

1986

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCKET NO. 860292-CA
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IN THE COURT OF APPEALS, STATE OF UTAH
DOCKET NO. 860292-CA

GILBERT R. WILBURN,	:	
	:	
Applicant/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,	:	
	:	
Defendants/Respondents.	:	

REPLY 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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Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

GILBERT R. WILBURN,	:	
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	:	Case No. 860202-CA
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PITTSBURGH, SECOND INJURY FUND	:	Category No. 6
and UTAH STATE INDUSTRIAL	:	
COMMISSION,	:	
	:	
Defendants/Respondents.	:	

REPLY BRIEF OF APPELLANT GILBERT R. WILBURN

SUMMARY OF ARGUMENT

Utah Code Annotated, §35-1-90 (1953 as amended) states that no agreement by an employee to waive his rights to compensation under the Utah Workers Compensation Act shall be valid. In accordance with case law interpreting this provision, settlements should only be allowed where the issue of compensability is truly doubtful. Furthermore, any agreement which purports to settle an injured worker's claim to worker's compensation benefits should be strictly construed according to its express terms so that no inadvertent waivers occur. Inasmuch as a settlement agreement is a contract, its scope and effect must be interpreted in accordance with general principles of contract law. The interpretation of a contract is a question of law for determination by the Court. In the case of an integrated contract unambiguous on its face, the

meaning of the document is to be determined solely from the four corners of the document itself. Furthermore, in the event of facial ambiguities within the document, the rules of construction require resolution in favor of the non-drafting party.

In the instant case, the Compromise and Settlement Agreement executed by the applicant is invalid inasmuch as the compensability of Mr. Wilburn's injury was not seriously in doubt. (See copy of Compromise and Settlement Agreement attached hereto as Addendum Exhibit A.) Furthermore, the Administrative Law Judge improperly relied on parol evidence presented at the time of the hearing to vary the express terms of the written document. Because the interpretation of a contract is a question of law, and because the issue presented on appeal involves the interpretation of a contract, this court has original jurisdiction to review the evidence and make its own finding as to the effect of the agreement at issue.

ARGUMENT

POINT I

THE COMPENSABLE NATURE OF MR. WILBURN'S INDUSTRIAL INJURY WAS NOT DOUBTFUL AT THE TIME THE SETTLEMENT AGREEMENT WAS NEGOTIATED AND EXECUTED.

Respondents allege that appellant would have the Court find all worker's compensation settlement agreements to be invalid in view of the statutory prohibition against waivers found in U.C.A. §35-1-90. This allegation is misleading and

seriously misconstrues appellant's position. It is not contested and, in fact, Mr. Wilburn agrees with the position espoused by the respondents that the settlement of disputed industrial claims is desirable and should be encouraged. However, because of the statutory prohibition against waivers, such settlements should only be encouraged under appropriate circumstances, namely where the compensable nature of the worker's injury is disputed and the worker's right to recover is doubtful. See Brigham Young University v. Industrial Commission, 279 P. 889 (Utah 1929). Where compensability is not a genuine matter of dispute, settlement is inappropriate and should not be allowed. Furthermore, where settlement is appropriate, any documents executed in furtherance of the settlement should be strictly construed according to their express terms so that only those claims and rights specifically identified are compromised. This requirement, rather than undermining the settlement process as alleged by respondents, would simply encourage careful drafting so that all parties are aware of the full effect of any agreement between them.

At the time the Compromise and Settlement Agreement in question was negotiated, the term "accident" was defined for purposes of worker's compensation law as follows:

It [accident] connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. . . . [T]his is not necessarily restricted to some single incident which happened suddenly at one particular time and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such a manner as to properly fall

within the definition of an accident as just stated above. However, such an occurrence must be distinguished from gradually developing conditions which are classified as occupational diseases and which are not compensable except as provided in Chapter 2 of Title 35 (Sections 35-2-1, et. seq.), U.C.A. 1953. (Footnotes omitted.)

Carling v. Industrial Commission, 16 Utah 2d 260, 399 P.2d 202, 203 (1965). The events giving rise to Mr. Wilburn's industrial injury clearly fall within the parameters of the definition set forth above. At the time of his industrial injury, appellant was working for respondent Interstate Electric as a heavy duty mechanic repairing and overhauling, among other things, portable power plants. On the day he was injured Mr. Wilburn attempted to lift a portable power plant weighing approximately 100 pounds from the floor to his work bench so that he could commence its repair. (R. at 350.) This particular power plant had a handle on it so that instead of lifting it from the front as he generally did, Mr. Wilburn bent over sideways and lifted the plant with one hand from his side. (R. at 355.) After lifting the plant, he felt a sharp pain in his back. (R. at 54, 55.) In view of the amount of weight Mr. Wilburn was lifting, the unusual manner in which he attempted to make the lift, and the immediate pain he experienced in carrying out this activity, Mr. Wilburn's injury on April 14, 1980 unquestionably constituted an "unanticipated and unintended occurrence different from what would normally be expected to occur in the usual course of events."

