, 277 N.W. 802 (1938). There the employee's widow recovered in a one-judge hearing. Id. at 74, 277 N.W. at 804. The employer filed a waiver of rehearing and appealed directly to the district court. Id. The widow objected, claiming that a direct appeal could not be taken without her consent. Id. at 74-75, 277 N.W. at 804. On appeal, the supreme court held that only one party needed to waive rehearing, that party being the one seeking review of the case. Id. at 78, 277 N.W. at 805. City of Lincoln was distinguished on the ground that neither party in that case had accepted the result of the one-judge hearing. Id. The supreme court continued:

It is therefore our conclusion that in case of a hearing before a judge of the compensation court, where findings and judgment are rendered and one party accepts such findings and judgment and the other does not, and, in accordance with law, waives a rehearing before the compensation court, such party may have an appeal directly to the district court.

63. Act of May 25, 1935, ch. 57, § 13(5), 1935 Neb. Laws 187 (codified then at COMP. STAT. NEB. 1929 § 48-174(5) (Cum. Supp. 1935)). A timetable for the perfection and adjudication of such an appeal was also provided. Id.

64. Id. Brown v. City of Omaha, 141 Neb. 587, 589, 4 N.W.2d 564, 565 (1942) states that a de novo consideration by the supreme court in a compensation case "calls for an independent conclusion on the record." Cf. Cahill v. Mockett, 143 Neb. 730, 10 N.W.2d 679 (1943) (action for specific performance of an alleged contract to make a will in plaintiff's favor):

Appeals in equity are for trial de novo in this court, and it is the duty of this court to reach an independent conclusion with reference to the findings of the district court. But, when the evidence on material issues so conflicts that it cannot be reconciled, the court considers the fact that the trial court observed the witnesses and their testimony, and must have accepted one version of the facts rather than the opposite.

65. The substantive provisions of the Workmen's Compensation Act were placed in new sections 48-101 to -151 while those provisions relating to the Nebraska Workmen's Compensation Court were placed in new sections 48-152 to 48-191. 3 Report of the 1943 Statute Commission, Parts 4-7 at §§ 48-101 to -190. Old section 48-162 of the 1929 Compiled Statutes (Cumulative Supplement 1941) became new section 48-152. Id. § 48-152. Old section 48-172 (all disputes go to compensation court) became new section 48-161. Id. § 48-161. Old section 48-174 (hearing, rehearing, appeal to district and supreme courts) was split up among new §§ 48-173 to -185. Id. § 48-173, Revisor's Note 1.
from strict rules of evidence and procedure was severed from the section that had contained it and was placed separately in section 48-168. References within section 48-168 were harmonized with other new revisions. All of these changes were incorporated into the original issue of the Revised Statutes of Nebraska.

In 1949, the rehearing statute was amended to provide that compensation court rehearings be en banc. The supreme court's standard of review on appeal was altered by a 1953 amendment. The third ground for setting aside or reversing the district court's judgment was changed by striking the word "conclusively" from the previous version, which had provided that if the court's findings of fact were not conclusively supported by the evidence in the record, the supreme court was to hear the case de novo on the record. A 1965 Act expanded the size of the Nebraska Workmen's Compensation Court to four judges.

Appellate review in workmen's compensation cases was radically altered as part of a 1975 law. A fifth member was added to the compensation court. Waiver of rehearing with direct appeal to the district court was abolished, as was appeal to the district court after rehearing.

---

66. COMP. STAT. NEB. 1929 § 48-157 (Cum. Supp. 1935). The exemption was subsection (6) of this section.
68. Id. § 48-168, Revisor's Note 4.
69. NEB. REV. STAT. (1943). The sections pertinent here are: § 48-152 (creation and size of compensation court); § 48-161 (all disputed claims go to compensation court); § 48-173 (commencing action in compensation court); §§ 48-177, 179 (one-judge hearing; adjudication); § 48-179 (rehearing by compensation court de novo); § 48-181 (waiver of rehearing and direct appeal to district court); § 48-182 (appeal to district court after rehearing); § 48-184 (district court standard of review on appeal after rehearing); § 48-185 (appeal from district court to supreme court; standard of review in supreme court).
72. Id. Compare with NEB. REV. STAT. § 48-185 (Reissue 1952).
76. Id. § 19 at 361 (repealing NEB. REV. STAT. § 48-181).
Instead of appeal to the district court, the law provided for an appeal after rehearing directly to the supreme court. The amended section also stated in part:

The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the ground that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.

