

1994

W. Franklin Stoddard, Water Well and Exploration Drilling v. Gregory Lynn Biddle and Utah Industrial Commission : Brief of Petitioner

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

W. FRANKLIN STODDARD, dba
WATER WELL & EXPLORATION
DRILLING,

Petitioner,

vs.

GREGORY LYNN BIDDLE and the
UTAH INDUSTRIAL COMMISSION,

Respondents.

Court of Appeals

Case No. ~~930740-CA~~

940454-CA

Industrial Commission

No. 900000986

Priority No. 7

BRIEF OF PETITIONER W. FRANKLIN STODDARD

APPEAL FROM ORDER DENYING MOTIONS FOR REVIEW
OF THE STATE INDUSTRIAL COMMISSION

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FILED

DEC 13 1994

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STATEMENT OF JURISDICTION

This court has jurisdiction to review this matter pursuant to Section 35-1-86, U.C.A., (1953, as amended).

STATEMENT OF ISSUES

1. Whether the respondent’s stipulation with Stoddard while represented by counsel and after approval of the commission bars his later re-application for benefits for the same cause.
2. Whether the applicant was acting within the course of his employment at the time of the injury.

1 DETERMINATIVE STATUTORY OR CONSTITUTIONAL PROVISIONS

2 Section 35-1-90; Rule R568-1-16; Wilburn vs. Interstate Electric, 748 P2d
3 582 (Utah, App., 1988).

4
5 STATEMENT OF THE CASE

6 Respondent Gregory Lynn Biddle received injuries which he claimed were
7 in the course of his employment with Petitioner. Petitioner/employer filed a
8 response claiming that respondent was not within the course of his employment at
9 the time of the injury. Just prior to a hearing on the matter in 1991, the parties
10 settled the matter by the Petitioner agreeing to pay the sum of \$5,100 toward
11 respondent's medical expenses. A Stipulation to that effect was submitted
12 providing for a dismissal with prejudice. The Commission through the ALJ
13 approved the settlement. Thereafter in 1993, respondent once again applied for
14 benefits in the same matter. A hearing was held and the ALJ determined that
15 the Stipulation was not binding, the respondent was acting in the course of his
16 employment at the time of the injury and granted benefits. The ALJ further
17 determined that the employer had no funds to pay the award and ordered the
18 Uninsured fund to cover the amounts due. The portion of the decision dealing
19 with the Stipulation and the question as to whether claimant was acting within the
20 course of his employment was appealed by both the Uninsured fund and the
1 Petitioner. The commission upheld the determination that the earlier Stipulation
2 was not binding on the respondent even though he was represented by counsel

1 and further upheld the finding that the respondent was acting in the course of his
2 employment at the time of the injury.

3

4

STATEMENT OF FACTS

5 The facts which are relevant to a determination of this case on appeal are
6 as follows:

7 1. In the fall of 1989, the applicant, Gregory Lynn Biddle, went to work
8 for the defendant, Franklin Lynn Stoddard, dba Water Well & Exploration
9 Drilling (p. 15, line 2).

10 2. Stoddard drills wells on agricultural properties for agricultural and farm
11 culinary purposes (p. 29, lines 14-25; p. 30 lines 1-12).

12 3. Mr. Biddle was only hired to work on certain specific drilling sites and
13 Stoddard paid him only for the time that he was at the site (p. 27, lines 17-24; p.
14 28, lines 17-20).

15 4. On June 4, 1990, Stoddard gave Biddle a ride to work. They stopped
16 on the way because Stoddard wanted to give one of his cousins a hand setting up
17 a drill rig. Biddle decided that he, too, would lend a hand and give Stoddard's
18 cousin a hand setting up the drill rig (p. 28, lines 7-23).

19 5. While Biddle was helping Stoddard's cousin, he crushed his ring and
20 middle fingers of his left hand (p. 18, lines 12-15).

21 6. In October, 1990, Biddle and his attorney, one Gregory Skabelund, filed
22 an application for hearing claiming that Biddle was entitled to payment of medical

1 expenses incurred as a result of the accident, temporary total compensation, and
2 permanent total disability (record index pps 1-6).

3 7. Stoddard vigorously contested the application, retained counsel and
4 filed an answer to the application on November 13, 1990 (record index pps 8-9).

5 8. Biddle claimed he could not work from June 4, 1990 to October 15,
6 1990.

7 9. On June 11, 1991, one of the Commission's administrative law judges
8 mailed a letter to counsel for Stoddard (record index p. 11). It stated:

9 "This letter is a follow-up of the above matter. Our file indicates
10 that the matter would be settled for \$5,100 in medical expenses, and
11 a stipulation was to be forwarded to our office so we might close
12 our file. I would appreciate a copy of the Stipulation so we may
13 conclude our involvement."

14 10. After that, both parties and their lawyers signed a stipulation. It is on
15 file in the Commission's record and states, in pertinent part (records index pps 12-
16 14),

17 "The parties in the above entitled action, hereby stipulate that W.
18 Franklin Stoddard dba Water Well and Exploration Drilling will pay
19 the medical expenses of the Applicant, Gregory Lynn Biddle, in a
20 sum not to exceed \$5,100.
21 Following said payment, applicant agrees that this action shall be dismissed
22 with prejudice."

23 An order was appended to the stipulation. One of the Commission's
24 administrative law judges signed the order which read:

25 "IT IS HEREBY ORDERED that pursuant to the above
26 stipulation, that W. Franklin Stoddard dba Water Well Exploration
27 Drilling pay all of Applicant's uninsured medical expenses incurred
28 as a result of the industrial accident dated the 4th of June, 1990, as
9 outlined below up to \$5,100: ..."

1 11. It is undisputed that the full \$5,100 was paid as agreed in the
2 Stipulation and in fact, Mr. Stoddard testified that he had to borrow sufficient
3 funds to pay the settlement and that he is still not finished paying that loan back
4 (p. 31, lines 16-18). In the Order Granting in Part and Denying in Part Motion
5 for Review issued by the Commission on October 28, 1993, the commission
6 mistakenly believed that there was a misunderstanding or dispute as to the
7 amount of medical bills. There in fact was no misunderstanding. The parties
8 realized at the hearing where the matter was resolved that the medicals would be
9 more than the \$5,100 by some unknown amount (p. 43, lines 5-14). Mr. Biddle
10 agreed to settle for the \$5,100 and that is why the stipulation specifically provided
11 that the medicals were to be paid "in a sum not to exceed \$5,100". The figures
12 for medical expenses set forth on the settlement document itself come to more
13 than the \$5,100. Had Mr. Biddle settled for full payment of all medical expenses
14 by Mr. Stoddard, the Stipulation would have not had a cap, but would have
15 provided that all medical expenses were to be paid by Mr. Stoddard. Because
16 liability really was an issue in good faith, Mr. Biddle agreed to settle for less than
17 his actual medical expenses and he did this upon the advice of and with
18 representation of counsel.