Appellant's position that the events leading to his industrial injury unquestionably constitute a compensable industrial accident is further supported by case law applying the Carling definition. For example, in Kaiser Steel Corporation v. Monfredi, 631 P.2d 888 (Utah 1981), benefits were awarded to an employee who suffered a back injury while shoveling rock onto a conveyer belt. The employee had testified at the hearing that as he was shoveling, he experienced a catch in his back. He also stated that he could identify no unusual incident such as breaking a shovel or slipping on a rock that precipitated his back problem. Additionally, the record indicated that the applicant had a significant history of prior back problems. In affirming the Commission's award of benefits, the Utah Supreme Court stated:

The applicant's history of work-related accidents and his medical condition showed a job-induced preexisting condition which could have been added to or aggravated, by the work-related incident that occurred on January 5, 1979, or which could have reached what this Court has referred to as a 'climax' due to 'exertion, stress, or other repetitive cause . . . in such manner as to properly fall within the definition of an accident . . . ' (Citation omitted.)

Id. at 892.

The Court also found a compensable industrial accident in the case of Painter Motor Company v. Ostler, 617 P.2d 975 (Utah 1980). In Painter, the applicant had been climbing a ladder and drilling holes for the installation of electrical boxes. This activity required him to hold a large drill up and away from his body. After doing this work for

some time, the applicant became aware of intensifying back and shoulder pain. Approximately four months later while moving boxes of parts at his employer's place of business, the employee again experienced pain in his back for which he eventually underwent surgery. Following his surgery, the applicant filed an application for benefits which was denied by the Administrative Law Judge. The Commission reversed the decision of the ALJ following a Motion for Review by the applicant and the Utah Supreme Court affirmed the decision of the Commission; in so doing it stated:

We have previously defined the term 'accident' as an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. Thus, if an employee incurs unexpected injuries, including internal failures, caused by the duties of his employment, he is eligible for compensation under §35-1-45. (Footnote omitted.) (Emphasis added).

Id. at 976.

The broad manner in which the definition of "accident" was being applied by the Court at the time the respondents raised the issue of "no accident" to Mr. Wilburn is especially evident in its decision in Schmidt v. Industrial Commission of Utah, 617 P.2d 693 (Utah 1980). In Schmidt, the applicant's employment required him to move heavy pieces of steel either alone or with the aid of fellow employees. After several months of work, the applicant began experiencing significant problems with his back. Because he could not specify a particular time or occurrence giving rise to his then present back problems, the Administrative Law Judge concluded

he was not entitled to compensation. The Utah Supreme Court reversed the finding of the Administrative Law Judge and remanded the case to the Commission for a determination on the issue of medical causation only. In doing so, it stated:

In this jurisdiction, it is settled beyond question an internal failure brought about by exertion in the course of employment may be an accident within the meaning of 35-1-45, without the requirement that the injury result from some incident which happened suddenly and is identifiable at a definite time and place. . . .

* * *

It is equally well settled the injury received may be accidental even though the exertion is that required in the ordinary course of employment. If an employee incurs unexpected injuries, including internal failures, caused by the ordinary duties of his employment, he is eligible for compensation under 35-1-45. (Footnotes omitted.) (Emphasis added.)

Schmidt at 695.

Respondents contend they were justified in raising the no accident defense because Mr. Wilburn was not engaged in any unusual activity at the time his injury occurred. However, as noted in the decision in Schmidt, it was well settled by the year 1984 that an injury could be accidental even though it was caused by the ordinary duties of employment. Furthermore, even if some type of unusual activity were arguably required as contended by respondents, Mr. Wilburn's injury met the requirements of a compensable accident. This contention is supported by the recorded statement taken by Libby Lowther, an adjuster for National Union, shortly after the accident. Therein Ms. Lowther

specifically asked Mr. Wilburn if there was anything unusual about his activities on the day of his injury. He replied that he generally lifted the power plants he was going to work on from the front because they did not have any handles. In this particular case, however, he lifted the plant from his side because it happened to have a handle on it. It was this manner of lifting that resulted in his injury. (R. at 355.)

