

1986

Gilbert R. Wilburn v. Interstate Electric, National Union Fire Insurance Company of Pittsburgh, Second Injury Fund and Utah State Industrial Commission : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Gilbert R. Wilburn v. Interstate Electric, National Union Fire Insurance Company of Pittsburgh, Second Injury Fund and Utah State Industrial Commission*, No. 860292 (Utah Court of Appeals, 1986).

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860292-CA

IN THE COURT OF APPEALS, STATE OF UTAH

GILBERT R. WILBURN,	:	
	:	
Petitioner/Appellant,	:	
	:	
vs.	:	Court of Appeals
	:	Case No. 860292-CA
INTERSTATE ELECTRIC, NATIONAL	:	
UNION FIRE INSURANCE COMPANY OF	:	
PITTSBURGH, SECOND INJURY FUND	:	Category No. 6
and UTAH STATE INDUSTRIAL	:	
COMMISSION,	:	
	:	
Respondents.	:	

BRIEF OF APPELLANT GILBERT R. WILBURN

Petition for Review from a Denial of Appellant's Motion for
Review of the Supplemental Findings of Fact, Conclusions
of Law and Order of the Industrial Commission of the
State of Utah

Honorable Richard G. Sumsion, Administrative Law Judge

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IN THE COURT OF APPEALS, STATE OF UTAH

GILBERT R. WILBURN,	:	
	:	
Petitioner/Appellant,	:	
	:	Court of Appeals
vs.	:	Case No. 860202-CA
	:	
INTERSTATE ELECTRIC, NATIONAL	:	
UNION FIRE INSURANCE COMPANY OF	:	Category No. 6
PITTSBURGH, SECOND INJURY FUND	:	
and UTAH STATE INDUSTRIAL	:	
COMMISSION,	:	
	:	
Respondents.	:	

BRIEF OF APPELLANT GILBERT R. WILBURN

JURISDICTION AND NATURE OF THE CASE

Jurisdiction is proper in this Court pursuant to Utah Code Ann. §35-1-83 (1986 Supplement) as a Petition for Review from an Order of the Industrial Commission denying appellant's Motion for Review. In the instant case, a hearing was held on May 14, 1986, at 10:00 o'clock a.m. Administrative Law Judge Richard G. Sumsion presided. Following the hearing, on May 28, 1986, Judge Sumsion issued Interim Findings of Fact, Conclusions of Law, and Order awarding benefits for permanent and total disability to the applicant. Respondents Interstate Electric Company (hereinafter "Interstate Electric") and National Union Fire Insurance Company of Pittsburgh (hereinafter "National Union") subsequently filed a Motion for Review pursuant to U.C.A. §35-1-82.53. Thereafter, the Administrative Law Judge

issued Supplemental Findings of Fact, Conclusions of Law, and Order denying Mr. Wilburn's claim. Following the issuance of the Supplemental Order, the appellant filed a Motion for Review to the Industrial Commission. Applicant's motion was denied and the order of the Administrative Law Judge affirmed on September 9, 1986. This Appeal followed.

STATEMENT OF ISSUES ON APPEAL

The issues presented for review are as follows:

1. Whether a compromise and settlement agreement bars a worker's right to claim permanent total disability benefits where the language of the agreement does not purport to settle claims for permanent and total disability, either expressly or by implication.

2. Whether a compromise and settlement agreement can properly waive an employee's right to compensation despite Utah Code Annotated §35-1-90, where the issue of liability was not, in fact, doubtful.

DETERMINATIVE PROVISIONS

Appellant respectfully contends that U.C.A. §35-1-90 (1953 as amended) is determinative of the issues to be decided in this case. Section 35-1-90 reads as follows:

No agreement by an employee to waive his rights to compensation under this title shall be valid. No agreement by an employee to pay any portion of the premium

paid by his employer shall be valid. Any employer who deducts any portion of such premium from the wages or salary of any employee entitled to the benefits of this title is guilty of a misdemeanor, and shall be fined not more than \$100 for each such offense. (Emphasis added).

STATEMENT OF THE CASE

The facts pertinent to this case are as follows:

1. Appellant Gilbert Wilburn is a 66-year old man with a ninth grade education who has worked as a heavy duty mechanic all his life. (R. at 52.)
2. At all times pertinent hereto, Mr. Wilburn was employed by respondent Interstate Electric as a mechanic, repairing and overhauling portable power plants, water pumps, oil pumps and hydraulic and telephone pole pullers. (R. at 53.)
3. On April 14, 1984, Mr. Wilburn attempted to lift a portable power plant weighing between seventy and ninety pounds from the floor to his work bench. (R. at 54, 84.)
4. As he lifted the power plant and twisted to set it on his work bench, Mr. Wilburn felt a severe burning pain in his low back and abdomen. (R. at 54, 55.)
5. The pain was so severe that it took his breath away forcing him to lean temporarily over the power plant and his work table in order to regain his senses. He then walked to a nearby bench and laid down. (R. at 55, 56.)
6. Mr. Wilburn promptly reported this incident to a co-worker, the shop foreman, and the shop manager. (R. at 56, 57.)

