

1986

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

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

GILBERT R. WILBURN,

Applicant/Appellant,

vs. Case No. 860292-CA

INTERSTATE ELECTRIC, NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, SECOND INJURY FUND
and UTAH STATE INDUSTRIAL
COMMISSION,

Category No. 6

Defendants/Respondents.

BRIEF OF DEFENDANTS/RESPONDENTS INTERSTATE ELECTRIC AND
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

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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BRIEF OF DEFENDANTS/RESPONDENTS INTERSTATE ELECTRIC AND
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JURISDICTION AND NATURE OF PROCEEDINGS

This is an original proceeding seeking review by the Utah Court of Appeals of an order of the Industrial Commission of Utah which denied the appellant's application for permanent total disability benefits under the Utah Worker's Compensation Act upon the grounds that the appellant had previously compromised and settled his claim for those benefits.

This Court is authorized to conduct a review of the lawfulness of the Commission's order pursuant to the provisions of § 35-1-83, Utah Code Ann. (1953, as amended).

STATEMENT OF ISSUES

Issues for review are:

1. Whether the appellant's Compensation and Settlement Agreement is enforceable and thus bars appellant's claim for permanent total disability benefits.
2. Whether the findings of the Industrial Commission are supported by substantial evidence.
3. Whether the order of the Industrial Commission is arbitrary and capricious.

DETERMINATIVE PROVISIONS

Statutory provisions which are determinative in connection with the Court's review are:

1. Utah Code Ann., § 35-1-16:

(1) It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority:

* * *

(e) to promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees; . . .

2. Utah Code Ann., § 35-1-84:

Upon the filing of the action for review the court shall direct the commission to furnish and certify to the Supreme Court, within twenty days, all proceedings and the transcript of evidence taken in the case, and the matter shall be determined upon the record of the commission as certified by it. Upon such review the court may affirm or set aside such award, but only upon the following grounds:

(1) That the commission acted without or in excess of its powers;

(2) That the findings of fact do not support the award.

3. Utah Code Ann., § 35-1-90:

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.

STATEMENT OF THE CASE

The statement of facts contained in the Brief of Appellant Gilbert R. Wilburn is incomplete and thus misleading. It cites as "fact" much of Mr. Wilburn's own self-serving testimony which was contradicted by other evidence and by cross-examination and thus not a proper basis for the findings of the Industrial Commission. Thus, defendants submit the following statement of facts to supplement and clarify the record:

1. Mr. Wilburn claims that on April 14, 1980, while working for Interstate Electric, he had occasion to lift a portable generator from the floor to his workbench. It was a small portable model intended to be moved about manually. This activity was not unusual nor unexpected. It was a normal,

routine and common function which he did on a regular basis while at work. (R. 84-85.)

2. In a recorded statement which Mr. Wilburn gave on May 22, 1980, he indicated that he did not feel pain in his back until five to ten minutes after the described lifting. His representations were as follows:

Q. Can you describe what you felt as you, you know when you picked this up?

A. Well after I did it I felt pain in my back.

Q. How soon after you did it?

A. Almost right away, fairly soon anyway.

Q. Okay, so it wasn't while you were actually lifting?

A. Within oh (inaudible).

Q. Okay, within what?

A. 5-10 minutes, I don't know. In fact I didn't even think anything of it (inaudible).

(R. 350-351.)

3. Mr. Wilburn continued working but consulted Dr. Gene Smith the following day concerning his low back pains. *Dr. Smith examined him and then released him to his regular work within a few days. He took three days off work and underwent some physical therapy for two to three weeks. He continued to work thereafter for over a year without additional medical treatment.* (R. 1, 59-60, 65, 297.)

4. On February 2, 1981, Mr. Wilburn was examined by Dr. Wallace Hess for the purpose of obtaining a disability rating which was then determined to be a 5% permanent partial disability from the claimed work injury plus a 15% permanent partial disability due to a preexisting low back condition. (R. 177-180.) Based upon said rating, Wilburn was paid for a permanent partial disability of 20%, with the employer and the Second Injury Fund paying their pro rata shares. (R. 102.)

5. Mr. Wilburn's first medical treatment for his low back after April 1980 was on August 18, 1981, when he went to see Dr. Gordon Affleck after he had been laid off work on July 31, 1981. (R. 11, 65-66, 297.) Dr. Affleck placed him on temporary total disability which was paid by the employer from then until September 30, 1983. (R. 298-300.)

6. On June 20, 1983, Mr. Wilburn was reexamined by Dr. Hess who noted a degeneration of Wilburn's arthritic condition, especially as it affected his neck and ankles, a condition unrelated to the industrial injury. Dr. Hess then determined that the permanent partial disability was a combined total of 36% with 10% assigned to the claimed industrial injury, 15% assigned to preexisting arthritis in the low back, and 15% assigned to a non-industrial cervical spine condition. (R. 181-189.)

7. Sometime in late 1983, Mr. Wilburn consulted with Administrative Law Judge Jan Moffitt at the Industrial Commission, who advised him to make a claim for permanent total disability. She referred Mr. Wilburn to Attorney Robert Shaughnessy, with whom he then consulted. (R. 122-123, 322.)