The cases cited by respondents in favor of their position that the compensability of Mr. Wilburn's claim was legitimately in dispute are distinguishable from Mr. Wilburn's case. For example, in Church of Jesus Christ, Etc. v. Industrial Commission, 590 P.2d 328 (1979), the applicant had experienced no pain at all while performing his regular employment duties. It was only when he stood up suddenly to answer the telephone that he felt pain in his back. Mr. Wilburn, on the other hand, was unquestionably engaged in the duties of his employment when he suffered his injury. Furthermore, the manner in which he attempted to lift the power plant to his workbench so that he could repair it was unusual and directly led to his injury.

In the case of Farmer's Grain Co-Op v. Mason, 606 P.2d 237 (Utah 1980) cited by respondents, the applicant noticed a gradual onset of back pain on two different occasions after unloading 100 pound bags of whey. After the second incident, the pain did not subside, and he thereafter applied for benefits. The applicant had a significant history of back problems and the medical panel chairman who examined the

applicant stated in the panel report that the increased injuries the applicant sustained would have occurred "with or without trauma, on or off the job, and from ordinary activities; and that he would have developed back problems over a period of time in his work regardless of any trauma." Id. at 239. There is no such evidence that would support a finding of no accident in the instant case. Although Mr. Wilburn admittedly had a prior back problem, he had never missed work as a result of it and he had only sought medical treatment for his back on one occasion prior to his 1980 injury (R. at 53, 82-83, 125.)

The cases of Sabo's Electronic Service v. Sabo, 642 P.2d 722 (Utah 1982) and Redman Warehousing Corporation v. Industrial Commission, 22 Utah 2d 398, 454 P.2d 283 (1969) are also distinguishable from the facts herein. In Sabo's, the applicant bent over to lift a box of twelve clock radios and found he could not straighten up. From the facts described, it does not appear that any effort other than bending over had been exerted. In sustaining the Commission's holding of no accident, the Court specifically stated:

[I]t appear[ed] to be mere coincidence that defendant's injury or malfunction occurred at work. . . . Proof of the causal relationship of duties of employment to unexpected injury is simply lacking.

Id. at 726. Likewise, in Redman, the applicant first experienced back pain after simply sitting and driving his truck. No particular exertion or stress could be identified as the precipitating factor of his injury. The Court, therefore,

held that the events leading to the applicant's injury did not constitute an accident that caused an injury. In the instant case, however, there was a specific identifiable incident leading to Mr. Wilburn's injury. Furthermore, the medical evidence available specifically established that at least a portion of Mr. Wilburn's resulting disability was directly attributable to the industrial event. All of this information was available to the respondents prior to the time they raised the issue of no accident. It is obvious from the case law that was in existence that the compensable nature of Mr. Wilburn's injury was not, in fact, subject to legitimate dispute at the time the Compromise and Settlement Agreement was negotiated. Furthermore, because compensability was not a legitimate issue in Mr. Wilburn's case, the Compromise and Settlement Agreement is invalid and should not be allowed to stand as a bar to Mr. Wilburn's current claim.

POINT II

THE COURT OF APPEALS IS NOT BOUND BY THE FINDINGS OF THE INDUSTRIAL COMMISSION WHERE THE QUESTION AT ISSUE IS A QUESTION OF LAW AND THE INTERPRETATION OF A CONTRACT IS A QUESTION OF LAW.

Mr. Wilburn does not contest the standard of review cited by respondents by which this court is bound in reviewing the findings of the Commission on questions of fact. However, the issue presented herein is not a question of fact, rather, it is a question of law. The standard of review to be applied in evaluating Commission decisions on questions of law is

identified in Dean Evans Chrysler Plymouth v. Morse, 692 P.2d 779 (Utah 1984). In Dean Evans the Utah Supreme Court stated:

In reviewing the Commission's interpretations of general questions of law, we apply a correction-of-error standard, with no deference given to the Commission's interpretations. (Citations omitted.) (Emphasis added.)

Id. at 782. See also Board of Education of Alpine School District v. Olsen, 684 P.2d 49, 51 (Ut. 1984) and State Tax Commission v. Industrial Commission of Utah, 685 P.2d 1051, 1052 (Utah, 1984). The issue on appeal herein involves the interpretation of a Compromise and Settlement Agreement executed by Mr. Wilburn and the respondents. In Morris v. Mountain States Telephone and Telegraph Company, 658 P.2d 1199 (Utah 1983), the Utah Supreme Court held that: "[T]he interpretation of a contract is a question of law, to be decided by the judge." It then added:

It is true that some opinions seem to qualify that rule by implying that it is limited to circumstances where there is no ambiguity or no 'room for uncertainty.' And some decisions have reversed summary judgments where the contract was ambiguous and remanded for taking evidence and making findings on the intent of the parties.