7. He continued to work for the remainder of the day, as well as the two following days thinking the pain would pass with time. (R. at 57.)

8. Finally, on the second day after this lifting incident, Mr. Wilburn was in such distress that he was forced to leave work and consult Dr. Gene Smith, an orthopedic surgeon. (R. at 58, 59.)

9. Although he was able to return to work just a few days after the accident, Mr. Wilburn continued to experience significant pain in his low back and right side. (R. at 61.)

10. On or about February 2, 1981, Mr. Wilburn was examined by Dr. Wally Hess pursuant to an independent medical examination requested by defendant National Union. Following his examination, Dr. Hess assigned Mr. Wilburn a permanent partial impairment rating of twenty percent (20%), fifteen percent of which he attributed to preexisting causes and five percent of which he attributed to aggravation of the preexisting condition by the industrial episode. (R. at 180.)

11. Following the industrial incident at issue, Mr. Wilburn continued to work for Interstate Electric until July 31, 1981, when he was laid off. During this period of time, however, Mr. Wilburn's condition continued to deteriorate. (R. at 65.)

12. In August of 1981, Mr. Wilburn began seeing Dr. Gordon Affleck. In a letter dated February 10, 1982, directed to American International Adjustment Company,

(hereinafter "American International"), Dr. Affleck stated that in his opinion Mr. Wilburn had at least a thirty percent (30%) permanent partial impairment with twenty percent attributable to preexisting conditions and ten percent due to his industrial injury. (R. at 225.)

13. On April 7, 1982, Dr. Affleck again wrote to American International, stating that Mr. Wilburn was suffering from a permanent disability of between twenty-five to forty percent. (R. at 227.)

14. Following a second independent medical examination of Mr. Wilburn on June 20, 1983, Dr. Hess increased his permanent partial disability rating of Mr. Wilburn's condition to thirty-six percent (36%) whole man, stating that fifteen percent of this rating was due to problems with Mr. Wilburn's cervical spine, fifteen percent was due to preexisting problems in his lumbar and lumbosacral spine, and ten percent was due to problems related to the industrial injury of his lumbosacral spine. (R. at 188, 189.)

15. Inasmuch as his condition had materially worsened, Mr. Wilburn sought additional worker's compensation benefits. (R. at 27.)

16. American International subsequently instructed Mr. Wilburn to meet with Stuart Poelman, counsel for respondents Interstate Electric and National Union, on February 24, 1984. (R. at 31.)

17. During the course of Mr. Wilburn's meeting with Mr. Poelman, Mr. Poelman claims that he informed Mr.

Wilburn of all of the defenses the respondents could raise, including the defense of no accident, if Mr. Wilburn were to file a claim for additional benefits. Mr. Poelman also told Mr. Wilburn that if the matter proceeded to a hearing and the respondents were to prevail, Mr. Wilburn would lose all workmen's compensation benefits, including his medical benefits. (R. at 110, 111.)

18. Following their meeting, Mr. Poelman prepared the Compromise and Settlement Agreement (hereinafter "Agreement") at issue herein. Pursuant to its terms, Mr. Wilburn was paid additional temporary total disability in the amount of \$1,590 for the period of September 20, through November 22, 1984, plus compensation for an additional five percent permanent partial disability from both the Employer and the Second Injury Fund. (R. at 114, 115.)

19. Following his meeting with Mr. Poelman, Mr. Wilburn contacted Shaun Howell, legal counsel for the Commission regarding the Agreement and his possible claim. (R. at 114.)

20. Ms. Howell discussed with Mr. Wilburn the various possible outcomes that could occur should he assert a claim and pursue it to a hearing. At no time, however, did Ms. Howell advise Mr. Wilburn whether or not he should sign the Compromise and Settlement Agreement. (R. at 138, 140.)

21. When Mr. Wilburn first approached Ms. Howell, he was uncertain as to the type of claim he should assert. Furthermore, he was extremely concerned about the

continuation of his compensation because he had not been able to return to work. (R. at 135.)

22. Mr. Wilburn testified that by signing the Agreement, he understood he was compromising his then current claim for additional temporary total and permanent partial disability benefits. He further understood that he would not be precluded from seeking additional benefits in the future should his condition warrant them. (R. at 77, 78.)

23. Mr. Wilburn's understanding to this effect was due in part to the following provision contained in the Agreement itself: "The Employer and The Fund agree that The Fund will reimburse the Employer for two-thirds of all future medical expense and temporary total disability for which liability to the Applicant may be incurred." (R. at 78.)

24. The Agreement does not mention at any place permanent and total disability or the effect its acceptance would purportedly have on Mr. Wilburn's right to assert such a claim in the future. (R. at 37-40.)