8. By his report dated February 1, 1984, Dr. Affleck rendered the opinion: "Mr. Wilburn is not capable of any significant employment, especially in the area that he has any training or capability in." (R. 248.) Thereafter, the applicant contacted National Union, the worker's compensation insurance carrier, claimed additional continuing disability compensation, and was then referred by the carrier to its attorney, Stuart L. Poelman, who met with Wilburn on February 24, 1984. (R. 31.)

9. While meeting with Mr. Wilburn, Mr. Poelman noted that the employer and its carrier could raise several defenses to Mr. Wilburn's claim for permanent disability, including the defense that the events of April 14, 1980, as described by Mr. Wilburn in his statement, did not constitute an industrial "accident" under the then-existing legal interpretation of that concept. It was explained to Mr. Wilburn that if the employer and its carrier were successful in asserting that defense, he would lose his claim for all additional compensation, including future medical expenses. On April 26, 1984, Mr. Wilburn talked

again with Mr. Poelman, at which time Mr. Wilburn noted his assertion of a claim for permanent total disability and a discussion was had concerning the effect of the "no accident" defense of the defendants. Mr. Wilburn was told to seek the advice of other counsel. He suggested, and Mr. Poelman concurred, that he confer with Judge Jan Moffitt or Judge Tim Allen at the Industrial Commission. The trade offs of a settlement were discussed, and Mr. Wilburn then offered to settle for an additional 10% permanent partial disability. (R. 129-130, 322-323.) Thereafter a verbal agreement was reached and a written Compromise and Settlement Agreement was prepared by Mr. Poelman and sent to Mr. Wilburn on May 31, 1984. (R. 35, 115.)

10. In June 1984 Mr. Wilburn consulted with Attorney Shaun Howell, legal counsel for the Industrial Commission, and asked her for her advice concerning the settlement. (R. 112, 117-119.) During that consultation, Mr. Wilburn knew of the risk he might take by pursuing his claim to a hearing. (R. 117.) Attorney Howell had met with Mr. Wilburn on various occasions: first when he brought in an application seeking a continuation of total disability benefits and indicated that he was going to make a claim for permanent total disability; again when he delivered some medical records to Ms. Howell for her review; and then again when he brought in a copy of the written

Compromise and Settlement Agreement for review. (R. 134-138.) Attorney Howell testified at the hearing before the Industrial Commission that during those discussions it was clear that Mr. Wilburn was asserting a claim for permanent total disability, that he knew of the defenses which had been explained to him by Mr. Poelman, and that she discussed those defenses with Mr. Wilburn, including the "no accident" defense which, if successful, would bar him from entitlement to future medical expenses. (R. 113-114, 141, 145.)

11. After considering the initial written Compromise and Settlement Agreement, Mr. Wilburn returned and asked that the agreement add payment to him of an additional \$1,590.00 for temporary total disability for the period of September 30, 1983 to November 22, 1983. The defendants agreed and the written agreement was then revised and sent to Mr. Wilburn for his signature. He then read it, asked Judge Moffitt about it, and signed it. (R. 115, 144.) It was then sent to the Industrial Commission on November 1, 1984, and was approved by the Commission through its legal counsel, Shaun Howell, on November 28, 1984. (R. 36, 40.) Defendants then made payment to Mr. Wilburn as specified by the agreement. (R. 115-116.)

12. When Mr. Wilburn entered into the written Compromise and Settlement Agreement he was age 63 and had not worked for over three years. (R. 119.) He was then on total disability

under Social Security and was claiming that he could not work. (R. 93, 119.) At the time the settlement agreement was entered into, it was the understanding of the defendants that the agreement compromised and settled Mr. Wilburn's claim for permanent total disability. (R. 151.)

13. On February 13, 1986, Mr. Wilburn, through his attorney Michael Dyer, filed an application with the Industrial Commission seeking permanent total disability benefits from the defendants. (R. 43.) The defendants answered the application asserting various defenses, including the fact that the claim is barred by the Compromise and Settlement Agreement theretofore entered into with Mr. Wilburn. (R. 44-45.) Hearing on the application was held on May 14, 1986, before Administrative Law Judge Richard Sumsion. (R. 49.) Judge Sumsion issued his Tentative Findings of Fact, Conclusions of Law and Order on May 28, 1986, whereby he found Mr. Wilburn to be permanently and totally disabled, referred him to rehabilitation services as required by statute and imposed liability for permanent total disability upon the defendants. (R. 338-345.) However, pursuant to a Motion for Review and Clarification filed by the defendants and responded to by counsel for Mr. Wilburn (R. 357-371), Judge Sumsion issued his Supplemental Findings of Fact, Conclusions of Law and Order, whereby he vacated his prior interim order of May 28, 1986, and ruled that the

Compromise and Settlement Agreement entered into between the parties and approved by the Commission on November 28, 1984, is binding and precludes the applicant from asserting his claim for permanent total disability. (R. 372-376.) Counsel for Mr. Wilburn then obtained review of the Supplemental Order by the full Commission. (R. 377.) Memoranda covering all of the issues raised in this appeal were then submitted to the Commission. (R. 380-406.) Upon review, the Commission denied appellant's Motion for Review, with all three commissioners concurring. (R. 407.)