However, our decisions hold that whether a contract is ambiguous is a question of law which the court must decide before it takes any evidence in clarification. More importantly, our more recent cases hold that even the resolution of contract ambiguities is a question of law for the court. (Emphasis added) (Footnotes omitted.)

The same conclusion reached in Morris was also reached in Overson v. United States Fidelity & Guaranty, 587 P.2d 149 (Utah 1978). In Overson the court made the following observation:

The accepted principle is that the interpretation of a contract's language is usually a law matter. This principle was articulated in the case of Central Credit Collection Control Corp. v. Grayson [7 Wash.App. 56, 499 P.2d 57 (1972)] as follows:

Interpretation of a written contract is usually a question of law for the court. If its terms are clear and unambiguous, summary judgment is proper. Even where some ambiguity exists in the contract, resolution of the ambiguity is still a question of law for the court, unless contradictory evidence is presented to clarify the ambiguity. (Footnote omitted.)

Overson at 151. See also Faulkner v. Farnsworth, 665 P.2d 1292 (Utah 1983).

Because the question at issue herein is one of interpretation of a fully-integrated written contract and because the interpretation of an integrated written contract is a question of law, this court's review is not limited to a determination of whether the Commission's findings are supported by substantial competent evidence. Rather this court is entitled to review the evidence anew and make its own determination as to whether the Compromise and Settlement Agreement executed by the parties in 1984 effectively bars appellant's current claim for permanent and total disability.

POINT III

PAROL EVIDENCE IS NOT ADMISSIBLE FOR THE PURPOSE
OF INTERPRETING AN INTEGRATED CONTRACT WHICH
IS UNAMBIGUOUS ON ITS FACE.

Following his industrial injury of April 14, 1980, Mr. Wilburn received from the defendants both temporary total disability and permanent partial disability benefits. The latter benefits were paid in accordance with the finding of Dr. W. E. Hess, the doctor to whom appellant had been referred for an independent medical examination. Dr. Hess found that Mr. Wilburn had a 20 percent whole man impairment, 15 percent of which he attributed to pre-existing causes and 5 percent of which he attributed to Mr. Wilburn's industrial injury. (R. at 180, 306.) Unfortunately, Mr. Wilburn's condition continued to deteriorate following his examination by Dr. Hess. When his previous benefits terminated, Mr. Wilburn again contacted National Union and requested additional temporary total disability and permanent partial disability benefits. After receiving Mr. Wilburn's request, National Union referred Mr. Wilburn to Dr. Hess a second time to obtain an updated opinion on his physical condition. After his second examination, Dr. Hess raised Mr. Wilburn's permanent partial disability rating to 35 percent whole man. (R at 189.) Although Dr. Hess found Mr. Wilburn's impairment to have increased, National Union failed to reinstate Mr. Wilburn's benefits. Finally, on February 9, 1984, the claims

representative for National Union requested that Mr. Wilburn meet with its counsel, Mr. Stuart Poelman, to discuss his case. (R at 31.) During the course of this meeting, Mr. Wilburn asked Mr. Poelman whether the respondents would be willing to pay him an additional 10 percent permanent partial disability based upon the added deterioration he had experienced. (R at 322, 323.) Mr. Wilburn also asked Mr. Poelman if he should assert a claim for permanent and total disability. Mr. Poelman appropriately replied that he could not advise appellant on this issue since to do so would place him in a conflict of interest. (R. at 322). Thereafter, the parties engaged in further discussions and negotiations which eventually resulted in the execution of the Compromise and Settlement Agreement at issue herein. During the course of these negotiations and prior to signing the Compromise and Settlement Agreement, Mr. Wilburn completed and filed with the Commission an Application for Hearing dated June 15, 1984. This application was never processed due to the compromise finally agreed upon by the parties.

The Compromise and Settlement Agreement was executed by the parties in or around November, 1984. Since that time, Mr. Wilburn's condition has continued to deteriorate, thus resulting in his current claim for permanent and total disability. Although the Compromise and Settlement Agreement does not discuss the issue of permanent and total disability anywhere within its four corners, respondents contend that it was intended to be a full and final settlement of all of Mr.

Wilburn's claims arising out of his industrial injury and that his claim for permanent and total disability is, therefore, barred. The Administrative Law Judge originally ruled in favor of Mr. Wilburn on this issue but following a Motion for Review by the respondents, he reversed his previous decision and held that Mr. Wilburn's claim is barred. This finding was subsequently upheld by the Commission.