25. On November 1, 1985, Dr. Affleck increased Mr. Wilburn's permanent total disability rating to forty-five percent (45%) stating that twelve percent is directly attributable to the industrial incident. (R. at 250.)

26. Prior to the industrial incident at issue herein, Mr. Wilburn had had no problems with his back which had been serious enough to prevent him from working. (R. at 53, 82-83, 125.)

SUMMARY OF ARGUMENT

Because of the express provision in the Utah Workman's Compensation Act prohibiting the waiver of benefits by employees in worker's compensation matters, any Agreement which purports to compromise the right of a worker must be strictly construed in order to avoid an unlawful waiver. Furthermore, all doubts and ambiguities relative to the Agreement should be resolved in favor of the employee so that the beneficent purposes of the Worker's Compensation Act might be fulfilled. Where an alleged Compromise and Settlement Agreement does not specifically bar an employee's right to assert a future claim, the employee should not thereafter be precluded from asserting that claim. A holding to the contrary constitutes a waiver of the employee's right to compensation to which he is otherwise entitled. In the instant case, the Compromise and Settlement Agreement signed by Mr. Wilburn does not specifically address the issue of permanent and total disability, nor does it purport to be a general release settling all of the claims Mr. Wilburn might raise as a result of the injuries he sustained on April 14, 1980, during the course of his employment. His claim for permanent total disability benefits is not, therefore, barred.

ARGUMENT

POINT I

THE DISALLOWANCE OF CLAIMS NOT EXPRESSLY
SETTLED BY AGREEMENT OF THE PARTIES CONSTITUTES AN INVALID
WAIVER OF RIGHTS TO COMPENSATION UNDER UTAH LAW.

Utah Code Ann., §35-1-90 (1953 as amended)

prohibits agreements by employees waiving their rights to
compensation under the Workmen's Compensation Act. That
section reads in part, as follows:

No agreement by an employee to waive his
rights to compensation under this title
shall be valid . . .

In view of this clear statutory prohibition against waivers,
settlement agreements affecting a worker's right to
compensation must be carefully examined to ensure that no
waiver takes place. Furthermore, such agreements must be
strictly construed so that only those claims expressly settled
by the parties are precluded from future pursuit. In the
instant case, Mr. Wilburn seeks to assert a claim for
permanent and total disability as a result of injuries he
suffered while working for respondent Interstate Electric on
April 14, 1980. Respondents allege that Mr. Wilburn's claim
is barred by a Compromise and Settlement Agreement which was
executed by him and the respondents and which was approved by
the Commission on November 28, 1984. (A copy of the Compromise
and Settlement Agreement is attached hereto as Addendum Exhibit
"A.") However, a review of the Agreement executed by the
parties undermines respondent's position. Nowhere is the issue

of permanent and total disability or the intended effect of the Agreement on such a claim discussed. Furthermore, there is no language in the Agreement suggesting that the alleged settlement achieved therein was intended to be a full and final settlement of all of Mr. Wilburn's claims arising out of the injuries he sustained on April 14, 1980.

On page 2 of the Agreement, the first full paragraph, it states:

WHEREAS, the Applicant now claims that he is entitled to additional benefits but the Employer and the Fund dispute said claim and also deny liability for any benefits which have been paid or are yet claimed by Applicant under the Utah Workmen's Compensation Act, . . .

The type of claim and additional benefits sought by Mr. Wilburn as referred to in the above-cited paragraph are never specifically identified in the Agreement. The Agreement does provide for the payment of additional temporary total disability and additional permanent partial disability benefits to the applicant, but it does not say that the payment of those benefits is in lieu of Mr. Wilburn's assertion of a claim for permanent and total disability.

Since the waiver of any rights to which an employee is otherwise entitled is contrary to law, it stands to reason that where rights are not specifically addressed by an alleged settlement agreement, they cannot legitimately be said to have been compromised and settled. This conclusion is supported by the Decision in Cretella v. New York Dock Co., 289 N.Y. 254, 45 N.E.2d 429 (1942.) In Cretella, the applicant

sought an award for permanent total disability benefits several years after receiving a "lump sum settlement" in 1934. New York law provided for the commutation of periodical benefits owed to a worker to one or more lump payments, (a "lump sum settlement") so long as certain factors were taken into consideration. The 1934 award did not follow the directions of the statute in computing the lump sum awarded to the applicant, however, and the Court of Appeals therefore concluded that the settlement was actually an attempt to compromise the injured employee's claim. The New York Workman's Compensation Act, like the Utah Act, contained a statute prohibiting waivers. In view of this provision, the Court held:

True it is that our Compensation Law does not prohibit 'settlements' but, in view of the obvious and well-known policy and intent of the whole statute and in view of Sections 32 and 33, which forbid any waiver by a claimant of his right to compensation or any release by him of benefits due, such an express prohibition of 'settlement' was probably thought by the drafters to be unnecessary. We hold that there can be no valid compromise of the amounts due a claimant under this law. (Emphasis added.)