The Fite decision was rendered under these relatively recent statutory provisions.

CASE LAW

Several problems are encountered in an examination of cases prior to Fite which deal with questions of evidence in compensation proceedings. First, the evidentiary and procedural exemption found in section 48-168 and its predecessors expressly applies only to the compensation court or commissioner. Prior to 1975, procedures for appeal and review of compensation court or commissioner determinations provided for trials de novo in the district court in many cases. Such a trial de novo would therefore create a record outside of the coverage of section 48-168 and its predecessors, thereby eliminating possible supreme court consideration of the effect of those provisions. Furthermore, some supreme court opinions are not clear as to whether a trial de novo was held in the district court.

78. Id. § 14 at 358-59 (amending Neb. Rev. Stat. § 48-185). A timetable for the appeal process was also provided. Id.
79. Id. The Nebraska Supreme Court has stated that "under the new statutory procedures for workmen's compensation cases, appeals from the judgments, orders, or awards of the Workmen's Compensation Court are taken directly to the Supreme Court, and there is no longer a de novo review in this court." Salinas v. Cyprus Indus. Minerals Co., 197 Neb. 198, 202, 247 N.W.2d 451, 453 (1976).
80. 199 Neb. at 361, 258 N.W.2d at 926.
82. See text at notes 46, 51, 61, 76, and 77 supra.
83. In the following cases cited in this section, it is unclear whether a trial de novo in the district court was involved: Seymour v. Journal-Star Printing Co., 174 Neb. 150, 152, 116 N.W.2d 297, 299 (1962) (transcript of compensation court proceedings used by stipulation); Marasco v. Fitzpatrick, 173 Neb. 272, 273, 113 N.W.2d 112,
A second problem is that the 1975 enactment of the Nebraska Evidence Rules\textsuperscript{84} replaced some of the evidentiary concepts and terminology used in older cases, especially the idea of res gestae.\textsuperscript{85} This makes comparison between the older cases and \textit{Fite}, which was decided under the new Nebraska Rules, more difficult. Nonetheless, a review of pre-\textit{Fite} cases provides a helpful background against which the \textit{Fite} decision can be viewed. Several of the more relevant decisions, especially those concerning the hearsay rule and exceptions to it, are discussed below.\textsuperscript{86}

\textsuperscript{84} \textsc{Neb. Rev. Stat.} §§ 27-101 to -1103 (Reissue 1975).

\textsuperscript{85} In discussing res gestae, the Nebraska Supreme Court has stated:

\begin{quote}
The doctrine of \textit{res gestae} is somewhat obscure, but expressed in our language, and not in the abbreviated Latin phrase, its application to the admissibility of statements depends upon their being spontaneous and impulsive; the material inquiry being whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection and premeditation. Tongue v. Perrigo, 130 Neb. 564, 571, 265 N.W. 737, 740 (1936).
\end{quote}

\textsuperscript{86} A number of Nebraska cases have dealt with various evidentiary aspects of compensation cases. They include: Reis v. Douglas County Hosp., 193 Neb. 542, 546, 227 N.W.2d 879, 883 (1975) (doctor with 20 years experience considered an expert, although not a heart specialist); Martin v. Frear, 184 Neb. 266, 270-71, 167 N.W.2d 69, 72 (1969) (expert's opinion not incompetent because based on history and examination made in role as treating physician); Schoenrock v. School Dist., 179 Neb. 621,
In *Ridenour v. Lewis* \(^{87}\) defendant's employee was found, mortally wounded, near the car he used for service calls. The employee made statements to those who found him that he had been shot in a struggle with bandits. The employer raised hearsay objections to the admission of the decedent's statements to prove the cause of death. On appeal from the district court's award to the plaintiff upon trial de novo, the supreme court held that the statements were properly admissible as part of the res gestae, while refusing to reach the question of whether a dying declaration was competent in a compensation case.\(^{88}\)

*Hamilton v. Huebner* \(^{89}\) also involved the res gestae exception, but in that case the supreme court found no exceptions to the hearsay rule. In *Hamilton*, the plaintiff's expert gave his opinion that the deceased employee died from a coronary thrombosis. The thrombosis was allegedly brought on by overexertion and a fall while using a pull rope which broke in the course of trying to start a small engine. The supreme court found no evidence of overexertion, and barred the only evidence of a fall as being hearsay statements which were not part of the res gestae.\(^{90}\) The court said that to allow hearsay in a compensation case would make the employer an insurer of his employees' well-being.\(^{91}\) This case involved a trial de novo in the district court after waiver of rehear-