In reaching the conclusion that the Compromise and Settlement Agreement effectively bars Mr. Wilburn's current claim, the Administrative Law Judge clearly relied upon testimony solicited at the time of the hearing regarding the discussions and negotiations engaged in by the parties prior to execution of the final document. This fact is evident in reviewing his Supplemental Findings of Fact, Conclusions of Law and Order dated July 2, 1986. In fact, the Administrative Law Judge specifically states therein:

Because of the particular circumstances under which the Compromise and Settlement Agreement of November 28, 1984 was executed, and subsequently approved by Legal Counsel for the Commission, the Administrative Law Judge is constrained to reverse his prior determination and find that the Compromise and Settlement Agreement was validly executed by the parties as a Settlement of a Disputed Claim and was not in violation of §35-1-90, U.C.A. (Emphasis added.)

(R. at 374.) (See also Copy of Supplemental Findings of Fact, Conclusions of Law and Order attached hereto as Addendum Exhibit B.)

It is a long standing rule of evidence in cases of contract interpretation that parol evidence is inadmissible to

vary or contradict the terms of an integrated written contract unambiguous on its face. In Youngren v. John W. Lloyd Construction Company, 22 Utah 2d 207, 450 P.2d 985, (1969) the Utah Supreme Court held:

When parties have negotiated on a subject and have thereafter entered into a written contract, it should be assumed that their prior negotiations are fused into the contract so that it represents their full agreement with respect thereto; and that, consequently, after its due execution, extraneous evidence should ordinarily not be permitted to add to, subtract from, vary, or contradict it. (footnote omitted.)

Id. at 987.

The same rule identified in Youngren was reiterated in Lamb v. Bangart, 525 P.2d 602 (Utah 1974).

In Lamb the court stated:

Evidence of any prior oral agreement, which contradicts the plain terms of the written agreement, is inadmissible under the parol evidence rule, for a party may not establish a different contract on facts known at the time of reducing their understanding to written form. All preliminary negotiations, conversations, and verbal agreements are merged in and superseded by the subsequent written contract, and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be altered by parol evidence. (Emphasis added.) (Footnote omitted.)

Lamb at 607. See also Wood v. Roberts, 586 P.2d 405 (Utah 1978) ("The rule is well established, evidence of prior negotiations is inadmissible to contradict terms of a final instrument.")

In the instant case, it is clear that the 1984 Compromise and Settlement Agreement was adopted by the parties as the final and complete expression of their oral agreement. The Agreement thus constitutes an integrated contract and parol evidence may not be introduced to vary or add to its express terms. See Eie v. St. Benedicts Hospital, 635 P.2d 1190, 1194 (Utah 1981) and Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985).

A review of the express language of the Compromise and Settlement Agreement which is the subject of this litigation reveals only a compromise of appellant's claim for additional temporary total disability and permanent partial disability benefits. The term permanent total disability benefits is not mentioned even one time within the four corners of the document. Thus, it is clear that the Administrative Law Judge's finding that the Agreement was intended to settle a claim for permanent and total disability came from sources extraneous to the agreement itself. Since according to the express terms of the Compromise and Settlement Agreement, the parties were only settling Mr. Wilburn's claim for additional permanent partial and temporary total disability benefits, the Administrative Law Judge's reliance upon parol evidence in interpreting the contract was improper and contrary to law. Furthermore, because the Agreement makes no express or implied reference to a settlement of Mr. Wilburn's right to claim permanent and total disability, it does not preclude Mr.

Wilburn from asserting a claim for permanent and total disability at the present time.

POINT IV

ANY ALLEGED AMBIGUITIES IN THE COMPROMISE AND
SETTLEMENT AGREEMENT SHOULD BE RESOLVED
IN FAVOR OF APPELLANT.

Assuming arguendo that the Compromise and Settlement Agreement contains ambiguities, those ambiguities should be resolved in favor of Mr. Wilburn. Two reasons militate in favor of this position. First, counsel for respondent National Union was responsible for the drafting of the Compromise and Settlement Agreement and second, Mr. Wilburn was not represented by counsel in negotiating and executing the Agreement.

It is a well-established rule in contract law that " . . . any uncertainty with respect to construction of a contract should be resolved against the party who [drew] the agreement." Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982). See also Matter of Estate of Orris, 622 P.2d 337, 339 (Utah 1980). In the instant case, Stuart Poelman, counsel for National Union, drafted the Compromise and Settlement Agreement at issue. As previously stated, the Agreement contains no language, express or implied, which purports to settle Mr. Wilburn's claim for permanent and total disability. In alleging that this was the actual intent of the Agreement respondents point to the negotiations preceding execution of the final document. Not once do they