19 12. On July 14, 1992, some two years after the accident, Biddle filed a
20 second application for hearing (record index p 36). He claimed that he was
21 entitled to payment for temporary total compensation, medical expenses and
22 permanent partial disability suffered as a result of the accident.

1 13. On February 3, 1993, one of the Commission's administrative law
2 judges held a hearing on the second application with the result as reflected in the
3 record. In the Findings of Fact, Conclusions of Law and Order issued as a result
4 of that hearing, the administrative law judge stated that "The prior application for
5 hearing did not result in a hearing, because the matter was settled pursuant to a
6 settlement agreement approved by another ALJ in July of 1991." (record index p.
7 44-52)

8

9 SUMMARY OF ARGUMENTS

10 When an applicant settles a workers compensation claim brought in the
11 Industrial Commission, is represented by counsel and the agreement is approved
12 by the Commission, that settlement should be final and not subject to reopening
13 by the applicant who may later decide he was misadvised by counsel or that he
14 had not wisely settled the matter.

15 Further, it is clear from the evidence before the commission that the
16 respondent was not working for Petitioner at the time of his injury, but instead
17 took it upon himself to assist Petitioner's cousin. He did so on his own and not in
18 response to any request of Petitioner. Under those circumstances, Petitioner
19 should not be responsible for any injury to Respondent.

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ARGUMENT

AT THE TIME OF HIS INJURY, THE APPLICANT WAS ARGUABLY NOT
WITHIN THE COURSE OF HIS EMPLOYMENT

The Uninsured Employer’s fund in an earlier memorandum in this matter
correctly pointed out that the accident must be one "arising out of and in the
course of his employment, wherever such injury occurred. . ." (Section 35-1-43,
UCA, 1953, as amended)

It was Mr. Biddle’s burden at the hearing to prove this fact.

It was undisputed that when Biddle was injured, he was not working at
Stoddard’s well site. Biddle knew this was not the well he was being taken to
work on. In spite of this knowledge, Biddle voluntarily and without being asked,
decided to help Mr. Stoddard’s cousin with his rig and was injured.

Biddle was arguably acting outside of his employment relationship when his
injury occurred and this is not a compensable accident. It is also arguable that
Petitioner was an agricultural employer not covered by the statute.

THE RESPONDENT’S STIPULATION TO A DISMISSAL OF HIS
FIRST APPLICATION FOR HEARING BARS THE LATER
APPLICATION FOR BENEFITS.

The starting point for the analysis of this point is *Wilburn vs. Interstate
Electric*, 748 P.2d 582 (Utah. App., 1988). In *Wilburn* the applicant suffered an

1 on the job injury to his back, for which his employer, Interstate Electric, and the
2 Employers Reinsurance Fund paid him permanent partial disability benefits.
3 Wilburn later concluded that he was permanently totally disabled as a result of
4 the injury and made a claim against his former employer for benefits. The
5 employer's lawyer told Wilburn that if he persisted with the claim, they would
6 resist and raise a number of defenses, among them that there had been no
7 accident. Wilburn, unrepresented by counsel, then agreed to settle for some
8 additional permanent partial disability. Approximately three years later, Wilburn
9 filed an application for permanent, total compensation. Interstate Electric raised
10 as a bar to Wilburn's permanent total claim the earlier settlement agreement.

11 The administrative law judge initially ruled against Interstate Electric,
12 finding that there was "no doubt" in his mind as to the compensability of
13 Wilburn's accident. Interstate moved for review and the ALJ reversed himself
14 finding that there was a bona fide dispute regarding as to the defendant's liability
15 and upheld the settlement agreement. The commission affirmed the ALJ and
16 Wilburn appealed to the Court of Appeals.

17 The Court of Appeals affirmed the Commission, and announced that the
18 test for determining the validity of a settlement agreement was, in essence, a
19 subjective one. Although the Court of Appeals, like the ALJ, said it would have
20 no problem finding Wilburn's claim compensable, nonetheless, it would not
21 impose its after the fact judgment on the parties.

1 "While we would have no difficulty in finding the applicant's claim
2 compensable, we agree with the administrative law judge that this
3 determination cannot 'supplant the judgment of those who earlier, in good
4 faith, viewed this claim as one of doubtful compensability. Since there is
5 sufficient evidence to support the judge's finding that the parties had a
6 good faith dispute as to the compensability of the claim, we defer to that
7 determination. In view of that finding, Section 35-1-90 is no bar to
8 enforceability of the agreement." 748 P.2d at 586-587. (emphasis added)
9

10 The Commission has adopted a rule, R568-1-16, which governs settlement
11 agreements in worker's compensation claims. In its entirety it reads:
12

13 "A. Section 35-1-90, U.C.A., invalidates any agreement which requires an
14 employee to waive his rights. Settlement agreements are appropriate,
15 however, when the parties, in good faith, view the claim as one of doubtful
16 compensability.

17 B. In determining if a claim is of doubtful compensability, the
18 Commission will look to the facts of the matter and will not be bound by
19 mere recitations in the settlement agreement.

20 C. The Commission encourages the settlement of disputed claims on
21 an amicable basis whenever possible. If the claim is not of doubtful
22 compensability, the settlement agreement must be open-ended to the

1 extent allowed under the Workers' Compensation Act. Parties will be
2 bound by their agreement to pay and receive a given amount of
3 compensation for a given injury.

4 D. Settlement agreements involving claims of doubtful compensability
5 shall be subject to approval by the Commission.

6 E. The agreement shall be final and not subject to further review upon
7 the same facts merely because of subsequent dissatisfaction.

8 F. The Commission shall suggest a format for use by parties desirous
9 of settling claims of doubtful compensability."
10

11 The final sentence of paragraph A of the rule is taken almost word for
12 word from the quoted portion of *Wilburn* and indicates that such agreements are
13 appropriate if the parties in good faith view the claim as one of disputed validity.

14 Critically, the rule states that the agreement is subject to approval by the
15 commission and that it is final and not subject to review upon the same facts
16 merely because of "subsequent dissatisfaction". The original administrative law
17 judge's letter of June 11, 1991 clearly indicates his understanding that payment of
18 \$5,100 in medical expenses would settle the matter and the file would be closed.
19 The administrative law judge signed the order approving the parties' stipulation.
20 The Findings of Fact, Conclusions of Law and order that is the subject of this
21 motion for review states,, "The prior application for hearing did not result in a
22

1 hearing, because the matter was settled pursuant to a settlement agreement
2 approved by another ALJ in July of 1991." (Order, page 1. emphasis added.)
3 Paragraph E of R568-1-16 bars any further review of the agreement. Clearly, the
4 order awarding additional benefits to Biddle was in error.