Id. at 430. The court further noted that before the applicant had received the 1934 lump sum settlement, the Industrial Board had approved a number of other awards to him in 1928 and 1929 for partial, temporary disability, thus implying a finding of temporary partial disability. The Board had also approved one prior lump sum settlement in 1930, without making a specific finding as to the extent or probable duration of the applicant's disability. It then stated:

Since neither of these attempted 'settlements' involves any classification of claimant's disability, the only classifications discoverable here are those of partial, temporary disability implicit in the 1928 and 1929 awards above referred to. Those 1928-29 classifications were 'erroneous and not in the interest of justice' since the Board has now found on sufficient proof that claimant is permanently totally disabled as a result of the 1928 accident. In a situation like this, Section 15, subdivision 6-a, of the Workman's Compensation Law permits reclassification 'at any time, without regard to the date of accident.'

Id. at 431.

The instant case is like Cretella in that the alleged settlement agreement does not refer to any classification of Mr. Wilburn's disability. Additionally, the only payments made under the Agreement are for temporary total and permanent partial disability, thus implying a finding of only permanent partial impairment on the part of Mr. Wilburn. Since Mr. Wilburn has presented sufficient evidence to show that his disability is, in fact, permanent and total, the Agreement cannot stand as a bar to his current claim.

The same conclusion reached in Cretella has also been reached in more recent decisions. For example, in Wacome v. Paul Mushero Const. Co., 498 A.2d 593 (Me. 1985), the plaintiff suffered an industrial injury to his left foot and lower back. Following the accident, the plaintiff and his employer entered into a compensation agreement which contained a description of the injury to his foot but did not contain a description of the injury to his back. Approximately

two years later, the employee sought additional recovery for his back injury which, at that time, had become disabling. The employer defended stating that the compensation agreement barred any further recovery for injuries arising out of the industrial accident in question. The Supreme Judicial Court of Maine reversed the decision of the Commission denying additional benefits to the employee and stated:

Only the employee's foot injuries were described in the approved settlement. The compensation paid was for the described foot injuries. The agreement does not purport to cover any injury to the employee's back, and no agreement exists between the parties concerning those injuries. The employee retains the legal right to seek compensation for the injury to his back.

Id. at 594.

The same conclusion was reached by the Supreme Court of Minnesota in the case of Hanson v. Jer Her Builders, 366 N.W.2d 294 (Minn. 1985). Therein, the plaintiff negotiated a settlement for an injury "in the nature of an injury to the eyes" for which he received compensation for "permanent partial disability of 13% of the visual field or the body as a whole." Six weeks after signing the settlement agreement, the employee filed a second petition seeking additional benefits for a 15% permanent partial disability of the head. The employer denied liability on the grounds that the prior settlement had been a compromise of all permanent partial disability arising out of the accident leading to the plaintiff's injuries. The Supreme Court of Minnesota held that although the stipulated settlement was somewhat ambiguous, it contained no specific reference to

any permanent partial disability of the head. Therefore, the employee's claim for permanent partial disability to the head was not foreclosed. Id. at 298. Although the decisions in Wacome and Hanson deal specifically with claims for particular injuries allegedly settled via a compromise agreement, their holdings are equally applicable to the case at bar where the matter at issue is the type of claim purportedly settled.

The conclusion reached by our own Utah Supreme Court in Barber Asphalt Corp. v. Industrial Comm'n., 135 P.2d 266 (Utah 1943) also supports Mr. Wilburn's contention that only claims expressly compromised may be deemed barred from subsequent assertion. In Barber, the applicant suffered a compensable industrial injury. The medical panel gave him a 5% permanent partial disability rating which he disputed. He applied for a hearing before the Commission, but before the hearing was held, entered into a Settlement Agreement with his employer on the basis of a 15% permanent partial disability rating. The Agreement signed by the applicant clearly stated that it constituted a final settlement of all claims arising out of the applicant's industrial accident. Furthermore, before signing the Agreement, the applicant was advised by his own independent counsel. The Commission subsequently approved the Settlement Agreement and payment was made according to its terms. Approximately one year later, the applicant filed a claim for additional compensation, alleging that his condition had deteriorated to the point he was totally disabled. After

reviewing the results of another medical examination, the Commission came to the conclusion that the applicant was indeed totally disabled and that he was thus entitled to benefits for permanent and total disability. The employer and its insured disputed this finding and alleged that the settlement agreement was a complete bar to the applicant's claim for permanent total disability benefits. In spite of a finding that all parties to the action conceded that the agreement in question was intended at the time of its execution to be a final settlement of all of the applicant's claims, the Utah Supreme Court upheld the decision of the Commission awarding additional benefits. In so doing, it stated:

We think a reasonable view of the provisions of the Utah Act and due consideration of the objects and purposes of such acts in general and the history which prompted their enactment, requires us to say that the Legislature intended to prevent an agreement such as shown in this case from becoming a bar to a claim for additional compensation for an increase in disability.