cite the language of the Agreement itself. This fact is significant inasmuch as the very purpose of reducing an oral agreement to writing is to specifically identify and preserve the terms agreed upon by them. Because counsel for National Union was the drafting party and because he had been personally involved in all of the discussions and negotiations leading up to the execution of the final document, National Union had more than ample opportunity to draft the agreement so that it clearly reflected the rights and claims each party was relinquishing. In spite of the opportunity it had to specifically identify and preclude any future assertion of a claim for permanent and total disability, however, the respondents failed to even so much as mention the subject of permanent and total disability. Furthermore, respondents failed to include any provision which might arguably serve as a catch all barring any and all future claims Mr. Wilburn might assert. The respondents' failure to either discuss the issue of permanent and total disability or identify the Agreement as a full and final settlement of all claims which might be raised by the appellant is, at the very least, odd in view of respondents claim that permanent and total disability was the very heart and soul of the negotiations leading to execution of the final document. It is hard to believe that experienced counsel would fail to include even so much as a passing reference to the very claim allegedly settled as a result of the parties' oral negotiations.

Additional doubt is cast upon the position of the respondents in view of Mr. Wilburn's contention that at the time he executed the Agreement in question it was his understanding the only claims he was compromising were his then current claims for additional temporary total disability and permanent partial disability benefits based upon the additional deterioration he had experienced in his physical condition since the payment of his previous award. (R. at 77.) Defendants refer to Mr. Wilburn's testimony in this regard as "self serving", however, it is no more "self serving" than the position taken by respondents, especially in view of the opportunities available to the respondents to clearly and unquestionably preclude the very claim Mr. Wilburn is now asserting. Additionally, Mr. Wilburn's understanding of the Compromise and Settlement Agreement is supported not only by his own testimony but also by language in the Agreement itself. For example, while the Agreement does not discuss permanent and total disability, it does specifically identify Mr. Wilburn's claims for temporary total and permanent partial disability and medical benefits. Also, in Paragraph 3 of the Agreement, it states:

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.

Admittedly, this language refers only to an agreement between the Employer and the Fund. However, to the untrained eye of a layman not represented by counsel, this language could

reasonably be viewed as evidence that he would not be precluded from asserting a future claim should his condition continue to worsen inasmuch as the Employer and The Fund were apparently contemplating the possibility of incurring future liability on his behalf.

The second factor militating in favor of construing any potential ambiguities in the Compromise and Settlement Agreement in favor of the appellant is the fact that Mr. Wilburn was not represented by counsel during either the course of negotiations or at the time of execution of the final written document. Although respondents state that Mr. Wilburn consulted with Janet Moffitt, Robert Shaughnessy and Shaun Howell before signing the Compromise and Settlement Agreement, a review of the record reveals that Mr. Wilburn's conversations with Janet Moffitt took place well before he ever met with Mr. Poelman about his claim. (R. at 122, 123.) Mr. Wilburn admittedly consulted with Robert Shaughnessy about his case on one occasion, but this consultation, too, took place before any negotiations were undertaken with Mr. Poelman. Furthermore, Mr. Wilburn did not seek any advice from Mr. Shaughnessy regarding the Compromise and Settlement Agreement until sometime after the Agreement had already been signed. (R. at 124.) Thus, the only legal counsel with whom Mr. Wilburn spoke directly about the Compromise and Settlement Agreement was Stuart Poelman, counsel for the employer and insurer, and Shaun Howell, legal counsel to the Commission. It is obvious from the very fact

that this litigation has arisen, that the Compromise and Settlement Agreement meant something different to Mr. Wilburn than it did to Mr. Poelman, its drafter, especially with regard to the language appearing in paragraph three as aforementioned. Ms. Howell, on the other hand, specifically stated that she did not advise Mr. Wilburn one way or the other regarding the advisability of signing the Agreement. (R. at 138.) In essence, all she did was advise him on the "possibilities." (R. at 143.) It is unclear from her testimony the extent to which she may have actually discussed the particular language of the Agreement itself with Mr. Wilburn and any possible questions he may have had in this regard. However, during cross examination Ms. Howell was specifically asked whether she ever discussed the aforementioned paragraph three with Mr. Wilburn. Her reply was that she doubted very much she had discussed that portion of the Compromise and Settlement Agreement with him. (R. at 150.) In view of these facts and circumstances and in view of the fact that Mr. Wilburn is not trained in the subtleties of the law, both law and equity require any ambiguities in the written document to be interpreted most strictly against the respondents.