5 The Industrial Commission is bound by its rule which states that settlement
6 agreements are not subject to review because of later dissatisfaction.
7 Administrative agencies must follow their own rules. In *State vs. Utah Merit*
8 *System Council*, 614 P.2d 1259 (Utah, 1980), the Supreme Court stated, " ...
9 administrative regulations are presumed to be reasonable and valid and cannot be
10 ignored or followed by the agency to suit its own purposes. Such is the essence of
11 arbitrary and capricious action. Without compelling grounds for not following its
12 rules, an agency must be held to them." 614 P.2d at 1263.

13 Finally, it should be remembered that the applicant was represented by a
14 lawyer at the time he signed the stipulation agreeing to a dismissal of his
15 application for hearing. Biddle now says that he didn't know what he was doing.
16 If that is the case, and it sounds suspiciously like buyer's remorse, the fact that he
17 had legal counsel who presumptively advised him of the consequences of his act,
18 he should not now be able to come in and claim ignorance.

19

20 CONCLUSION

21 Under *Wilburn* and under R568-1-16, the parties earlier settlement of Mr.
22 Biddle's claim is binding, further, respondent was not an employee of Petitioner at

1 the time of his injury and this appeal should be granted, and the Court of Appeals
2 should enter its order reversing the order of the Industrial Commission awarding
3 additional benefits to the applicant.

4 Dated this 14th day of December, 1994.

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ROGER F. BARON
ATTORNEY FOR PETITIONER

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing BRIEF OF
PETITIONER this 14 day of December, 1994, postage prepaid to the following:

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3 SECTION 35-1-86, UTAH CODE ANNOTATED
4

5 The Court of Appeals has jurisdiction to review, reverse, or annul any order of
6 the commission, or to suspend or delay the operation or execution of any order.
7 as last amended by Chapter 72, Laws of Utah 1988
8
9

10
11 SECTION 35-1-43, UTAH CODE ANNOTATED
12

13 35-1-43. "Employee," "worker" or "workmen," and "operative" defined --
14 Mining lessees and sublessees -- Partners and sole proprietors -- Corporate
15 officers and directors -- Real estate agents and brokers.
16

17 (1) As used in this chapter, "employee," "worker" or "workmen," and "operative"
18 mean:

19 (a) each elective and appointive officer and any other person, in the
20 service of the state, or of any county, city, town, or school district within the state,
21 serving the state, or any county, city, town, or school district under any election or
22 appointment, or under any contract of hire, express or implied, written or oral,
23 including each officer and employee of the state institutions of learning and
24 members of the National Guard while on state active duty; and

25 (b) each person in the service of any employer, as defined in Section
26 35-1-42, who employs one or more workers or operatives regularly in the same
27 business, or in or about the same establishment, under any contract of hire,
28 express or implied, oral or written, including aliens and minors, whether legally or
29 illegally working for hire, but not including any person whose employment is
30 casual and not in the usual course of the trade, business, or occupation of his
31 employer.

32 (2) Unless a lessee provides coverage as an employer under this chapter, any
33 lessee in mines or of mining property and each employee and sublessee of the
34 lessee shall be covered for compensation by the lessor under this chapter, and
35 shall be subject to this chapter and entitled to its benefits to the same extent as if
36 they were employees of the lessor drawing such wages as are paid employees for
37 substantially similar work. The lessor may deduct from the proceeds of ores
38 mined by the lessees an amount equal to the insurance premium for that type of
39 work.

40 (3) (a) A partnership or sole proprietorship may elect to include as an
41 employee under this chapter any partner of the partnership or the owner of the
42 sole proprietorship. If a partnership or sole proprietorship makes this election, it
43 shall serve written notice upon its insurance carrier and upon the commission
44 naming the persons to be covered. No partner of a partnership or owner of a sole

1 proprietorship is considered an employee under this chapter until this notice has
2 been given. For premium rate making, the insurance carrier shall assume the
3 salary or wage of the employee to be 150% of the state's average weekly wage.

4 (b) A corporation may elect not to include any director or officer of the
5 corporation as an employee under this chapter. If a corporation makes this
6 election, it shall serve written notice upon its insurance carrier and upon the
7 commission naming the persons to be excluded from coverage. A director or
8 officer of a corporation is considered an employee under this chapter until this
9 notice has been given.

10 (4) As used in this chapter, "employee," "worker" or "workman," and "operative"
11 do not include a real estate agent or real estate broker, as defined in Section
12 61-2-2, who performs services in that capacity for a real estate broker if:

13 (a) substantially all of the real estate agent's or associated broker's
14 income for services is from real estate commissions;

15 (b) the services of the real estate agent or associated broker are
16 performed under a written contract specifying that the real estate agent is an
17 independent contractor; and

18 (c) the contract states that the real estate agent or associated broker is
19 not to be treated as an employee for federal income tax purposes.

20 (5) As used in this chapter, "employee," "worker" or "workman," and "operative"
21 do not include an offender performing labor under Section 64-13-16 or 64-13-19,
22 except as required by federal statute or regulation.

23 as last amended by Chapters 106 and 130, Laws of Utah 1993
24
25
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27 SECTION 35-1-90 UTAH CODE ANNOTATED

28
29 35-1-90. Void agreements between employers and employees.
30

31 No agreement by an employee to waive his rights to compensation under this title
32 shall be valid. No agreement by an employee to pay any portion of the premium
33 paid by his employer shall be valid. Any employer who deducts any portion of
34 such premium from the wages of salary of any employee entitled to the benefits of
35 this title is guilty of a misdemeanor, and shall be fined not more than \$100 for
36 each such offense.

37 No change since 1953

any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Accordingly, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

In the Terminology section, "partner" is defined as "[denoting] a member of a partnership and a shareholder in a law firm organized as a professional corporation."

Rule 5.1 delineates the responsibilities of a *partner or supervisory lawyer* in law firms and associations. Rule 5.1(a) states a partner's obligation is to ensure reasonable efforts are made to be sure that all lawyers within the firm conform to the Rules. Rule 5.1(b) specifically requires supervisory lawyers to make reasonable efforts to ensure those lawyers they supervise conform to the Rules.

Rule 5.1(c) states:

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Comment to Rule 5.1 is also instructive. "Apart from this Rule and Rule 8.4(a),² a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules." Clearly

2. Rule 8.4(a): It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist

the Utah Supreme Court is only concerned with potential disciplinary actions and has specifically refrained from addressing questions of civil liability. In regulating the practice of law, the Supreme Court has done nothing to change those principles of corporate law discussed earlier.

The dismissal of the trial court is affirmed. Costs against plaintiffs.

JACKSON and ORME, JJ., concur.



Gilbert R. WILBURN, Plaintiff,

v.