---

87. 121 Neb. 823, 238 N.W. 745 (1931).
88. Id. at 829, 238 N.W. at 748. A similar case was *Perry v. Johnson Fruit Co.*, 123 Neb. 558, 243 N.W. 655 (1932). An employee had been working on a car he used as part of his job. He was found near it, badly burned. He regained consciousness at the hospital before dying, and stated that he was burned when the car exploded. On appeal from the district court's trial de novo, the statements were held part of the res gestae and admissible. Id. at 561-62, 243 N.W. at 656.
89. 146 Neb. 320, 19 N.W.2d 552 (1945).
90. Id. at 328-32, 19 N.W.2d at 557-59.
91. Id. at 332, 19 N.W.2d at 559.
ing.\textsuperscript{92}

A factual situation which bears a striking resemblance to that in \textit{Fite} is found in \textit{Kirkpatrick v. Chocolate Sales Corp.}\textsuperscript{93} The deceased employee, a division manager for the defendant, traveled as part of his job and frequently visited a customer in Lincoln, Nebraska. On the date of his death, he left his Omaha home, telling his wife that he was going to Lincoln. He went to his office, performed some duties, then called his wife and told her that he was leaving then and would be back at noon of the next day. The employee was struck by a car while crossing a street near a taxi stand, and later died. It was shown that the decedent would have had time, except for the accident, to catch a train to Lincoln. The defendant denied that the employee's death arose out of and in the course of his employment.

The compensation commissioner dismissed the action brought against the defendant employer. In the district court, after trial de novo, an award was made to the plaintiff. On appeal, the Nebraska Supreme Court affirmed. The court reviewed the evidence and stated: "It may be fairly and reasonably inferred from competent evidence not contradicted that the employee was injured on his way to Lincoln and that the fatal accident arose out of and in the course of his employment. . . ."\textsuperscript{94} The court, however, did not identify which evidence it was relying on, and refused to review rulings admitting evidence on the ground that the result in the trial de novo depended "alone on evidence properly admitted."\textsuperscript{95} \textit{Kirkpatrick} was cited in \textit{Fite} for the proposition that the Nebraska Evidence Rules did not alter prior Nebraska law allowing the admission of statements evidencing an intent to do a specific act in the future.\textsuperscript{96}

A 1946 decision, \textit{Faulhaber v. Roberts Dairy Co.},\textsuperscript{97} is apparently the only case to apply any version of section 48-168 prior to \textit{Fite}. The case involved a thumb injury which developed into gangrene, resulting in the amputation of an employee's hand. The employee subsequently filed a compensation claim on his own, which specified only an injury to the thumb from a hammer blow.

\textsuperscript{92} \textit{Id.} at 322, 19 N.W.2d at 554. \textit{See also} text at note 61 \textit{supra}.
\textsuperscript{93} 127 Neb. 604, 256 N.W. 89 (1934).
\textsuperscript{94} \textit{Id.} at 608, 256 N.W. at 91.
\textsuperscript{95} \textit{Id.} The opinion does not specify what evidence was challenged, nor does it make clear whether the reference is to the trial de novo in the district court or in the supreme court. \textit{Id}.
\textsuperscript{96} 199 Neb. at 358-59, 258 N.W.2d at 925. \textit{See} note 28 and accompanying text \textit{supra}.
\textsuperscript{97} 147 Neb. 631, 24 N.W.2d 571 (1946).
The claim was denied in a one-judge hearing. On rehearing, plaintiff, this time with the aid of counsel, was permitted to file an amended petition which pointed to a burn subsequent to the hammer injury as resulting in the gangrene. The employer challenged this amended petition. On appeal, the supreme court cited section 48-168 and stated: "We conclude that in view of the beneficient character of the Workmen's Compensation Act and for the reasons hereinafter stated, permission to file the amended petition before the trial de novo was clearly within the power and discretion of the compensation court." The reasons mentioned were that the defendant was not prejudiced by the new petition, and that an amendment could have been obtained under the civil code.

These compensation cases provide an historical context from which, at first glance, Fite does not seem to significantly depart. On further examination, however, an important difference can be discerned. The pre-Fite decisions deal with evidence on a piece-meal basis without any overall approach to the evidentiary aspects of workmen's compensation. Although Fite does deal with a specific exception to the hearsay rule, it goes much further. Fite appears to be the first Nebraska compensation case to set forth a broad standard that is applicable to all of the rules of evidence: that as a minimum, the compensation court's rules of evidence may be no more restrictive than those of Nebraska trial courts.