CONCLUSION

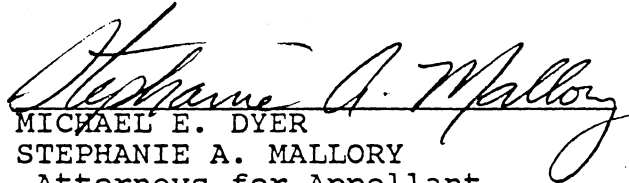
Utah law specifically provides that an employee cannot waive his rights to worker's compensation benefits. In the instant case, the respondents allege that the Compromise and Settlement Agreement signed by Mr. Wilburn in November of 1984 bars his current claim for permanent and total disability. Purported settlement agreements in the area of worker's compensation are valid only if the compensable nature of the applicant's claim is truly doubtful. The facts and circumstances giving rise to Mr. Wilburn's injury do not render his claim doubtful under the law as it existed at the time the Compromise and Settlement Agreement was negotiated and thus the Agreement is invalid.

Should the Court determine the Agreement to be valid, however, it should be noted that it does not purport to bar Mr. Wilburn's claim for permanent total disability benefits either expressly or by implication. Because the Agreement is unambiguous on its face, it must be strictly construed in accordance with its express terms. Furthermore, any facial ambiguities within the document itself should be resolved in favor of the applicant as he was the non-drafting party and he was not represented by counsel at the time it was executed. Thus, the decision of the Commission denying Mr. Wilburn permanent total disability should be reversed and his claim for permanent and total disability should be allowed.

1987.

RESPECTFULLY submitted this 13~~th~~ day of July,

RICHARDS, BRANDT, MILLER
& NELSON


MICHAEL E. DYER
STEPHANIE A. MALLORY

Attorneys for Appellant
Gilbert R. Wilburn

WIL/01/SAM
jp71387

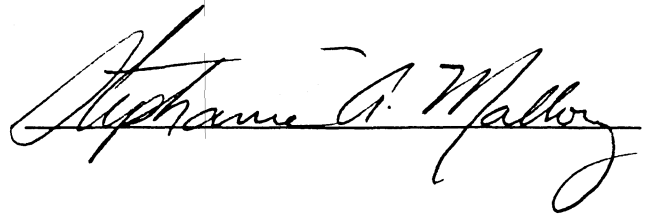
MAILING CERTIFICATE

I HEREBY CERTIFY that four true and correct copies of the foregoing instrument were mailed, first class, postage prepaid on this 13TH day of July, 1987, to each of 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



WIL/01/SAM
jp71387

ADDENDUM

EXHIBIT A

4 1 4 81009
9-5-81
- 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.

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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 R. [Signature]

THE SECOND INJURY FUND:

Robert Martney

Approved by the Industrial Commission of Utah:

Shawn 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

EXHIBIT B



THE INDUSTRIAL COMMISSION OF UTAH

Case No. 86000196

GILBERT R. WILBURN,

Applicant,

vs.

INTERSTATE ELECTRIC and/or
NATIONAL UNION FIRE INSURANCE CO. OF
PITTSBURGH and
SECOND INJURY FUND,

Defendants.

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SUPPLEMENTAL

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

Interim Findings of Fact, Conclusions of Law and Order were entered in this matter on May 28, 1986. A Motion for Review was timely filed by the Defendants on June 13, 1986. Part of the Motion sought clarification of various portions of the Order, but the Administrative Law Judge is particularly concerned with that part of the Motion which seeks a reversal of the basic determination relative to the Compromise and Settlement Agreement entered into between the parties on November 28, 1984. Applicant's response to the Motion has also been considered.

As stated in the original Findings of Fact, the Administrative Law Judge believes the Applicant's claim is controlled by the holdings in the two cases cited in the original Findings. These cases are Brigham Young University v. Industrial Commission, Utah, 279 P 889 (1929) and Barber Asphalt v. Industrial Commission, Utah, 103 Utah 371, 135 P2d 266, (1943). The BYU case approved a Stipulation and Settlement of a Disputed Claim where the compensability of the claim was a close issue.

The Court explained in the BYU case what was meant by the compensability of the claim being a close issue by stating it was one "concerning which reasonable minds may well differ, and where the right of the Applicant to recover is doubtful." Although the Settlement Agreement entered into was invalidated by the Court, the decision in the Barber Asphalt case is consistent with the BYU case. 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 his employment as a result of a compensable industrial accident. This was in sharp contrast to the BYU case in which the Court specifically stated 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."

GILBERT R. WILBURN
ORDER
PAGE TWO

In the original Order, the Administrative Law Judge expressed his opinion that there was no doubt as to the compensability of the Applicant's claim. Upon further reflection, the Administrative Law Judge would still find the Applicant sustained a compensable industrial accident. But the critical issue now seems to be not so much what the finding of the Administrative Law Judge would have been in retrospect, but whether such a finding, made at this time, can supplant the previous Compromise and Settlement Agreement which, on its face, constituted a Compromise and Settlement Agreement of a disputed claim.