INTERSTATE ELECTRIC, National Union Fire Insurance Company of Pittsburgh and Second Injury Fund, Defendants.

No. 860292-CA.

Court of Appeals of Utah.

Jan. 19, 1988.

Claimant appealed from a decision of the Industrial Commission that a compromise and settlement agreement barred a claim for permanent total disability benefits. The Court of Appeals, Orme, J., held that: (1) the agreement was ambiguous with respect to whether it released only claims for temporary total disability and permanent partial disability benefits, or whether it also released permanent total disability claims; (2) extrinsic evidence supported the conclusion that the claim for permanent total disability benefits was barred; (3) evidence supported the administrative law judge's finding that the parties had a good-faith dispute about the compensability of the claim, so that the agreement was enforceable; and (4) the Commis-

or induce another to do so, or do so through the acts of another.

opt a regularized procedure of settlement agreements, mission's failure to do so did reversal.

irmed.

Compensation ⇐1156

ise and settlement agreement us as to whether it was re- for permanent total disability just of claims for temporary y and permanent partial dis- its, justifying consideration of dence. U.C.A.1953, 35-1-1 et

⇐155

Compensation ⇐1128

e that contract should be con- st drafter did not operate in 'ashion upon finding that com- settlement agreement was am- th respect to whether parties release only claims for tempo- lisability and permanent partial enefits or whether agreement ed to release claim for perma- lisability; doctrine of construing s in contract against drafter only after consideration of all extrinsic evidence.

s' Compensation ⇐1158

isic evidence supported adminis- / judge's finding that compromise ment agreement was intended to aims for permanent total disabili- as, not just claims for temporary permanent partial disability bene- .A.1953, 35-1-1 et seq.

ers' Compensation ⇐1115

ements of workers' compensation e appropriate only when compen- ture of worker's injury is disputed ker's right to recover is doubtful; mpensability of claim is not dis- vorker cannot waive his claim by ent. U.C.A.1953, 35-1-90.

ers' Compensation ⇐1157

icient evidence supported adminis- law judge's finding that parties had ith dispute as to compensability of s' compensation claim and, there-

fore, compromise and settlement agree- ment was enforceable. U.C.A.1953, 35-1- 90.

6. Workers' Compensation ⇐1124

Industrial Commission should imple- ment regulations governing settlement of claims to safeguard against abuses that might otherwise occur if unscrupulous em- ployer or carrier attempts to take advan- tage of unsophisticated worker seeking to settle claim without advice of counsel. U.C.A.1953, 35-1-10, 35-1-16, 35-1- 16(1)(e), 35-1-90.

7. Workers' Compensation ⇐1138

Industrial Commission's failure to adopt regular process for review and ap- proval of settlements was not so arbitrary and capricious as to warrant reversal of decision that compromise and settlement agreement barred application for perma- nent total disability benefits. U.C.A.1953, 35-1-10, 35-1-16, 35-1-16(1)(e), 35-1-90.

Michael E. Dyer, Stephanie A. Mallory (argued), Richards, Brandt, Miller & Nel- son, Salt Lake City, for plaintiff.

Stuart L. Poelman (argued), Snow, Chris- tensen & Martineau, Salt Lake City, for Interstate Elec. & Nat'l Union.

Erie V. Boorman (argued), Second Injury Fund, Salt Lake City.

Before GARFF, JACKSON and ORME, JJ.

OPINION

ORME, Judge:

Plaintiff Wilburn appeals from an Indus- trial Commission order denying his applica- tion for permanent total disability benefits under Utah's Workers' Compensation laws. The Commission's decision was premised on the ground that plaintiff had previously compromised and settled his claim. Plain- tiff seeks reversal of the Commission's or- der and an award of permanent total dis- ability benefits. We affirm.

BY ELDER COURT

FACTS

Plaintiff worked at Interstate Electric as a heavy duty mechanic repairing and overhauling portable power plants, water pumps, and hydraulic telephone pullers. On April 14, 1980, plaintiff injured his back while trying to lift a portable powerplant from the floor to his work bench. Plaintiff continued working the remainder of the day as well as the two following days. When the pain did not subside, he consulted a doctor. After missing a few days of work, he continued working for the rest of the year with no other medical treatment.

On February 2, 1981, Interstate Electric's insurance carrier, defendant National Union, had plaintiff submit to an independent physical examination, which resulted in a permanent partial impairment rating of 20%. Fifteen percent of the impairment was attributable to preexisting causes, paid by the Second Injury Fund, and 5% attributable to aggravation of the preexisting condition by the industrial accident, paid by Interstate Electric. Plaintiff continued working until he was laid off on July 31, 1981. Following another examination, he was placed on temporary total disability on August 18, 1981. On June 20, 1983, plaintiff was reexamined and received a permanent partial impairment rating of 36%, with 10% attributable to the industrial accident, 15% to preexisting problems in his lumbar and lumbosacral spine, and 15% to a non-industrial cervical spine condition.

In late 1983, plaintiff consulted an administrative law judge who advised him to make a claim for permanent total disability. Plaintiff contacted Interstate Electric's carrier, asserted his claim, and was referred to the carrier's attorney. The attorney told plaintiff that if he claimed permanent total disability, Interstate Electric would raise several defenses, including the "no accident" defense, and if it prevailed, plaintiff would lose his claim for all additional compensation. Plaintiff then agreed to settle for an additional 10% permanent partial disability. Upon receiving a written Compromise and Settlement Agreement, plaintiff consulted with an Industrial Commission attorney, and as a result, asked

that the agreement contain an additional \$1,590.00 for temporary total disability benefits during the fall of 1983. The agreement was revised as requested, signed by both parties, and approved by the Industrial Commission in November 1984. Defendants then paid plaintiff as required in the agreement.

Despite the agreement, in early 1986 plaintiff filed an application with the Industrial Commission seeking permanent total disability compensation from defendants. A hearing was held on the application and the administrative law judge issued his "Interim Findings of Fact, Conclusions of Law and Order" on May 28, 1986, in which he expressed "no doubt" as to the compensability of plaintiff's claim, found him to be permanently and totally disabled, and imposed liability for permanent total disability upon defendants. Defendants filed a "Motion for Review and Clarification" and the administrative law judge then issued his "Supplemental Findings of Fact, Conclusions of Law and Order," vacating his prior order. Specifically, the judge found that, while he would have held that Wilburn sustained a "compensable accident," there was a bona fide dispute as to defendants' liability for plaintiff's alleged industrial injury. The Compromise and Settlement Agreement was therefore binding and barred plaintiff's claim for permanent total disability compensation.

On appeal, plaintiff argues that he did not release his claim for permanent total disability benefits upon signing the Compromise and Settlement Agreement and, if his claim was released by the agreement, that the settlement was void as against public policy and in violation of Utah Code Ann. § 35-1-90 (1974).