14. Included in the findings of The Industrial Commission are the following:

(a) The defendants were in good faith in asserting the defense that the alleged event did not constitute a compensable accident. (R. 339.)

(b) Mr. Wilburn clearly contemplated asserting a claim for permanent total disability several months before he executed the Compromise and Settlement Agreement. (R. 341.)

(c) It was the clear understanding of the parties that the trade off contemplated by the agreement included a relinquishing of Mr. Wilburn's claim for permanent total disability. (R. 341.)

(d) The parties stipulated in the written agreement itself that there was a bona fide issue as to the compensability of the applicant's claim at the time of the agreement. (R. 38.)

(e) The agreement had been approved by the Industrial Commission's legal counsel. (R. 40.)

(f) Settlement of industrial claims is usually a desirable objective from a policy standpoint. (R. 373.)

(g) Mr. Wilburn had been advised to and did discuss his claim with an attorney prior to signing the Compromise and Settlement Agreement. (R. 373.)

(h) Mr. Wilburn discussed the Compromise and Settlement Agreement with the Commission's legal counsel who approved the settlement after discussing with Mr. Wilburn all of its ramifications. (R. 373.)

(i) Mr. Wilburn gave long and serious consideration to the execution of the agreement and the agreement was not prepared on the spur of the moment and signed hastily. (R. 373.)

(j) The applicant understood the possibility of losing medical benefits if he were to lose his claim on the issue of "no accident." (R. 373.)

(k) A settlement agreement such as that of Mr. Wilburn's is valid under Utah law when an issue

concerning the compensability of the claim is at issue.
(R. 372.)

(1) To invalidate Mr. Wilburn's agreement would seriously undermine the entire settlement process, rendering such so uncertain and unpredictable as to seldom be worthy of serious consideration. (R. 374.)

SUMMARY OF ARGUMENT

POINT I:

1. The Supreme Court has validated agreements between employers and employees to settle worker's compensation claims.
2. Legislative and public policy favor such agreements as approved by the Industrial Commission.

POINT II:

1. The evidence of record, reviewed in light of Utah law as it existed when the Compromise and Settlement Agreement was negotiated, demonstrates that the defense of "no accident" was asserted in good faith and was a bona fide issue to be negotiated.
2. The Industrial Commission's findings of defendants' good faith is supported by substantial evidence.
3. The closeness of an issue, if it is bona fide, cannot be raised in later proceedings as a factor to invalidate the settlement agreement.

4. The issues settled by an agreement cannot be later litigated and the results of such litigation then used to argue whether the issue was a bona fide issue at the time of the settlement.

POINT III:

1. The Industrial Commission's finding that the Compromise and Settlement Agreement contemplated the settlement of the appellant's claim for permanent total disability is supported by abundant evidence.

2. The Industrial Commission's findings in this case cannot be changed by the Court of Appeals under the statutory and common law standards of review imposed upon the court.

ARGUMENT

POINT I.

AGREEMENTS BETWEEN AN EMPLOYER AND EMPLOYEE COMPROMISING AND SETTLING A DISPUTED CLAIM OF LIABILITY UNDER THE UTAH WORKER'S COMPEN- SATION ACT ARE VALID AND ENFORCEABLE.

In the case of Brigham Young University v. Industrial Commission of Utah, 279 P. 889 (Utah 1929), the Utah Supreme Court long ago established that an employer and employee may enter into a binding settlement agreement which compromises and settles an employee's claim for Worker's Compensation benefits. In the BYU case, the claim in question included, among other things, a dispute concerning whether the employee was injured by accident arising out of or in the course of his employment and also whether or not the alleged accident was the cause of the employee's subsequent death. Thus, at issue was the very compensability of the claim. The Court specifically addressed the affect of what is now designated as § 35-1-90, Utah Code Ann., which reads:

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.

Contrary to the assertions contained in Appellant's Brief herein, the Court ruled that said statutory provision does not preclude a valid and enforceable compromise and settlement agreement as between the employer and the employee. In so doing, the Court stated:

Let it be assumed that it is competent for the Legislature to restrict the right of the employer and employe to make settlements or impose conditions upon which they may be made, yet in our opinion the Legislature has not, either by express language or by necessary implication, done so.

* * *

The section of this Act referred to does not, in our judgment, support the view that the right of the employer and employe to settle a claim arising under the Act after it has arisen is circumscribed or prohibited.

* * *

The right of parties sui juris to settle their own controversy and avoid litigation is a valuable and absolute right, and may be exercised by them under all circumstances, unless the state, under proper exercise of police power, has circumscribed, restricted or prohibited it. Holding as we do that such inhibition or restriction neither expressly or by necessary implication is manifest by the Act, we think the parties had the undoubted right to make the settlement which was made by them.

Id. at 892-893.