DISCUSSION

Fite's ultimate holding is that the compensation court may not be more restrictive than a trial court in its admission of evidence, but may evidence that a trial court cannot admit. Judge White reaches this conclusion by considering the two statutes exempting the compensation court from the Nebraska Evidence Rules, sections 48-168 and 27-1101(4)(d), and by examining the policies behind these exemptions and the compensation act in general.

Section 27-101(4)(d) is part of the Nebraska Evidence Rules. There is no comment accompanying it. However, the equivalent

98. Id. at 634-35, 24 N.W.2d at 573-74.
99. Id. at 635, 24 N.W.2d at 574.
100. Id. at 635-36, 24 N.W.2d at 574.
101. 199 Neb. at 360-61, 258 N.W.2d at 926.
102. NEB. REV. STAT. § 48-168 (Reissue 1974).
104. 199 Neb. at 358, 360, 258 N.W.2d at 925-26.
provision in the Proposed Nebraska Rules of Evidence\textsuperscript{106} does have a comment which simply states: "The rules do not apply to the Workmen's Compensation Court, Sec. 48-168. . . ."\textsuperscript{107}

The basic statutory provision on the evidentiary exemption is therefore section 48-168, which has existed without amendment to its substantive provisions since its enactment in 1917, over 60 years ago.\textsuperscript{108} It currently provides:

The Nebraska Workmen's Compensation Court shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of sections 48-101 to 48-190.\textsuperscript{109}

The Nebraska Workmen's Compensation Court does have two rules of procedure regarding evidence. Rule XX\textsuperscript{110} on medical evidence provides that the compensation court is not bound by the usual rules of evidence. It allows signed written reports by an attending or examining physician and itemized bills to be received at the court's discretion during one-judge hearings in lieu of or in addition to, the personal testimony of that physician.\textsuperscript{111} On rehearing, however, such reports can be received only on stipulation of the parties, by offer without objection from the other party, or by order of the court.\textsuperscript{112} Section 48-168 is one of the authorities cited for this rule, and the reason given for the rule is that since the record produced on rehearing is the basis for all subsequent proceedings, the right to cross-examine medical witnesses must be preserved, except as provided.\textsuperscript{113}

Rule XXI,\textsuperscript{114} entitled "Evidence", provides that without limiting the compensation court power to take evidence, interrogato-

\begin{thebibliography}{11}
\bibitem{106} Nebraska Supreme Court Committee on Practice and Procedure, Proposed Nebraska Rules of Evidence, Rule 1101(d)(4), at 192 (August 1, 1973).
\bibitem{107} Id. at 193, Comment to Subdivision (d)(4).
\bibitem{108} \textit{Compare} NEB. REV. STAT. § 48-168 (Reissue 1974) \textit{with} Act of April 24, 1917, ch. 85, § 29(b), 1917 Neb. Laws 199 (later codified at COMP. STAT. NEB. 1922 § 3080(b)). \textit{See} text at notes 48-50 \textit{supra}. \bibitem{109} NEB. REV. STAT. § 48-168 (Reissue 1974). Professor Larson, in his treatise on workmen's compensation, says that over half of the states have laws providing that common law and statutory rules of evidence do not apply in compensation proceedings. 3 A. LARSON, \textit{THE LAW OF WORKMEN'S COMPENSATION} § 79.30 (1976). \textit{For his comprehensive discussion of the evidentiary aspects of workmen's compensation, see} 3 id. \textit{at} §§ 79.00 to .90. \bibitem{110} NEB. WORKMEN'S COMP. CT. R. PRO. XX. \bibitem{111} Id. \bibitem{112} Id. \bibitem{113} Id. \bibitem{114} NEB. WORKMEN'S COMP. CT. R. PRO. XXI. 
\end{thebibliography}
ries, depositions, requests for admission and discovery proceedings conforming to the district court Code of Civil Procedure will be accepted if they do not delay hearings or rehearings. Section 48-168 is again mentioned as one of the authorities for the rule. While neither rule governed the decision in Fite, it does appear that the compensation court has been aware that section 48-168 controls evidentiary matters before the court. The Fite decision serves to reinforce the importance of this section.