SETTLEMENT AGREEMENT

We first address the issue of whether the agreement between the parties settled plaintiff's claim for permanent total disability benefits. When a contract is unambiguous, its interpretation is a question of law. *See, e.g., Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985); *Seashores Inc. v. Hancey*, 738 P.2d 645 (Utah Ct.App.1987).

If it is ambiguous,—and the determination of whether or not a contract is ambiguous is itself a question of law—extrinsic evidence as to the parties' intent must be received and considered in an effort to glean what the parties actually agreed to. *Seashores Inc. v. Hancey*, 738 P.2d at 647. If a trial court interprets a contract as a matter of law, on appeal the trial court's resolution is afforded no particular deference. *Id.* On the other hand, if the contract is ambiguous and the trial forum finds facts respecting the intention of the parties based on extrinsic evidence, then appellate review is strictly limited and the findings and judgment of the trier will not be disturbed if based on substantial, competent, admissible evidence. *Id.*; Utah R.Civ.P. 52.

[1] Accordingly, we must first determine, as a matter of law, whether the contract is ambiguous. Plaintiff argues that the Compromise and Settlement Agreement is unambiguous in its release of only his claim for temporary total disability and permanent partial disability benefits since it does not specifically mention permanent total disability. The difficulty with this position is that the contract does not refer specifically even to the claims defendant concedes were released by the document. Thus, while it is clear the parties meant to settle something, it is unclear what claim or claims they meant to settle.

1. Several Utah cases have invoked the doctrine but have typically not elaborated on its proper role. See, e.g., *Sears v. Riemersma*, 655 P.2d 1105, 1107 (Utah 1982) ("The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement."); *Parks Enters., Inc. v. New Century Realty, Inc.*, 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against the drafter."); *In re Estate of Orris*, 622 P.2d 337, 339 (Utah 1980) (language of an ambiguous instrument should be construed most strictly against the party who drafted the instrument). The case of *Wells Fargo Bank v. Midwest Realty & Fin., Inc.*, 544 P.2d 882 (Utah 1975), recognizes that where a document is ambiguous, it is appropriate to construe it "strictly against the party who wrote it," but also appropriate to "take extraneous evidence and look to the total circumstances to determine what the

Since the contract is ambiguous, it was appropriate for the administrative law judge to consider extrinsic evidence in an effort to find the intentions of the parties in entering into the agreement. Plaintiff argues, however, that the extrinsic evidence in this case does not support a finding that the agreement contemplated a release of his permanent total disability claim. In this regard, plaintiff urges application of the doctrine that ambiguities in a contract should be construed against the party responsible for its drafting.

A. Construction Against Drafter

[2] Plaintiff misapprehends the doctrine that contracts should be construed against the drafter.¹ The doctrine does not operate in dispositive fashion simply because ambiguity has been found. Once a contract is deemed ambiguous, the next order of business is to admit extrinsic evidence to aid in interpretation of the contract. It is only after extrinsic evidence is considered and the court is still uncertain as to the intention of the parties that ambiguities should be construed against the drafter.² In other words, the doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended. This rule has been summarized as follows:

parties should reasonably be deemed to have understood thereby." *Id.* at 885. While the opinion does not say so, it is obvious there is nothing left to construe—"strictly against the party who wrote it" or otherwise—if extraneous evidence clearly establishes "what the parties should reasonably be deemed to have understood" in executing an agreement.

2. There are arguable exceptions to this rule, including where insurance and surety contracts are concerned. See, e.g., *Shelter America Corp. v. Ohio Cas. & Ins. Co.*, 745 P.2d 843 (Utah Ct.App. 1987). However, such exceptions may be explained, at least in part, by the fact that such contracts are ordinarily not preceded by discussion or negotiation of specific terms and, thus, absent meaningful extrinsic evidence as to intent, recourse must be had directly to the maxim that ambiguities should be construed against the drafter.

BY FOLDER COUNCIL

After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. If . . . the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is less favorable in its legal effect to the party who chose the words.

3 A. Corbin, *Corbin on Contracts* § 559 (1960).

B. *Extrinsic Evidence*

[3] In this case, the judge received extrinsic evidence, including testimony of the Commission's former legal counsel who approved the agreement, plaintiff's own testimony, and other testimony on the circumstances surrounding the execution of the Compromise and Settlement Agreement, and concluded, as a matter of fact, that the agreement was validly executed by the parties as a settlement of a disputed claim, including for permanent total disability benefits. Although the evidence was in conflict, ample evidence supports the judge's findings in this regard.

Reviewing the record, we have some doubt about whether the decision reached by the judge was the fairest or the most appropriate in view of the extrinsic evidence. However, our approval or disapproval of the substantive decision reached is largely irrelevant. "[W]e give maximum deference to the basic facts determined by the agency, which will be sustained if there is evidence of any substance that can be reasonably regarded as supporting the determination made." *Wilson v. Industrial Comm'n*, 735 P.2d 403, 405 (Utah Ct.App. 1987) (citing *Allen & Assoc. v. Industrial Comm'n*, 732 P.2d 508, 508-09 (Utah 1987)). Deference, always due by appellate courts to fact-finders, is maximized where, as here, the Legislature has comprehen-

sively delegated responsibility over a particular subject to a specialized administrative agency. Utah Code Ann. § 35-1-16 (1987). See, e.g., *Department of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 608-10 (Utah 1983); *Central Bank & Trust Co. v. Brimhall*, 28 Utah 2d 14, 16, 497 P.2d 638, 641 (1972).

SECTION 35-1-90

Notwithstanding the ambiguity of the contract and the findings of the administrative law judge, plaintiff argues that the agreement is nonetheless void as against public policy and in violation of § 35-1-90 of Utah's Workers' Compensation statutes. Section 35-1-90 provides, in relevant part: "No agreement by an employee to waive his rights to compensation under this title shall be valid." Utah Code Ann. § 35-1-90 (1974).

[4] Under this provision, settlements are appropriate only when the compensable nature of the worker's injury is disputed and the worker's right to recover is doubtful. See *Brigham Young Univ. v. Industrial Comm'n*, 74 Utah 349, 279 P. 889 (1929). Conversely, when the compensability of a workers' compensation claim is not disputed, an employee cannot waive his claim by agreement. *Barber Asphalt Corp. v. Industrial Comm'n*, 103 Utah 371, 135 P.2d 266 (1943).

[5] The administrative law judge in this case focused on the effect of these two cases on plaintiff's claim and determined that the settlement should be enforced only if there had been a bona fide dispute as to the compensability of plaintiff's claim. Recognizing that the issue was not so much whether the judge believed the applicant sustained a compensable accident as it was a matter of what the parties believed and acted upon, the administrative law judge reversed his initial, tentative decision and found that the Compromise and Settlement Agreement was validly executed by the parties as a settlement of a disputed claim, including for permanent total disability, and was not in violation of § 35-1-90.