In the instant case the Industrial Commission has upheld the validity of Mr. Wilburn's Compromise and Settlement Agreement and specifically noted the Commission's policy with respect to such agreements.

The settlement of any claim is usually a desirable objective. The settlement of a disputed claim is particularly desirable because an adjudication of the claim seldom satisfies both parties and frequently leads to appeals and delays that thwart the beneficial purposes of workmen's compensation legislation. The policy of the Commission has been, and should continue to be, one that encourages the settlement of claims. It has been the long-standing practice of the Industrial Commission to approve settlements. This practice has operated as a safeguard against abuses that might otherwise occur, if an unscrupulous employer or insurance carrier attempted to take advantage of an unsophisticated worker seeking to settle a claim without the advice of counsel. The practice also affords some protection against clerical errors in the calculation of benefits payable to an Applicant.

(R. 373.)

Appellant further attempts to rely upon the case of Barber Asphalt Corp. v. Industrial Commission, 135 P.2d 266 (Utah 1943) to support his attempt to invalidate his own settlement agreement. The Industrial Commission specifically addressed the Barber Asphalt case in its findings and noted that it is distinguishable from the BYU case as well as Mr. Wilburn's case, since in both the BYU case and Mr. Wilburn's case the settlement involved a disputed claim of compensability. The Commission noted:

In the Barber Asphalt case there was no issue as to the fact that the applicant's injury arose out of or in the course of employment as a result of a compensable industrial accident. This was in sharp contrast to the BYU case in which the Court specifically stated that the compensability of the claim was a close issue "concerning which reasonable minds might well differ

and the right of the applicant to recover was doubtful."

(R. 372.)

The Barber Asphalt case did not invalidate all settlements of Worker's Compensation claims nor did it overrule the BYU case. It simply held that where the compensability of a worker's compensation claim is not disputed, an employee cannot, by agreement, waive his claim to future compensation since the Worker's Compensation Act vests the Commission with continuing jurisdiction to increase an award upon a showing of a change in the employee's condition which was not known at the time of the original award. Nothing in the Barber Asphalt case prohibits an employer and employee from settling claims which have already accrued, nor does it prevent the final settlement of a claim when the compensability of that claim is at issue.

In considering Mr. Wilburn's claim, the Industrial Commission specifically found that his Compromise and Settlement Agreement was entered into for the purpose of resolving an issue concerning the compensability of his claim. At issue was whether or not Mr. Wilburn's lifting of the portable generator during the course of his work constituted an "accident" within the meaning of the Utah Worker's Compensation Act. The Commission correctly applied the holding of the BYU case and found that the Barber Asphalt case was not applicable. The

Commission thus held that Mr. Wilburn's agreement was enforceable, that it was the intent of the parties under such agreement to settle the claim for permanent total disability and it therefore barred Mr. Wilburn's claim for permanent total disability as filed thereafter.

The Appellant cites certain cases from other jurisdictions in an attempt to support his claim that his settlement agreement should be invalidated; i.e., Walcome v. Paul Mushero Construction Co., 498 A.2d 593 (Me. 1985); Hansen v. Jer Her Builders, 366 N.W.2d 294 (Minn. 1985), and Ruiz v. City of Albuquerque, 577 P.2d 424 (N.M. 1978). A critical review of these cases reveals that they do not support the Appellant's position with respect to the validity of settlement agreements between the employer and the employee. On the contrary, each of those cases upholds the validity of such agreements. In all three cases the compensability of the claim was not even at issue, and, even so, the court upheld the agreement insofar as it settled the particular accrued claims covered by the agreement. The issues addressed in those cases merely involved a determination of what claims were covered by the agreements. In the Walcome case, the court found that the settlement agreement only covered the claimed foot injuries and that a claim for back injuries, arising out of the same accident, was not covered by the agreement. The court did not refuse to enforce

the agreement as to the foot injuries. It simply defined the scope of the agreement. In the Hansen case, the settlement agreement was held to be valid and enforceable with respect to the vision impairment which it expressly covered. The written agreement expressly provided that "all other claims are left open." Thus the court remanded the cases for a factual determination concerning what other injuries to the head, other than vision impairment, had been sustained as a result of the industrial accident. In essence, the court was simply enforcing the settlement agreement in conformity with its express provisions and the intent of the parties. And again, in the Ruiz case, the court upheld the settlement agreement as valid and enforceable but determined that its scope was limited to a settlement of claims "described in the complaint." It was determined that the agreement did not cover a claim for rehabilitation benefits since such had not been included in the complaint referred to.

Appellant also cites the case of Cretella v. New York Dock Co., 45 N.E.2d 429 (N.Y. 1942), as supporting his position. However, a review of the Cretella case reveals that it deals only with the issue which was addressed by the Utah Court in the Barber Asphalt case. In Cretella, the compensability of the claim was not at issue. The court simply held, as the Utah court held in Barber Asphalt, that because of the Commission

continuing jurisdiction, employers and employees had, under New York law, limited powers of settlement. The court determined that the agreement under review had failed to comply with the New York law. The court did not, by its ruling in Cretella, invalidate the compromise of a worker's compensation claim where the compensability of the claim was at issue.