Id. at 270. It further elaborated as follows:

The workman, as shown by the present evidence, is entitled to compensation as for total permanent disability or surgical treatment as required by the order appealed from. At the time the agreement was entered into, he had the right to claim such compensation in case the developments which have now taken place should occur. The effect of the agreement is to release the company from that liability. It was in effect a waiver to claim a right which the law gave him. The facts establishing liability for results flowing from the injury in this case were not in dispute. It was not a compromise agreement as to facts to establish liability. It was an agreement to accept payment for partial

disability under a law which gave the workman the right to compensation for total disability if it should afterward result from the injury. (Emphasis added.)

Id. at 271.

Mr. Wilburn's situation is nearly identical to Barber. As previously stated, the Compromise and Settlement Agreement between Mr. Wilburn and the respondents provides only for the payment of temporary total and permanent partial disability benefits. It fails to address the issue of permanent and total disability specifically and it does not purport to be a full and final settlement of all of Mr. Wilburn's claims. Also, since the execution of the Agreement on November 28, 1984, Mr. Wilburn has experienced a deterioration of his condition just like the applicant in Barber. This fact is confirmed by both the tentative finding of permanent total disability by the Administrative Law Judge in his Interim Order and the medical evidence on record. For example, on November 1, 1985, Mr. Wilburn was seen by Dr. Gordon Affleck. After Mr. Wilburn's visit, Dr. Affleck noted:

Gilbert comes in again to discuss his medical problems. He is certainly progressing with his problems. He is worse, it seems, each time that I see him as far as range of motion and the number of symptoms that he is having. . . .

(R. at 214.) In a letter dated November 1, 1985, Dr. Affleck noted that Mr. Wilburn's overall disability "[had] increased considerably" since he first started seeing him. He also stated that he would rate Mr. Wilburn's permanent partial

impairment at that point in time to be 45% with 30% of that disability rating attributable to his lumbar spine alone. Of the 30%, he stated 18% was preexisting and 12% was due to the industrial incident.

In Meecham v. Industrial Comm'n. of Utah, 692 P.2d 783 (Utah 1984), the Utah Supreme Court held that claims for permanent and total disability are governed by Utah Code Ann. §35-1-67 which contains no statute of limitations. The Court also noted that under §35-1-78, the Industrial Commission has continuing jurisdiction to modify awards where it feels modification is justified. In the instant case, Mr. Wilburn has experienced a continuing deterioration of his condition since his industrial accident. He is, therefore, entitled to invoke the continuing jurisdiction of the Commission and to assert a claim for permanent total disability. Because this is his right under the Act, any attempt to interpret the Compromise and Settlement Agreement so as to prevent him from exercising it must be struck down as an invalid waiver.

POINT II

A COMPROMISE AND SETTLEMENT AGREEMENT ALLEGEDLY EXECUTED ON THE BASIS OF DISPUTED LIABILITY MAY NOT BAR AN EMPLOYEE'S SUBSEQUENT CLAIM WHERE THE COMPENSABILITY OF THE EMPLOYEE'S CLAIM WAS NOT, IN FACT, DOUBTFUL.

The respondents seek to uphold the validity of the Agreement by distinguishing the instant case from Barber. It is their position that Barber is not controlling because the compensability of Mr. Wilburn's claim was doubtful, and

thus subject to compromise. However, in this case, it is clear that compensability was not, in fact, a doubtful issue upon which reasonable minds could legitimately differ. Thus, the respondent's raising of the "no accident" defense was not done in good faith and the mere assertion that there was a "serious and disputed question as to whether or not the Employer [was] liable to the Applicant for any benefits under the Utah Workman's Compensation Act," will not render the Agreement a valid settlement of Mr. Wilburn's rights under the Compensation Act.

The only apparent basis relied upon by the respondents in asserting the defense of no accident was the information provided by Mr. Wilburn to the insurance adjuster, Libby Lowther, in a recorded statement taken May 22, 1980, more than a month after the accident happened. Although the Statement is not in evidence, appellant would like to point out that he had the opportunity to review the transcription of the statement taken by Ms. Lowther. The transcription was fraught with places where his responses to the questions posed by Ms. Lowther were inaudible to the typist transcribing it. Many of the inaudibles appeared at points in the statement where Mr. Wilburn and Ms. Lowther were discussing how the accident happened and the onset of Mr. Wilburn's pain. Although Mr. Wilburn at one point stated that he first experienced pain a few minutes after lifting the power plant, he also stated in the same Statement that he experienced immediate pain and his testimony at the hearing

regarding this point was that he experienced pain immediately after lifting the power plant but that it became much more severe five to ten minutes later. (R. at 81.) It is uncontested that Mr. Wilburn lifted a power plant weighing between 70 and 90 pounds just prior to, if not simultaneous with, the onset of his pain. There is no evidence of any non-work related activity engaged in by Mr. Wilburn between the lifting incident and the onset of his pain, which, even in the light most favorable to the respondents, set in no more than ten minutes after he lifted the generator. A delay of five to ten minutes between the lifting of an object weighing at least 70 pounds and the onset of sudden severe pain is not a sufficient time lag to create a bona fide dispute as to the causal connection between the injury and Mr. Wilburn's employment activities. Of particular significance on this point is the fact that in both his Interim Order and his Supplemental Order, the Administrative Law Judge stated that in his opinion, "there was no doubt as to the compensability of the applicant's claim." (R. at 373.)