In his Motion for Review, Counsel for the Defendants has correctly stated that the Compromise and Settlement Agreement of November 28, 1984, was (1) entered into between the parties in good faith, (2) the parties stipulated that there was a bonafide issue as to the compensability of the Applicant's claim at the time of said Agreement, (3) there was a specific finding in the original Order of May 28, 1986, that the Defendants acted in good faith in asserting the defense of "no accident" in connection with the Agreement, and (4) the Agreement was approved by the Industrial Commission's Legal Counsel.

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 beneficent 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 longstanding 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.

In Mr. 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 this 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." The Applicant had previously received substantial

GILBERT R. WILBURN
ORDER
PAGE THREE

compensation benefits and was offered additional benefits, as well as a continuation of his medical benefits.

Under the foregoing circumstances surrounding the execution of the Compromise and Settlement Agreement, the issue is perhaps not so much a matter of whether the Administrative Law Judge believes the Applicant sustained a compensable industrial accident as it is a matter of what the parties believed and acted upon, at the time the Compensation Agreement was executed. The Defendants were undoubtedly relying upon the information furnished the insurance adjustor by the Applicant on May 22, 1980, at which time, the adjustor took a recorded statement as to how the injury occurred and the timing of the pain the Applicant felt in connection with his injury. This statement is not in evidence, but it does provide some understanding of the Defendant's point of view. The transcript does not change the opinion of the Administrative Law Judge as to the compensability of the Applicant's claim, but it does help explain why the Applicant elected to execute the Agreement rather than submit his claim to the Commission for adjudication.

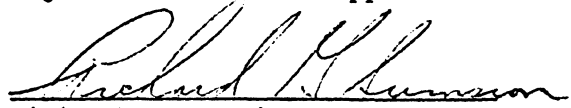
Because of the particular circumstances under which the Compromise and Settlement Agreement of November 28, 1984 was executed, and subsequently approved by Legal Counsel for the Commission, the Administrative Law Judge is constrained to reverse his prior determination and find that the Compromise and Settlement Agreement was validly executed by the parties as a Settlement of a Disputed Claim and was not in violation of Section 35-1-90, U.C.A. The Administrative Law Judge realizes the harsh consequences of this determination. Mr. Wilburn is a very likeable person and is undoubtedly in need of whatever benefits or compensation he can obtain. However, compassion for the Applicant does not justify the erosion of a principle and policy pertaining to Compensation Agreements generally. As stated in the original Order, the award of compensation could only be justified if reasonable minds could not differ as to the compensability of the Applicant's claim. The fact that the Administrative Law Judge would have no difficulty in finding the Applicant's claim compensable does not, at this time, supplant the judgment of those who earlier, in good faith, viewed this claim as one of doubtful compensability. The Applicant had pondered the effect of the Agreement for several months and had discussed the same fully with the Commission's Legal Counsel and with an attorney. To invalidate the Agreement at this time would seriously undermine the entire settlement process, rendering such so uncertain and unpredictable as to seldom be worthy of serious consideration.

GILBERT R. WILBURN
ORDER
PAGE FOUR

For the reasons stated above,

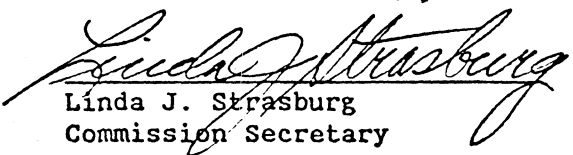
IT IS HEREBY ORDERED that the Interim Order of May 28, 1986, be, and the same is hereby, vacated and set aside and the Compromise and Settlement Agreement entered into between the parties and approved by the Commission on November 28, 1984, is deemed binding upon the parties, precluding the Applicant from asserting a claim at this time. Having vacated the prior Order, the other matters in the original Interim Order on which the Defendants sought clarification are now moot.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.


Richard G. Sumsion
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah this
2nd day of ~~June~~, 1986.

ATTEST


Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on July 2, 1986, a copy of the attached Supplemental Findings of Fact, Conclusions of Law and Order in the case of Gilbert R. Wilburn issued July 2, 1986, was mailed to the following persons at the following addresses, postage paid:

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

Michael E. Dyer, Atty., P.O. Box 2465, SLC, UT 84110

Stuart L. Poelman, Atty., P.O. Box 3000, SLC, UT 84110

Erie V. Boorman, Administrator Second Injury Fund

National Union Fire Insurance Company of Pittsburgh, c/o American
International Adjusting, P.O. Box 6159, SLC, UT 84106

Interstate Electric, 1000 West Center Street, North Salt Lake
UT 84054

THE INDUSTRIAL COMMISSION OF UTAH

By

Carol Olson

Carol Olson