BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| WEST ALLIS-WEST MILWAUKEE EDUCATIONAL ASSOCIATION and MARY ELLEN BYRNE | |
| and | Case 66<br>No. 43672<br>MA-6039 |
| SCHOOL DISTRICT OF WEST ALLIS-WEST MILWAUKEE | |

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, on behalf of the West Allis-West Milwaukee Education Association and Mary Ellen Byrne.

Foley & Lardner, Attorneys at Law, by Mr. Herbert P. Wiedemann, on behalf of the School District of West Allis-West Milwaukee.

## ARBITRATION AWARD

The West Allis-West Milwaukee Education Association hereinafter the Association and the School District of West Allis-West Milwaukee, hereinafter the District, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned was designated to arbitrate in the dispute and a hearing was held before the undersigned on May 8, 1990 in West Allis, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by August 28, 1990. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

## ISSUES

The parties were unable to agree on a statement of the issues. The Association would state the issues as follows:

1. Was the grievance timely filed?

2. Did the District violate Article XV, A., Workers Compensation, of the parties collective bargaining agreement, when it denied the grievant salary continuation for the period of March 11, 1986 through June 8, 1987? If so, what is the appropriate remedy.

The District would state the issues to be decided as being:

> Under the collective bargaining agreement, which is in evidence as Joint Exhibit 1, what disposition should be made of the grievance signed by Mary Ellen Byrne, date of filing January 18, 1990, which is in evidence as Joint Exhibit 2?

The District takes the position that the grievance was not timely filed.

The undersigned concludes that the Association's statement of the issues adequately and more specifically states the issues to be decided.

CONTRACT PROVISIONS

The following provisions are cited from the parties' 1985-1987 Agreement:

ARTICLE XII
GRIEVANCE PROCEDURE

. . .

B. The purpose of this grievance procedure is to provide a method for speedy and final determination of questions involving the interpretation and application of the provisions of this Agreement and to conditions of employment specifically set forth in this Agreement in order to prevent protracted misunderstandings which may arise from time to time concerning such questions. The grievance proceedings shall be kept as informal and confidential as is appropriate at all levels of the procedure.

. . .

D. Steps in Grievance Procedure. Grievances shall be resolved, except as otherwise provided, in accordance with the following procedure. Time limits indicated at each step of the proceedings are directory and every effort shall be made by the parties to comply with such time limits. Such time limits may be extended by mutual agreement of the parties.

Step 1. An aggrieved person shall promptly submit his grievance in writing directly to his principal or supervisor. The grievance shall be discussed by the aggrieved person and his principal or supervisor within three school days thereafter or at such other time as agreed by the parties. The principal or supervisor shall notify the aggrieved person in writing of his disposition of the grievance within three school days after the discussion has concluded.

Step 2. If the aggrieved person is not satisfied with the disposition at Step 1, he may within three school days after receiving the Step 1 disposition request in writing a meeting with the Superintendent or his representative. Such request shall contain the statement of the grievance and the substance of or a copy of the Step 1 disposition. Within five school days after receipt of such written request, or such other period of time as may be agreeable to the parties, the grievance shall be discussed by the parties. Within five school days after the conclusion of such meeting, the Superintendent or his representative shall give written disposition of the grievance to the aggrieved person.

Step 3. If the Association is satisfied with the disposition at Step 2,. the grievance shall be deemed finally resolved by that disposition. If the Association is not satisfied with the disposition at Step 2, it may within fifteen school days after receipt of the written disposition under Step 2 file with the Board a written request for arbitration of the grievance. Such request shall include a complete statement of the grievance and the substance of or a copy of the disposition under Step 2. Within ten days after receipt of such written request, the Board and