Thus, appellant has failed to cite a single case, either in Utah or in any other jurisdiction, which supports the invalidation of Mr. Wilburn's Compromise and Settlement Agreement with the defendants. The BYU case is the law in Utah and should be followed.

As noted by the Industrial Commission, there are good public policy reasons for allowing an employer and employee to settle claims to the extent that they have already accrued or where the compensability of the entire claim is at issue. The Worker's Compensation Act favors an expedited resolution of claims. For this Court to invalidate the resolution of accrued claims by means of settlement would be counterproductive to the intent of the Act. Without the power to settle, employers and employees would be forced into endless and unnecessary litigation. The order of the Commission in this case should be affirmed. As the Commission noted:

To invalidate the agreement at this time would seriously undermine the entire settlement process, render such so uncertain and unpredictable as to seldom be worthy of serious consideration.

(R. 374.)

The Legislature specifically gave the Industrial Commission the power and duty to foster the expedited resolution of claims under the Workman's Compensation Act. Section 35-1-16(1) of the Act provides:

(1) It shall be the duty of the commission, and it shall have full power, jurisdiction, and authority:

* * *

(e) to promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees. (Emphasis added.)

Certainly it was the intent of the Utah Legislature that the Commission should have the authority to resolve such disputes by means of a settlement which it scrutinizes and approves. Such was the action by the Commission in regard to Mr. Wilburn's claim.

POINT II.

THE COMPENSABILITY OF WILBURN'S CLAIM WAS A BONA FIDE ISSUE WHEN THE COMPENSATION SETTLEMENT AGREEMENT WAS EXECUTED AND APPROVED.

Appellant urges that the "no accident" defense asserted by the defendants, was not sufficiently significant to establish a bona fide issue of compensability. The Industrial Commission found otherwise . . . and for good reason. The significance of the no accident defense must be assessed by understanding the status of the law on that issue as it existed at the time of

the agreement, not as it is now subsequently changed. At the time of the agreement, the issue of what constituted an industrial "accident" so as to support a claim for worker's compensation benefits had been the subject of substantial litigation resulting in Supreme Court decisions which had generated inconsistent results. Consequently, various administrative law judges at the Industrial Commission were deciding the issue based upon differing factors and differing emphases. This inconsistency created an uncertainty which caused an increasing number of claims filed with the Industrial Commission to be litigated. The inconsistency in court decisions has now just recently been acknowledged and a solution has been addressed by the Utah Supreme Court in the case of Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986), wherein the Court stated:

Prior decisions by this Court have often failed to distinguish the analysis of the acts in question and the discussion of causation elements. As a result, this Court and the Commission are faced with confusing and often inconsistent precedent. For this reason, we now undertake a fresh look at the policy and historical background of the worker's compensation statute in an attempt to provide a clear and workable rule for future application by the Commission.

Id. at 18.

At the time Mr. Wilburn and the defendants entered into their Compromise and Settlement Agreement, the defendants were

justified in believing that there was a good chance of prevailing on the "no accident" issue should the matter be litigated. Court decisions upon which they could rely placed emphasis on the accidental and unintentional nature of the activity or event which caused the injury, not upon the accidental and unintentional nature of the injury itself. In 1969, the Court had decided Redman Warehousing Corp. v. Industrial Commission, 454 P.2d 283 (Utah 1969), wherein the Court denied compensation in a case where the employee herniated a disc in his back while riding in and driving a long-haul truck. There the Supreme Court stated:

There is nothing in this record that shows any unusual event, or "accident," if you please, justifying compensability within the nature, intent or spirit of the workmen's compensation act. To conclude otherwise would ensure every truck driver, every railroad engineer, every airplane pilot, and a lot of others, against a physiological malfunction or physical collapse of any of hundreds of human organs completely unproven as to cause, but compensable only by virtue of the happenstance that the malfunction, collapse or injury occurred while the employee was on the job, and not home or elsewhere.

Id. at 285.

In 1979, the Supreme Court issued its opinion in the case of Church of Jesus Christ of Latter-day Saints v. Industrial Commission, 590 P.2d 328 (Utah 1979), in which it denied compensation under the Worker's Compensation Act for a herniated disc which occurred when the employee, after having set up

a series of chairs, sat down to rest and then stood up suddenly to answer the telephone. There was no dispute as to the causal relationship between the herniated disc and the work activity, but the Court denied compensation on the grounds that no accident had occurred. In so doing, the Court stated:

The only facts relating to the claimed accident were presented by the testimony of Thurman, and there is nothing contained therein that warrants a conclusion that an accident occurred. There is nothing in his testimony that shows anything unusual about his activities, that shows any unusual exertion or strain, or that shows any contact with objects or a fall. There is simply nothing different about his activities on the day in question than on any other such working day.

Id. at 329.