The policies and purposes behind the compensation act as a whole both compliment and support the specific provisions of section 48-168. These policies, as found in the case law, were used by Judge White in conjunction with section 48-168 to reach his conclusions in Fite. As authority for his statement that the compensation act is of general interest and that technical refinements of interpretation will not be allowed to defeat it, he cited Speas v. Boone County. The same statement was made there in reference to a compensation claim being opposed on grounds that it was filed after a deadline in the compensation act, which delay the court found to be induced by the insurance carrier. From Speas, the line of authority can be traced to Parson v. Murphy, which appears to be the original source of the princi-

115. Id.
116. Id.
117. It is interesting to note that on reconsideration of the case after remand, the compensation court included some evidentiary rulings which it said were inadvertently omitted from the original opinion on rehearing. The court stated that it was overruling one objection "even though it appears that the evidence against which the objection is aimed would be inadmissible and not subject to any hearsay exception in the trial courts of this state. However, we have received it under the general power conferred by Section 48-168 . . . ." Fite v. Ammco Tools, Inc., Doc. 55, No. 347 (Neb. Workmen's Comp. Ct. Feb. 6, 1978).
118. 199 Neb. at 360, 258 N.W.2d at 926. For recent statements of this principle in addition to Fite, see, e.g., Marlow v. Maple Manor Apts., 193 Neb. 654, 656-57, 228 N.W.2d 303, 305 (1975) (unsuccessful compensation claim does not bar subsequent tort action); Thomsen v. Sears Roebuck & Co., 192 Neb. 236, 243, 219 N.W.2d 746, 750 (1974) (employee's fall, while leaving lunchroom to give car keys to son, held in course of employment).
119. 119 Neb. 58, 227 N.W. 87 (1929).
120. Id. at 69, 227 N.W. at 91.
121. Id.
122. Speas, 119 Neb. at 69, 227 N.W. at 91, cited Baade v. Omaha Flour Mills Co., 118 Neb. 445, 448, 225 N.W. 117, 119 (1929) where the principle was again used in relation to an allegedly late claim for compensation. Baade, 118 Neb. at 448, 225 N.W. at 119, cited McGuire v. Phelan-Shirley Co., 111 Neb. 609, 612, 197 N.W. 615, 616 (1924), in which the concept was invoked to support a finding that an injury which occurred outside of Nebraska was within the coverage of the compensation act. McGuire, 111 Neb. at 612, 197 N.W. at 616, cited Parson. See note 123 infra.
ple.

In Parson, the employer asserted that the claimant had to be actually receiving support from the deceased employee at the time of the accident to be considered a dependent. The court did not accept the employer's position and stated: "The act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." 124 No authority was cited for this proposition. It might be noted that this principle was enunciated in 1917, the same year that the ancestor of section 48-168 first appeared. 125

In Fite, Judge White asserted that, given the "beneficient" purposes of the compensation act in the exemption from the Nebraska Evidence Rules, the compensation court may admit evidence which a trial court cannot. 126 He did not spell out these purposes or cite support for this statement. However, references to such purposes can be found in other cases.

In referring to the compensation act, Parson states: "Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden." 127 In Hanley v. Union Stock Yards Co. 128 it is said: "The statute is remedial in its nature, its purpose was to do justice to workmen without expense, litigation and unnecessary delays." 129 The court in Beideck v. Acme Amusement Co. 130 asserts:

The employers' liability act was intended by the legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and his employer. It was intended to take the place of the tort action with its tedious delays and technicalities that so often clog, and at times totally defeat, the administration of justice. 131

Many cases can be found in which it is said that the compensation act should be liberally construed. 132 However, one caveat

124. 101 Neb. at 545, 163 N.W. at 848.
125. See note 49 and accompanying text supra.
126. 199 Neb. at 360, 258 N.W.2d at 926.
127. 101 Neb. 542, 545, 163 N.W. 847, 848 (1917).
128. 100 Neb. 232, 158 N.W. 939 (1916).
129. Id. at 234, 158 N.W. at 940.
130. 102 Neb. 128, 166 N.W. 193 (1918).
131. Id. at 131, 166 N.W. at 194. This statement is cited with approval in a more recent case, Gill v. Hrupek, 184 Neb. 436, 439, 168 N.W.2d 377, 378 (1969).
should be mentioned: the principle of liberal construction of the compensation act applies to the law, but not to the evidence offered in support of a compensation claim.133