While we would have no difficulty in finding the applicant's claim compensable,

agree with the administrative law judge this determination cannot "supplant judgment of those who earlier, in good faith, viewed this claim as one of doubtful compensability."³ Since there is sufficient evidence to support the judge's finding that the parties had a good faith dispute as to compensability of the claim, we defer to the administrative law judge's determination. In view of that finding, § 35-1-90 is no bar to enforceability of the agreement.

TOWARDS A MORE REGULAR PROCEDURE

5] We acknowledge, as did the administrative law judge, the "harsh consequences" of this decision but agree that the Commission's passion for the Applicant does not justify the erosion of a principle and policy pertaining to compensation agreements generally." The parties tell us that it has been the policy of the Industrial Commission to encourage the settlement of claims and that it has been the practice of the Commission to approve settlement agreements before their execution. The Legislature specifically granted to the Industrial Commission the power and authority to promote the expedited resolution of claims under the Workers' Compensation statutes. Section 35-1-16 provides:

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

....

(5) To promote the voluntary arbitration, mediation and conciliation of disputes between employers and employees.⁴

Utah Code Ann. § 35-1-16 (1974).

The Commission is likewise vested with the authority to promulgate rules for gov-

3. Interstate Electric's argument about the "compensability" of Wilburn's claim was not altogether implausible given the state of flux surrounding the definition of "accident" at the time plaintiff's claim was filed. See, e.g., *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986).

4. Subsequent legislation has changed the format of, but not the language quoted from, § 35-1-16. See Utah Code Ann. § 35-1-16(1)(e) (1987).

5. The Commission has developed a "Compensation Agreement" form. "This form is used by

erning these procedures. Utah Code Ann. § 35-1-10 (1974). Clearly, then, the Commission has the prerogative to adopt regulations governing the settlement of claims. Implicit in the Commission's practice of reviewing proposed settlements is the concomitant responsibility of the Commission to assure that an applicant is aware of the scope and consequences of his or her settlement agreement. Moreover, when important rights are at issue, they should not be left to the vagaries of self-serving recall. If it is true, as defendants suggest, that the Industrial Commission approves as many as fifty of these settlements a year, then the Commission should implement a process which will operate, as the administrative law judge stated, to "safeguard against abuses that might otherwise occur, if an unscrupulous employer or insurance carrier attempt[s] to take advantage of an unsophisticated worker seeking to settle a claim without the advice of counsel."

[7] It seems to us that the Commission should formalize its long-standing practice of getting involved in the settlement of claims. Pursuant to its rule making authority, the Commission should adopt procedures defining its role in settlements. To help avoid disputes like the instant one, it might, by rule, require the use of a standard, unambiguous form specifically delineating which claims are released and which, if any, are preserved by the agreement.⁵ While such a regularized process of review and approval of settlements by the Commission seems clearly preferable, we cannot say the failure heretofore to have adopted such a process is so arbitrary

the parties to a workers' compensation claim to enter into an agreement as to a permanent partial impairment award, and must be submitted to the Commission for approval." Workers' Compensation Rules and Regulations § R490-1-2(P) (effective March 4, 1986, as amended). The "Compensation Agreement," the Commission's Form 019, is used in situations where there is no dispute about the occurrence or compensability of an accident to document that a claimant "accepts the compensation and Medical payments paid to date and agrees with the permanent partial disability rating shown above."

BY ELDER COURT

and capricious as to warrant reversal in this case.

The Industrial Commission's order is affirmed.

GARFF and JACKSON, JJ., concur.



**In the Matter of the Adoption of K.O.,
aka K.D., a minor,**

v.

**Helen DENISON, Petitioner
and Appellant.**

No. 870246-CA.

Court of Appeals of Utah.

Jan. 21, 1988.

Natural grandmother of child sought to vacate adoption of child. The First District Court, Cache County, Omer J. Call, J., granted adoptive parent's motion for summary judgment, and grandmother appealed. The Court of Appeals, Davidson, J., held that: (1) remand was necessary, as trial court decided summary judgment motion before grandmother's time to answer motion had expired; (2) material issue of fact existed as to whether adoptive parents were residents of state at time of filing petition for adoption; and (3) grandmother was entitled to notice of adoption proceedings and opportunity to establish and enforce her rights in child.

Reversed and remanded.

1. Appeal and Error ⇨1073(1)

Remand of grant of summary judgment motion was required, as court granted motion two days before expiration of nonmovant's time to answer motion.

2. Judgment ⇨185.3(9)

Material issue of fact existed as to legal residence of adoptive parents at time of adoption, precluding summary judgment in grandmother's action to vacate adoption; adoption petition was filed in November and affidavit of division of family services representative stated that adoptive parents moved out of jurisdiction in September. U.C.A.1953, 20-2-14, 78-30-7.

3. Adoption ⇨12

Natural grandmother of child was entitled to notice of adoption and an opportunity to establish and enforce her rights as to child; grandmother had taken care of child since birth.

Anne Milne, Utah Legal Services, Inc., M. David Eckersley (Argued), Houtt & Eckersley, Salt Lake City, for petitioner and appellant.

Marlin J. Grant (Argued), Olson & Hoggan, Logan, for respondents (Adoptive Parents).

Before BENCH, ORME and
DAVIDSON, JJ.

OPINION

DAVIDSON, Judge:

Petitioner Helen Denison appeals from an order of summary judgment which denied a motion to set aside her grandson's adoption and also denied her motion for continuance to permit discovery.

Petitioner is the natural grandmother of the child at issue who was born on August 10, 1977. Approximately six years after the child's birth, the parental rights of the natural parents were terminated by order of the Second District Juvenile Court. After having been under the primary care of petitioner from birth until the adoption placement, the child was placed with the Division of Family Services for placement in a suitable adoptive home. On April 23, 1984, the Division of Family Services placed the child in the home of Mr. & Mrs. W (the W's) who, at that time, were residents of Cache County, Utah. On Septem-

Likewise in *Home Builders Association of Greater Kansas City v. City of Kansas City*,⁷ the Missouri Supreme Court held:

... if the burden cast upon the subdivider is *reasonably* attributable to his activity, then the requirement [of dedication or fees in lieu thereof] is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power. *Inssofar as the establishment of a subdivision within a city increases the recreational needs of the city, then to that extent the cost of meeting that increase indeed may reasonably be required of the subdivider.* (Emphasis in original.)

In this case the rule adopted by this Court in *Call I*, quoted *ante*, cannot be applied without plaintiffs being given the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any. Implicit in this rule is the requirement that if the subdivision generates such needs and West Jordan exacts the fee in lieu of dedication, it is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question. This is not to say that the benefit must be solely to the particular subdivision, but only that there be some demonstrable benefit to it.