Thereafter, the Court decided the case of Farmers Grain Co-op v. Mason, 606 P.2d 237 (Utah 1980), and denied compensation to Mr. Mason who, it was found, sustained injury to his back as a result of unloading 100 pound bags of whey from a delivery truck. The court noted that Mr. Mason had suffered from back ailments prior to his alleged accident and the Court stated:

The evidence further reveals that the type of work activity engaged in by defendant (that of unloading heavy cargo) was not unusual or unexpected. The work was typical of that of a truck driver and comparable to the work he had followed for a number of years. Further, the aggravation of his physical condition gradually developed without the intervention of any "external occurrence" or trauma.

Id. at 239-240.

Then again in 1982, the Court determined, by its opinion in Sabo's Electronic Service v. Sabo, 642 P.2d 722 (Utah 1982), that an employee who injured his back while unloading boxes in the course of his employment was not entitled to worker's compensation benefits since no "accident" had occurred. Citing numerous prior decisions, the Court applied its strict interpretation of "accident" in upholding the determination of the administrative law judge that:

The activities of this morning were not unusual and were not strenuous in any way. He had only loaded a couple of boxes and was doing the same thing that he frequently did in connection with his employment in unloading boxes which usually required bending over and picking them up. He has done the same thing many times in the past.

Id. at 723-724.

* * *

In order to recover worker's compensation benefits, the applicant must have incurred an injury as the result of an accident during the course of his employment. Though it is clear that the applicant was engaged in his regular employment and that there was an injury, we cannot find that there was an accident in the sense contemplated by the worker's compensation statutes . . .

Id. at 724.

* * *

The mere fact that defendant's impairment resulted (in the words of Dr. Maumberger) "entirely from the incident which he alleges to" should not imply that a compensable accident has occurred, as defined in this opinion.

Id. at 726.

With this background of judicial decision, and faced with the facts of the Wilburn claim as then analyzed by counsel for the defendants, there can be no question that the defendants asserted the "no accident" defense to Mr. Wilburn's claims in good faith, as found by the Industrial Commission. At that time, defendants had then determined that Mr. Wilburn's lifting of the portable generator did not involve any external trauma, nor did it involve any unusual event. It was one of Mr. Wilburn's common, usual and intended activities at work. Moreover, he had indicated in his statement that his back pain did not occur until five to ten minutes after that lifting episode. It had further been determined that Mr. Wilburn suffered from a preexisting back condition and that the onset of back pain as a result of lifting activities could likely be expected. It was further determined that following the lifting episode, Mr. Wilburn had only once been examined by Dr. Smith and had not thereafter sought any medical treatment for his back, following a short period of therapy, until after he had lost his job over a year later.

The "no accident" defense asserted by defendants was real and viable. The parties stipulated in the written agreement itself 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 Worker's Compensation Act." (R. 38.) There

is no evidence in the record that the defendants acted in bad faith or that Mr. Wilburn was subjected to any kind of fraud or misrepresentation. When a settlement agreement is negotiated based upon a bona fide issue of compensability, it should be upheld.

In order to make such an agreement possible, its validity cannot later be scrutinized based upon an after-the-fact debate as to how close the disputed issue was. The closeness of the issue is always one of the factors considered by the parties in connection with their negotiation of the terms of the agreement. That factor is weighed in determining what consideration should be paid for the agreement. If the issue is a bona fide one and is asserted in good faith, then it should be sufficient to support the validity of the Settlement Agreement entered into. To allow the closeness of the issue, if otherwise bona fide, to be later litigated and used as a means of invalidating the agreement would render impotent any attempt to negotiate an agreement in the first place.

Judge Sumsion properly acknowledged that his own determination that there was an industrial accident, made in retrospect, is not relevant as to whether or not the Compromise and Settlement Agreement "constituted a compromise and settlement of a disputed claim." He correctly found that the compensability of Mr. Wilburn's claim was disputed in good faith,

that the "no accident" issue was a bona fide issue at the time the agreement was entered into and that it was an issue upon which reasonable minds could well differ. (R. 374.) It is clear that the defendants and Mr. Wilburn entered into their settlement agreement in order to avoid litigation, as well as to avoid the risk of the "no accident" issue being determined in favor of the opposing party. It would be senseless to now hold that the agreement could later be held invalid by reason of the actual later litigation of that issue when the whole purpose of the Agreement was to settle and thus avoid that issue and the litigation thereof.

POINT III.

THE EVIDENCE AMPLY SUPPORTS THE INDUSTRIAL COMMISSION'S FINDING THAT MR. WILBURN HAD SETTLED HIS CLAIM FOR PERMANENT TOTAL DISABILITY.

Mr. Wilburn attempted to persuade the Industrial Commission that, when he entered into the Compromise and Settlement Agreement with the defendants, he did not understand that he was settling his claim for permanent total disability. The evidence is overwhelmingly to the contrary, and the Industrial Commission found against him on that issue:

The applicant clearly contemplated asserting a claim for permanent total disability several months before he executed the Compromise and Settlement Agreement. There is no evidence of a "subsequent

change of condition or a new development not contemplated at the time of the release or settlement agreement." On the other hand, at the time the applicant executed the Compromise and Settlement Agreement, he was not represented by counsel even though he had sought the advice of counsel early on in the negotiations. The stated basis for executing the agreement was to avoid the necessity of further litigating the "no accident" issue and, in doing so, assuring the applicant of a continuation of his medical benefits and some additional compensation. There is no express provision that the agreement was a tradeoff with respect to the applicant's potential claim for permanent total disability, even though this clearly was the understanding of the parties.