It is also significant to note that prior to raising the no accident defense, respondents paid Mr. Wilburn temporary total and permanent partial disability benefits in the amount of \$39,234.00, over a period of approximately three years. In addition to the aforementioned compensation, the respondents also paid all of Mr. Wilburn's ongoing medical expenses. If the respondents felt they truly had a legitimate defense to Mr. Wilburn's lifting accident after obtaining his

statement, it seems they would have asserted this defense at that point in time rather than continue to pay Mr. Wilburn over such an extended period. In view of all of the above-stated facts, it is highly questionable that the respondent's decision to raise the no accident defense was, in fact, based on a bona fide dispute as to compensability.

POINT III

IN VIEW OF THE EXPRESS STATUTORY PROHIBITION AGAINST
WAIVERS, ALL AMBIGUITIES IN AN ALLEGED SETTLEMENT
AGREEMENT AND ALL REASONABLE DOUBTS AS TO THE
INTENTIONS OF THE PARTIES MUST BE RESOLVED
IN FAVOR OF THE WORKER

In the instant case, Mr. Wilburn testified that at the time he signed the Compromise and Settlement Agreement, it was his understanding that the only claims he was compromising were his then-current claims for additional temporary total and permanent partial disability benefits. Mr. Wilburn's benefits were terminated by National Union on September 30, 1983, and he had had great difficulty in getting them reinstated even though he had been told by Gordon Wyatt, the adjuster handling his claim, that if he would furnish him with some additional medical information regarding his current condition, those benefits would be paid once again. (R. at 76.) Prior to the time his temporary total disability benefits were terminated, Dr. Hess had written to Mr. Wyatt on June 20, 1983, giving Mr. Wilburn a higher disability rating than the rating he had assigned to him after his examination in February of 1981. Mr. Wilburn stated, however, that even

with the increased disability rating given him by respondent's own physician, no additional award had been offered to him.

(R. at 76.)

Following Mr. Wyatt's request for additional medical information, Mr. Wilburn contacted Dr. Affleck who also wrote directly to Mr. Wyatt. In a letter dated November 22, 1983, Dr. Affleck stated:

I think Mr. Wilburn will be willing to accept a compromise position, perhaps receiving a cutoff date of temporary total disability as of the date of this letter, and then making a settlement as to the permanent partial rating of approximately 36% as previously noted on correspondence from Dr. Wally Hess.

(R. at 245.) After receiving Dr. Affleck's letter, Mr. Wyatt arranged for Mr. Wilburn to see Dr. David Egli for a psychiatric evaluation. It was following Dr. Egli's evaluation that Mr. Wilburn was instructed to meet with Mr. Poelman for the purpose of further discussing his case. After his meeting with Mr. Poelman, Mr. Poelman prepared the Agreement in question. It is significant to note that the Agreement appears to follow the suggested compromise of benefits suggested by Dr. Affleck in his letter. Furthermore, when questioned specifically about his understanding of the Agreement and the effect it would have on his future benefits, Mr. Wilburn stated:

- A. Well, it reads real clearly here to me, in this page 3. On paragraph 3. It says: 'The Employer and the Fund agree that the Fund will reimburse the Employer for two-thirds of all future medical expense and temporary total disability for which liability to the

Applicant may be incurred.'
(Emphasis added.)

Q. What was your understanding of the language?

A. Well, I thought at a future time I could go back for maybe more total disability, or whatever was really coming to me, even a permanent. I thought I should have had a permanent total disability by then, without going through this.

(R. at 78.)

Thus, it is clear from the facts and circumstances cited above that because he had had an increase in his disability ratings, and because he had provided the respondents with the additional medical information they had requested showing a further deterioration of his condition, Mr. Wilburn felt he was entitled to receive additional benefits. Furthermore, it is apparent that Mr. Wilburn was led to believe by the very language of the Agreement itself that the respondents were contemplating incurring additional liability on his behalf.