Reversed and remanded for further proceedings not inconsistent with this opinion. No costs awarded.

CROCKETT, C. J., and MAUGHAN, HALL and STEWART, JJ., concur.



7. 555 S.W.2d 832, 835 (Mo.1977).

STATE of Utah, By and Through the DEPARTMENT OF COMMUNITY AFFAIRS, Plaintiff and Respondent,

v.

UTAH MERIT SYSTEM COUNCIL and William A. Callahan, Defendants and Appellant.

No. 16501.

Supreme Court of Utah.

July 3, 1980.

State sought review of a decision of the Merit System Council ordering the reemployment of an employee of the Department of Community Affairs. The Third District Court, Salt Lake County, G. Hal Taylor, J., reversed, and remanded to the Council to hold a new hearing. Employee appealed. The Supreme Court, Stewart, J., held that the exclusion of the director of the Department of Community Affairs from a portion of the administrative hearing because she was a witness in the proceeding was reversible error and the attendance by a deputy director, who directed another arm of the operation and lacked full knowledge of the case, was not sufficient to provide the Department with appropriate representation.

Affirmed.

1. Officers and Public Employees ⇌72(1)

Both parties to proceeding before Merit System Council were entitled to have testimony taken under oath or affirmation.

2. Officers and Public Employees ⇌72(2)

Failure to place witnesses before Merit System Council under oath was not reversibly erroneous where no objection was raised until State sought review of Council order in district court.

3. Officers and Public Employees ⇌72(2)

Omissions from record of proceeding before Merit System Council were not re-

versibly erroneous where affidavits were received to cure those omissions in record and no claim was made that affidavits were in error on any material issue.

4. Officers and Public Employees ⇐72(1, 2)

In proceeding before Merit System Council to review dismissal of agency employee, exclusion of director of agency from portion of administrative hearing because she was witness in proceeding was reversibly erroneous and attendance by deputy agency director, who directed another arm of operation and lacked full knowledge of case, was not sufficient to provide agency with appropriate representation.

5. Administrative Law and Procedure ⇐469

Administrative hearings need not have all of the formality of judicial procedure and degree of formality may depend upon nature of administrative proceeding.

6. Administrative Law and Procedure ⇐391, 416

Administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by agency to suit its own purposes, and agency must be held to those regulations without compelling ground for not following them.

J. Francis Valerga, Salt Lake City, for Callahan.

Anthony L. Rampton of Fabian & Clendenin, Salt Lake City, for Utah Merit System.

Robert B. Hansen, Atty. Gen., James L. Barker, Stephen G. Schwendiman, Asst. Attys. Gen., Salt Lake City, for plaintiff and respondent.

1. The record fails to establish that defendant falls within the statutory protection for merit system employees. Defendant was director of an agency within the Department of Community Affairs, yet his duties were not sufficiently set forth to allow a determination, nor were any facts presented to establish, whether he may be exempt under Utah Code Ann. § 67-13-6(a)(4) (1953), as amended. If such exemption exists in this case, there was no showing that the administrative hearing process before

STEWART, Justice:

Defendant William Callahan was terminated as an employee of the Department of Community Affairs. The Utah Merit System Council ordered his reemployment. The State of Utah sought review in a district court which reversed and remanded. The district court directed the Council to hold a new hearing on the ground that three procedural errors had been committed during the hearing before the Merit System Council, i. e., failure to place witnesses under oath, failure to maintain a complete record of the testimony adduced, and exclusion of a party to the action from the proceedings. Callahan now appeals from the district court order setting aside the decision of the Utah Merit Council. Callahan urges on appeal that none of the grounds relied on by the district court justifies a new hearing before the Merit Council.¹

Defendant Callahan was director of the Housing Development Agency in the Department of Community Affairs. The grounds stated for his termination were lack of support for administrative policy, insubordination, inefficiency, disloyalty, and nonfeasance in performance of his duties. Defendant appealed the decision to the Utah Merit System Council. The hearing lasted an entire day and generated a record consisting of a 135-page transcript. Although Beth Jarman, the Director of the Department, was absent from part or all of the proceedings, the deputy director of that department was present during the hearing. The Merit Council found that defendant's performance as an employee of the Department of Community Affairs had been "for

the Merit Council was still available to defendant. At the time of defendant's hearings before the Merit Council (October 30, 1978, and December 12, 1978) Utah Code Ann. §§ 67-13-1 to 67-13-15 (1953), as amended, was the applicable law. The Merit System Act contained therein has been repealed and superseded by the Utah State Personnel Management Act, Utah Code Ann. §§ 67-19-1 to 67-19-29 (1953), as amended, which became effective July 1, 1979.

the most part, of a very high quality," and that the "immediate cause of his termination appears to be more of a personality conflict between the appellant and his immediate supervisor than with his job performance." Finding the reasons asserted for the dismissal not adequately supported by the evidence, the Merit Council unanimously ordered the defendant to be reinstated. The State filed a petition in the district court pursuant to Rule 65B,² Utah Rules of Civil Procedure, to review the Merit Council order.

[1] On this appeal defendant contends the district court erred in holding that the three above-mentioned procedural defects in the administrative hearing constituted reversible error. The first contention is that the lower court erred in ruling that the Merit Council's failure to swear witnesses prior to presenting testimony was prejudicial error. Clearly both parties to this proceeding were entitled to have the testimony under oath or affirmation. Retention of a job is a legally-protected interest, e. g., *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and loss of a job should not be countenanced on the basis of statements made by fellow employees not under oath. On the other hand, the State also has a legitimate interest in the integrity of a proceeding to determine job retention. The public service is indeed a public trust, and retention of unfit public employees is inimical to the public interest. At the least a witness who testifies under oath is likely to be more deliberate and careful in the statements he makes because of the knowledge that an unbridled tongue may lead to legal sanctions. Both the State and the employee are therefore entitled to have witnesses placed under oath in a retention proceeding.

[2] At the first administrative hearing, plaintiff inquired whether there was a procedure for swearing in the witnesses. Plaintiff did not object to the failure to

administer an oath and simply responded to the negative response by calling his first witness. The first time the objection was raised was on review in the district court. Because no timely objection was made in the administrative hearing, the matter was not appropriately raised before the district court. Cf. Rule 46, Utah Rules of Civil Procedure. *Sanders v. Cassity*, Utah, 586 P.2d 423 (1978); *Steele v. Wilkinson*, 10 Utah 2d 159, 349 P.2d 1117 (1966); *Pettin-gill v. Perkins*, 2 Utah 2d 266, 272 P.2d 185 (1954). See *Wilcoxon v. United States*, 231 F.2d 384 (10th Cir. 1956), specifically holding that the requirement of an oath is waived by the absence of a timely objection. Therefore the Merit Council proceedings were not defective for failing to administer the oath.