(R. 341.) (Emphasis added.)

* * *

In Wilburn's case, he was advised to and did discuss his claim with an attorney, but at the time he signed the Compromise and Settlement Agreement, he was not represented by counsel. He did, however, discuss the Compromise and Settlement Agreement with the Commission's Legal Counsel, who approved the Settlement after discussing all of its ramifications with the Applicant. Based upon the testimony of the Commission's former legal counsel who approved this particular Agreement, and based upon the Applicant's own testimony, there can be little doubt that the Applicant gave long and serious consideration to the execution of the Agreement. This was not an Agreement that was prepared on the spur of the moment and signed hastily. It was, in fact, prepared weeks, if not months, before it was actually executed. By his own admission, the Applicant, at the time the Agreement was signed, was extremely concerned about ensuring a continuation of his medical benefits which were assured if he agreed to the terms of the Compromise and Settlement Agreement. If not, there is no doubt that the Applicant understood the possibility of losing that benefit if he were to lose his claim on the issue of "no accident."

(R. 373.)

The Utah Court of Appeals is bound by law to affirm these findings as made by the Industrial Commission, since the court is governed by special standards of review imposed by both statute and case law. Section 35-1-84, Utah Code Ann. (1953) provides, in part:

Upon such review the court may affirm or set aside such award, but only upon the following grounds:

(1) That the Commission acted without or in excess of its powers;

(2) That the findings of fact do not support the award.

The Utah Supreme Court has recently reaffirmed its interpretation of this standard of review in the case of Blaine v. Industrial Commission, 700 P.2d 1084 (Utah 1985). After quoting the above statute, the Supreme Court stated:

This Court has interpreted the foregoing statutory standard on numerous occasions and has concluded that the Commission's findings are not to be displaced in the absence of a showing that they are arbitrary and capricious.

Id. at 1086.

In the Blaine case, the Supreme Court cited the prior case of Kaiser Steel Corp. v. Monfredi, 631 P.2d 888 (Utah 1981), wherein the standards of review were discussed:

Under any of these standards--Kavalinakis, Kent and Norris--it is apparent that this Court's function in reviewing Commission findings of fact is a strictly limited one in which the question is not whether the

Court agrees with the Commission's findings or whether they are supported by a preponderance of evidence. Instead, the reviewing Court's inquiry is whether the Commission's findings are "arbitrary or capricious," or "wholly without cause," or contrary to the "one [inevitable] conclusion from the evidence," or without "any substantial evidence" to support them. Only then should the Commission's findings be displaced.

Id. at 890.

These standards have been longstanding. In the early case of Twin Peaks Canning Co. v. Industrial Commission, 196 P. 853 (Utah 1921), the Utah Supreme Court established the standard for review of the evidence with respect to Industrial Commission cases:

This Court is now firmly committed to the doctrine that it will examine the evidence only to ascertain whether there is any substantial evidence in support of the findings of the Commission, and whether it has acted without or in excess of its jurisdiction.

Id. at 877.

In the instant case, the evidence supporting the Commission's finding that Mr. Wilburn understood and intended to relinquish his claim for permanent total disability is not only substantial, it is abundant. In fact, with the exception of Mr. Wilburn's own self-serving testimony, it is nearly conclusive. That evidence includes the fact that Mr. Wilburn was totally disabled before he ever presented his claim to the defendants for additional benefits in February 1984. At that

time he was 63 years of age, he hadn't worked since July 1981 (R. 119, 331); he had already applied for and was receiving total disability benefits from Social Security (R. 119); he was then representing that he could no longer work (R. 119); Dr. Affleck had certified that he was no longer employable (R. 248); and both Dr. Hess and Richard Olson from the State Division of Rehabilitation had informed him that he was not a good candidate for rehabilitation (R. 121, 189). It was further noted that when he did claim additional benefits, he was asserting a claim for ongoing total disability. Furthermore, Mr. Wilburn admitted talking to Mr. Poelman about his claim for permanent total disability (R. 111). He testified that he did not disagree with the content of Mr. Poelman's memorandum which outlined some of the factors discussed in connection with their negotiation of the settlement agreement, including Mr. Wilburn's claim of permanent total disability. (R. 129-130.)

It is also clear that before Mr. Wilburn signed his Compromise and Settlement Agreement, he had been thoroughly advised concerning its ramifications by both Mr. Poelman and the commission's legal counsel, Shaun Howell. He even admitted that he had previously discussed asserting his claim with Judge Moffitt of the Commission and with attorney Robert Shaughnessy. On the other hand, there is no evidence of record that

Mr. Wilburn was not claiming permanent total disability in connection with the negotiation of his Compromise and Settlement Agreement. His testimony concerning that matter at hearing was: "I don't remember, but I could have." (R. 110.)