Although the respondents contend that the intention of the parties was to compromise and settle all of Mr. Wilburn's claims, the express language of the agreement does not support this position. Counsel for respondents Interstate Electric and National Union drafted the Compromise and Settlement Agreement. If the agreement was, in fact, intended to be a full and final compromise of all of Mr. Wilburn's claims, it should have been drafted so as to clearly reflect this fact. In the case of Compromise and Settlement Agreements

affected in the area of workmen's compensation, where there is uncertainty as to the intentions of the parties, all reasonable doubts should be resolved in favor of the employee. This conclusion was reached by the Court of Appeals in New Mexico in the case of Ruiz v. City of Albuquerque, 91 N.M. 526, 577 P.2d 424 (1978). In Ruiz, the court was faced with a situation similar to the one at bar. The applicant had suffered an industrial injury which he later settled. Pursuant to the settlement, he signed a stipulation providing that upon the filing of a Satisfaction of Judgment, all of the claims he had against the defendant as described in his Complaint would be "fully and finally released, discharged and satisfied." The judgment on the release released "any and all claims by the plaintiff." When the applicant later sought to hold the employer liable for the payment of vocational rehabilitation benefits under the State Workmen's Compensation Act, the court found that there was a discrepancy between the judgment and the stipulation inasmuch as the stipulation released only the applicant's claims for injuries described in the Complaint. It further found that the only claims made by the plaintiff in the Complaint were for compensation for disability and medical expenses. It then stated, quoting from Dinkle v. Denton, 68 N.M. 108, 112, 359 P.2d 345, 347 (1961), as follows:

* * *

The primary rule of construction of releases is that the intention of the parties must govern This intention must be gathered from the words used in the instrument and not from matters dehors the writing. In accordance with these

principles, it has been held that words in a release should not be construed to extend beyond the express consideration mentioned, and that such words should not be construed to operate as a release of indebtedness which the parties apparently did not intend

* * *

(Emphasis in original.)

Id. at 427. The court then went on to state:

New Mexico looks with disfavor on releases that smother a meritorious claim for relief. In personal injury cases, this policy was expressly adopted by the enactment of the 'Release Act.' (Citations omitted.) Under the Compensation Act, to fulfill its purposes, we believe that any reasonable doubt as to the intentions of the parties and the effect of a release should be construed in favor of the workman. (Emphasis added.)

Id. at 428. The Court reversed the decision of the lower court and awarded rehabilitation benefits to the plaintiff.

In the instant case, there is, at the very least, reasonable doubt as to what the parties actually sought to accomplish by execution of the Agreement. The rule of construction employed by the New Mexico court should, therefore, be employed by this Court to render the Agreement invalid insofar as it purports to bar Mr. Wilburn's claim for permanent and total disability. This position is further supported by the fact that at the time he executed the Agreement, Mr. Wilburn was not represented by independent counsel. Furthermore, he was not the drafting party and the Agreement itself not only fails to state on its face that is a compromise of such a claim but it also contains ambiguous

language which could reasonably be interpreted by a layman as a reservation of his rights to pursue a claim in the future if he experienced a further change in conditions. All of these factors favor a finding that the Compromise and Settlement Agreement signed by Mr. Wilburn does not effectively bar his present claim.

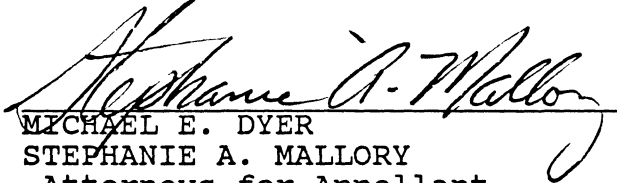
CONCLUSION

Because agreements by an employee waving his/her rights to compensation under the Utah Workmen's Compensation Act are void by statute, any Compromise and Settlement Agreement signed by an employee must be strictly construed so as to avoid a waiver. Where the Agreement in question does not expressly purport to foreclose the assertion of all future claims of the workman, foreclosure of such claims should not be implied. Furthermore, all reasonable doubts regarding the intentions of the parties should be resolved in favor of the workman in order to effect the beneficent purposes of the Worker's Compensation Act. In the instant case, Mr. Wilburn signed an Agreement paying him additional temporary total disability and permanent partial disability benefits only. The Agreement contains language suggesting the anticipation of future liability by the respondents. It does not mention in any manner the issue of permanent total disability nor does it purport to be a full and final settlement of any and all claims that Mr. Wilburn might raise in connection with his industrial injury. In view of these facts and in view of the

purposes of the Workmen's Compensation Act, the Compromise and Settlement Agreement herein should not be construed as a bar to Mr. Wilburn's current claim for permanent and total disability.

RESPECTFULLY submitted this 12TH day of March, 1987.

RICHARDS, BRANDT, MILLER
& NELSON


MICHAEL E. DYER
STEPHANIE A. MALLORY
Attorneys for Appellant
Gilbert R. Wilburn

WILBURN3/SMW
sm03127

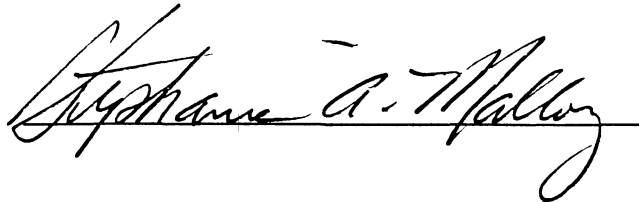
MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 27th day of March, 1987, to the following counsel of record:

Stuart L. Poelman
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Respondents
Interstate Electric and
National Union Fire Ins. Co.
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84110

Erie V. Boorman
SECOND INJURY FUND
Attorney for Respondent
Second Injury Fund
P.O. Box 45580
Salt Lake City, Utah 84145-0580

INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
Salt Lake City, Utah

A handwritten signature in cursive script, reading "Stephen A. Malloy", written over a horizontal line.