[3] The district court also reversed because of an omission in the record of a discussion which occurred prior to the recording of the proceedings. The affidavit of the executive secretary of the Merit Council confirms the Merit Council's position that the only matter discussed prior to the recording of the proceedings was whether the hearing should be postponed or should proceed with just a quorum present. The record was also considered deficient by the State due to the loss of the record of the testimony of Lois Strand, which apparently resulted from a tape recorder malfunctioning. Two affidavits, one by Lois Strand, the witness whose testimony was not recorded, and the other by counsel for the State, summarized the testimony. These corrections sufficiently cured the defect in this case in view of the fact that no claim is made that the affidavits are in error on any material issue. *Waterman v. State*, 35 Misc.2d 954, 232 N.Y.S.2d 22 (1962).

Finally, the district court held that the exclusion of a witness, Beth Jarman, the Director of the State agency, from a portion of the administrative hearing was reversible error. We agree. Exclusion of

2. The appropriateness of challenging the Merit System Council's order by extraordinary writ in the district court was not raised in this case.

The issue was not presented to this Court and therefore is not addressed in this decision.

witnesses is a practice designed to prevent a person's testimony from being influenced by the testimony given by other witnesses. *Taylor v. United States*, 388 F.2d 786 (9th Cir. 1967). The time-honored practice in judicial proceedings is codified in Rule 43(f), U.R.C.P., providing:

Upon motion of either party, the court shall exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witnesses.³

[4] Statutes in a number of jurisdictions establish the right of a party to an action to remain in attendance during the entire trial.⁴ Our rule is silent on that issue. In some cases there may be reason to differentiate between administrative and judicial proceedings, but in this case we hold that the State's personal representative was not subject to exclusion.⁵ Cf. 6 *Wigmore on Evidence* § 1841 (Chadbourn rev. ed. 1976); 75 Am.Jur.2d *Trial* § 62 (1974). This conclusion is based on the proposition that a party's presence at the proceedings may be essential in assisting in the presentation of its case and otherwise protecting its interests by observing the conduct of the trial.

The necessity of preserving fundamental requirements of procedural fairness in administrative hearings was stated in *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431 (1913):

The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U.S. 25, [24 S.Ct. 563, 48 L.Ed. 860]. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential

rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding

[5] We recognize that administrative hearings need not have all the formality of judicial procedure and that the degree of formality may depend on the nature of the administrative proceeding. We also recognize that the person excluded was a representative of the State. Because governmental entities and private citizens are not on an equal footing as to constitutional prohibitions and because an arm of the State is involved herein, the constitutional requirements of due process do not apply to the State as they would to a private citizen. Yet in this case, the State, in accordance with the Merit Council procedural rules and because of the nature of the case involved, should also be allowed to have its representative in attendance at the Council hearing in order to present, or assist in presenting, the State's case in chief and rebuttal evidence, and to conduct or assist in conducting cross-examination to assure an accurate and complete disclosure of the facts. See *Entre Nous Club v. Toronto*, 4 Utah 2d 98, 287 P.2d 670 (1955); 2 Am.Jur.2d *Administrative Law* § 397 (1962).

The question of whether the director of the plaintiff agency was actually a party to the proceedings which heard defendant's appeal and thus entitled to be present is answered in the affirmative by the Merit

3. Whereas Rule 43(f) provides mandatory exclusion on motions, U.C.A. § 78-7-4 (1953), as amended, provides the court with a discretionary power to exclude witnesses from hearing testimony of others.

4. Compare, e. g., Tennessee Code § 24-106 (1955); Texas Rules of Civil Procedure, Rule 267; Uniform Rules of Evidence, Rule 615.

5. A party litigant who is also a witness may be requested to testify first. See *Moore v. Chambers*, Miss., 199 So.2d 261 (1967).

System Council's procedural rules. The Merit System Procedures, Article III, § 2, ¶ 2b(3)–2b(3)(d) provide:

(3) At the close of the agency representative's oral statements and the testimony or evidence offered by agency witnesses, *questions may be directed to the representative and each witness by interested parties. Interested Parties* are as follows, and they shall raise questions in the order named and at times called upon by the chairman.

(a) *The agency representative, on the testimony and evidence of agency witnesses; and agency witnesses, on the testimony and evidence of the representative and of each other witness.*

(b) *The appellant, on the testimony and evidence offered by the agency representative and each agency witness.* Questions of the appellant at this point should be aimed at focusing the attention of the Council on what he considers to be weaknesses of the agency's position or on points that he will make later when presenting his case. This is not the proper place for rebuttal or counter arguments.

(c) The Merit System Director, on the testimony and evidence of the agency representative and each agency witness.

(d) Council, on the testimony of and evidence offered by the agency representative and each witness. [Emphasis added.]

Article III, § 2, ¶ 2(c) provides an identical procedure for the opposition:

(c) Presentation of the appellant's case—The procedure here shall be exactly the same as that for presentation of the case of the agency except that the roles of the agency representative and witnesses and those of the appellant and his witnesses shall be reversed.

6. The deputy director's presence could have been sufficient had he been properly designated

[6] No agency representative with full knowledge of the case was present at the proceedings to propose questions. The Council cannot violate its own procedural rules by denying an appropriate agency representative access to the proceedings. See *Gardner v. F.C.C.*, 530 F.2d 1086 (D.C.Cir. 1976); *Palmer v. Weinberger*, 396 F.Supp. 654 (W.D.N.Y.1975); *United States v. RCA Alaska Communications, Inc.*, Alaska, 597 P.2d 489 (1978); and *Moore v. Oregon State Penitentiary Corrections Div.*, 16 Or.App. 536, 519 P.2d 389 (1974). Defendants contend that the procedural rules are merely "guidelines," but administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purposes. Such is the essence of arbitrary and capricious action. Without compelling grounds for not following its rules, an agency must be held to them. See *Bess v. Park*, 144 Cal.App.2d 798, 301 P.2d 978 (1956); *Augustin v. Barnes*, 41 Colo.App. 533, 592 P.2d 9 (1978); *State v. Parham*, Okl., 412 P.2d 142 (1966); and *Lumpkin v. Dept. of Social & Health Services*, 20 Wash.App. 406, 581 P.2d 1060 (1978). The attendance by Deputy Director Grundfossen, an ad hoc representative who directed another arm of the operation and lacked full knowledge of the instant case, was not sufficient to provide the agency with appropriate representation.⁶

The judgment of the trial court is affirmed.

CROCKETT, C. J., and WILKINS, MAUGHAN and HALL, JJ., concur.



by the appropriate party as its representative.