It is further clear from the record that in order to secure the settlement agreement, the defendants were required to pay all, if not more, in benefits under the settlement agreement than they would have had to pay if the claim had gone to hearing and defendants could have asserted their various other defenses. The only thing which Mr. Wilburn had left to give up in exchange for the defendants' waiver of its "no accident" defense was his claim for permanent total disability.

It should be noted that the accuracy of Mr. Wilburn's own testimony is suspect and that the Industrial Commission is not bound to accept such testimony without qualification. In the case of Bain v. Industrial Commission, 199 P. 666 (Utah 1921), the Utah Supreme Court stated:

. . . it must be remembered that the findings and conclusions of the Commission on questions of fact are conclusive and final, and not subject to review. Before this Court can disturb such findings and conclusions, it must appear as a matter of law that they are contrary to the law and contrary to the evidence. The Commission are the judges of the credibility of the witnesses, and in determining the facts, if there is any substantial reason why they should not believe the testimony of any particular witness, they have the undoubted right to disregard it and eliminate it from consideration.

Id. at 666-667.

It was obvious that Mr. Wilburn's testimony was, in some respects, contradictory or contradicted. It was, in other respects, exaggerated. For example, Mr. Wilburn initially testified that prior to April 14, 1980, he had no back problem. (R. 53.) Upon cross-examination, however, he admitted to having some back problems. (R. 82.) The medical records in evidence amply demonstrate that he had significant preexisting back problems. Mr. Wilburn also testified both at the hearing (R. 127) and by sworn affidavit (R. 328) that he had never been advised to seek the assistance of counsel in connection with the negotiation and execution of his Compromise and Settlement Agreement. This testimony was squarely contradicted by the applicant's own testimony to the effect that when he met with Judge Moffitt in 1983, she provided him with a list of attorneys, and he then conferred with Attorney Robert Shaughnessy. (R. 122-123.) It is further contradicted by the testimony at hearing of Attorney Shaun Howell (R. 145) and the memorandum of Stuart Poelman (R. 322). Mr. Wilburn also testified at the hearing concerning the details of his claimed accident and it became apparent that he was embellishing the facts beyond and in contradiction to the same description of facts which he had given in his statement dated May 22, 1980. (R. 347.) Certainly the Industrial Commission was justified in discounting the credibility of Mr. Wilburn's own self-serving

testimony. Mr. Wilburn claimed that he was confused by the language in the Compromise and Settlement Agreement dealing with reimbursements between the employer and its carrier and the Second Injury Fund. The Industrial Commission was fully justified in disbelieving Mr. Wilburn concerning such alleged confusion. It is apparent that the confusion in such language was more a ploy by counsel to generate an issue than a true source of confusion to Mr. Wilburn.

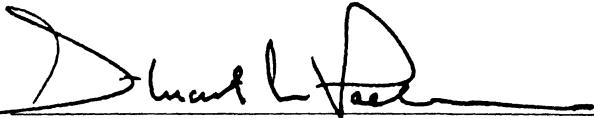
Appellant notes that the Compromise and Settlement Agreement does not contain explicit language defining the claims which were settled thereby. However, it should also be noted that the written agreement does not specify what defenses were being relinquished by the defendants. Mr. Wilburn certainly does not dispute that the Agreement contemplated that he should retain his right to future medical expenses. That, too, is not set forth in the Agreement. Obviously the written Compromise and Settlement Agreement was not designed to specify all of those items. Thus, it was incumbent upon the Industrial Commission to determine those matters from all of the evidence. It was clearly understood and readily ascertained by Mr. Wilburn that the intent of the agreement was to ensure him of continuing medical benefits. By the same token, it is clear by the evidence that Mr. Wilburn also intended to relinquish his claim for permanent total disability.

CONCLUSION

Mr. Wilburn and the defendants entered into a valid and binding agreement whereby they intended to compromise and settle their claims, including the claim for permanent total disability. Said agreement was carefully scrutinized and then approved by the Industrial Commission. Mr. Wilburn's later attempt to reassert his claim for permanent total disability was properly denied by the Industrial Commission based upon substantial evidence that the Compromise and Settlement Agreement which he signed was understood and intended by him to include his claim for permanent total disability. Agreements such as that entered into by Mr. Wilburn are valid, enforceable and in support of legislative and public policy. Based upon standards of review as imposed by the Legislature and as articulated by the Utah Supreme Court in past decisions, the Commission's order denying the appellant's claim for permanent total disability benefits should be affirmed.

Respectfully submitted this 13th day of May, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By 

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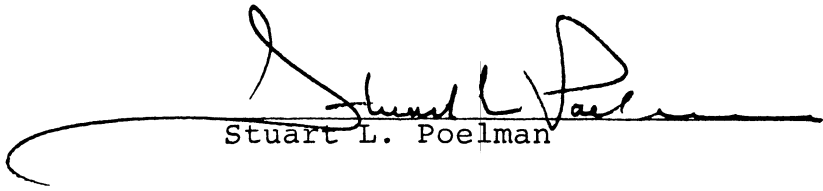
CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 1987,
I caused four true and correct copies of the foregoing
Brief of Defendants/Respondents Interstate Electric and
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