The reasoning in Fite, based on the elements of statutory and decisional law discussed above, was quite straightforward. Section 48-168 frees the compensation court from the constraints of the evidentiary rules used in the other courts of the state. The compensation law is to be liberally interpreted, not defeated by technical refinements of interpretation; and among its purposes is a rapid resolution of disputes without the expense, delay and complexity of usual judicial proceedings. The compensation court therefore serves as a workman’s refuge from what is presumed to be the more complicated and difficult forum of a regular trial court. An anomalous situation results when, as in Fite, the compensation court proves to be more restrictive than a trial court. Given this situation, the holding in Fite logically follows.134

IMPLICATIONS

In Fite v. Ammco Tools, Inc., the Nebraska Supreme Court stated that the Nebraska Workmen’s Compensation Court’s rules of evidence may not be more restrictive than those of a state trial


133. For recent statements of this concept see, e.g., Barbaglia v. General Motors Acceptance Corp., 190 Neb. 529, 532, 209 N.W. 2d 353, 355-56 (1973); Hartwig v. Educational Serv. Unit No. 13, 189 Neb. 339, 341, 202 N.W. 2d 618, 620 (1972).

The rule seems to have originated in Chambers v. Bilhorn, Bower & Peters, Inc., 145 Neb. 277, 16 N.W. 2d 173 (1944), where the following statement appears without the citation of supporting authority:

But plaintiff argues that it has long been the rule of this court that a liberal construction will be given to the workmen’s compensation act, and that, liberally construed, this evidence is sufficient to sustain an award. The rule of liberal construction applies to the law, not to the evidence offered to support a claim. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules heretofore set out, nor does it permit a court to award compensation where the requisite proof is lacking. Id. at 282, 16 N.W. 2d at 175.


court, but that the compensation court may receive evidence which is inadmissible in a trial court.

By virtue of section 48-168, and the public policies and purposes behind the compensation act, the compensation court is not bound by the Nebraska Evidence Rules. Ironically, the Fite decision, although utilizing these principles in its reasoning, in effect imposed the Nebraska Rules on the compensation court as a minimum amount of evidence that must be accepted. The flexibility given the compensation court by section 48-168 may now be exercised only in the direction of a more liberal reception of proffered evidence.

Three areas that may be affected by the Fite decision are: (1) practice in the compensation court; (2) compensation court responses to changes in the Nebraska Evidence Rules; and (3) appellate review of compensation cases. A reasonable assumption is that the compensation court and practitioners before it will adhere closely to the Nebraska Rules, because of familiarity with them, and because the Rules now bear the imprimatur of the supreme court for use in compensation proceedings, forming a sort of safety zone of acceptable evidence. Significant departures from the Rules would not seem likely in the near future.

One instance in which changes in the compensation evidentiary rules might occur would be in response to modifications in the Nebraska Rules themselves. All of the policies behind the Fite decision would seem to promote an automatic expansion of the boundaries of compensation court evidence to match any broadening of the Nebraska Rules. Conversely, it would appear that there would not be a corresponding contraction, should restrictions ever be placed on the Nebraska Rules. To say that evidence, which could formerly be admitted to support a claim, was no longer admissible for the same purpose, would run counter to the liberal view of the compensation law.

Finally, there are the effects of Fite on appellate review. The series of statutory changes over the years restricting appellate review seems to express a legislative policy to keep the adjudication of disputes in the compensation court as much as possible. As a result of Fite's holding, it is now clear that the supreme court is in a position where it has direct, but limited review of cases the records of which can include evidence outside of that normally received in state trial courts. This is evidence with which the supreme court may be neither familiar nor comfortable in dealing. The compensation court might serve as a testing ground for new ideas in evidence. Although it is doubtful that the compensation
court will ever take any radical approaches to evidence, the supreme court might one day feel compelled to at least partially limit the apparent evidentiary freedom given the compensation court in *Fite*.

**CONCLUSION**

*Fite* is a logical decision which clarifies the evidentiary rules in compensation cases. Instead of utilizing a rule by rule approach to evidence, it sets forth a broad standard which can be applied to any evidentiary question. By stating that the compensation court may be no more restrictive than trial courts in its admission of evidence, the Nebraska Supreme Court has reaffirmed the compensation court’s special role in carrying out the beneficient purposes of the workmen's compensation act. The Nebraska Evidence Rules form a reasonably clear standard which the compensation court can use in following *Fite’s* mandate. Finally, the open-ended nature of the *Fite* decision, setting a minimum, rather than a maximum limit on the reception of evidence, gives the Nebraska Compensation Court flexibility to deal with future developments in the laws of workmen's compensation and evidence.

*Theodore Duncan Fraizer—'79*