WILBURN3/SMW
sm03137

ADDENDUM

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

Case No. 81000909

GILBERT WILBURN,

Applicant-Employee,

vs.

COMPROMISE AND SETTLEMENT
AGREEMENT

INTERSTATE ELECTRIC, NATIONAL
UNION FIRE INSURANCE and
SECOND INJURY FUND,

Employee-Carrier.

THIS AGREEMENT entered into this date by and between
Gilbert R. Wilburn (hereinafter called "Applicant"), Inter-
state Electric and National Union Fire Insurance (hereinafter
collectively called "Employer"), and The Second Injury Fund
(hereinafter collectively called "The Fund"),

WHEREAS, Applicant claims to have sustained an injury by
accident arising out of or in the course of his employment
with Interstate Electric on April 14, 1980, and

WHEREAS, the parties hereto have previously entered into
a compensation agreement pursuant to which certain workmen's
compensation benefits have been paid to the applicant and
pursuant to which an order for reimbursement has been entered

by the Commission whereby The Fund has been ordered to reimburse the Employer for 75% of all medical expenses and temporary total disability benefits paid, and

WHEREAS, the Applicant now claims that he is entitled to additional benefits but the Employer and The Fund dispute said claim and also deny liability for any benefits which have been paid or are yet claimed by Applicant under the Utah Workmen's Compensation Act, and

WHEREAS, the Employer has paid to or on behalf of Applicant temporary total disability benefits and medical benefits in the total sum of \$41,054.66 for which the Fund has not yet reimbursed the Employer for its pro rata share, and

WHEREAS, the parties acknowledge that there exists a serious and disputed question as to whether or not the Employer is liable to the Applicant for any benefits under the Utah Workmen's Compensation Act, and

WHEREAS, it is the intent and desire of the Applicant, the Employer and The Fund that the said claim of the Applicant be compromised and settled so as to avoid the necessity of further litigation, and

WHEREAS, the parties to this agreement have carefully considered their respective positions with respect to said claims and have concluded that the settlement of claims herein made is fair and equitable in every respect.

REC'D
JAN 10 1974
NOW, THEREFORE, in reliance of the foregoing recitals and in consideration of the following terms and obligations, the parties agree:

1. Employer shall pay to Applicant the additional sum of \$1,590.00 representing additional temporary total disability plus the sum of \$2,184.00 representing an additional 5% permanent partial disability over and above those amounts which it has already paid to Applicant.

2. The Fund shall pay to Applicant the sum of \$2,184.00 representing an additional 5% permanent partial disability over and above those amount which The Fund has already paid to Applicant.

3. The Fund shall reimburse the Employer for two-thirds of all temporary total disability and medical benefits heretofore and now paid by the Employer for which the Employer has not yet received any reimbursement from The Fund, which two-thirds reimbursement is calculated to be in the total sum of \$28,429.77. The Employer and The Fund agree that The Fund will reimburse the Employer for two-thirds of all future medical expense and temporary total disability for which liability to the Applicant may be incurred.

4. It is understood and agreed by and between the parties that this Agreement constitutes a compromise of a disputed claim and does not constitute an admission of any fact, contention or liability on the part of any of the parties.

5. This Agreement shall become binding and effective
only when approved by the Industrial Commission of Utah.

DATED this ____ day of _____, 1984.

APPLICANT:

Gilbert R. Wilburn
Gilbert R. Wilburn

INTERSTATE ELECTRIC and NATIONAL
UNION FIRE INSURANCE:

James L. Paer

THE SECOND INJURY FUND:

Robert Marting

Approved by the Industrial Commission of Utah:

James Howell
legal counsel
November 28, 1984

CERTIFICATE OF MAILING

I certify that on November 28, 1984
a copy of the attached COMPROMISE AND SETTLEMENT
AGREEMENT
was mailed to the following persons at the following
addresses, postage paid:

~~Sandra Southern
Unigard Insurance Group
4444 South 700 East
Salt Lake City, Utah 84107~~

Gilbert A. Martinez
Administrator
Second Injury Fund

Stuart L. Poelman, Esquire
Snow, Christensen & Martineau
Attorneys at Law
10 Exchange Place - Eleventh Floor
Salt Lake City, Utah 84110

Gilbert R. Wilburn
1920 South 50 West
Bountiful, Utah 84010

THE INDUSTRIAL COMMISSION OF UTAH

By Diana M. Hocking