> the Association shall attempt to select an arbitrator. If agreement on the selection of an arbitrator cannot be reached within such time, the request for arbitration shall be forwarded by the Board to the Wisconsin Employment Relations Commission for the appointment of a member of its staff as an arbitrator to determine the grievance. The arbitrator, however selected, shall be limited to determining questions arising under this Agreement and shall not have authority to modify or change any of the terms of this Agreement. The decision of the arbitrator, when within the scope of his authority under this Agreement, shall be final and binding upon the Board, the Association and the aggrieved person. The expenses of arbitration shall be shared equally by the Board and the Association but each party shall bear its own expenses of preparation and presentation of its case to the arbitrator.
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> . . .
>
> ARTICLE XV
>
> LEAVE
>
> Except as otherwise herein provided, each teacher shall be entitled to the following leave provisions:
>
> A. Worker's Compensation. Any teacher absent from duty because of injury or disease compensable under the Wisconsin Worker's Compensation Law shall receive full salary from the Board in lieu of the weekly indemnity otherwise due to such teacher under the Worker's Compensation Law, provided, however, that such salary continuation shall continue only during the period of temporary partial or temporary total disability as determined by medical examination. Checks made payable to a teacher for weekly indemnity under the compensation law by any Worker's Compensation Insurance carrier of the Board shall be endorsed by the teacher and turned over to the Board.

BACKGROUND

The Grievant, Mary Ellen Byrne, was employed by the District as a Fifth Grade teacher from 1965 until her employment was terminated on August 3, 1987. The first thirteen years of her employment, Byrne taught at Franklin Elementary, and thereafter at General Mitchell Elementary until she became ill and stopped teaching in 1984.

In December of 1983 Byrne was referred to Dr. Jordan Fink, a specialist in the area of allergies and immunology. Byrne complained of increasing difficulty with shortness of breath, fatigue, loss of her voice, sore throat, loss of balance, coughing, chills, blood-shot eyes, etc., and indicated the symptoms seemed to be worse while at work and to improve when she was not there. Through tests applied to Byrne and cultures grown from organisms collected from the ventilation system at General Mitchell School, Dr. Fink concluded that Byrne's symptoms were caused by her allergy to several species of aspergillus organisms. Byrne finished the 1983-1984 school year and returned for the 1984-1985 school year in August of 1984. Byrne continued to complain of the symptoms and indicated her condition improved somewhat on the weekends. In January of 1985, Dr. Fink concluded after "challenging" Byrne with organisms taken from her work environment that those aspergillus organisms were causing her problems and that she would be risking serious injury to her respiratory system if she returned to her classroom. He indicated all of this in his letter of January 8, 1985 to the District's Superintendent, Sam Castagna, also indicating that if she were to work elsewhere in the building and experience similar symptoms, she should be removed from that building.

Byrne was off work until February of 1985 and filed a Worker's Compensation claim alleging her medical problems were caused by her work environment in the District. Byrne had returned to work in a different school in February, but experienced the same symptoms after a few days. Effective

February 21, 1985 Byrne was placed on medical leave status due to her respiratory problems and she did not return to work in the District from that time forward.

The District's Worker's Compensation carrier, Employers Insurance of Wausau, herein Employers, admitted liability for temporary total disability for Byrne for the period December 6, 1984 through March 10, 1986 and made Worker's Compensation benefit payments to her for that period, as well as paying medical expenses on her Worker's Compensation claim.

Byrne also claimed temporary total disability and permanent partial disability benefits for a period after March 11, 1986, but Employers took the position she was not entitled to benefits for any period after that date and contested her entire claim, including causation between her employment setting and her alleged medical condition, her disability and liability for medical expenses. Byrne continued to pursue her Worker's Compensation claim for the period of March 11, 1986 - June 8, 1987.

By letter of December 2, 1986, the District's Superintendent, Castagna, notified Byrne the District was contemplating her dismissal for the following reasons:

> (1) You are either able to work as a teacher, in which case you are absent without justification, or
>
> (2) You are prevented from working as a teacher by a physical condition that will continue for at least the next several years and may be indefinite, in which case you are no longer available for employment by the District.

Castagna's letter also advised Byrne that she had a right to a hearing before the District's Board of Education upon written request and to be represented by counsel. Byrne requested a hearing and a hearing was held before the Board on May 7, 1987. By letter of August 4, 1987, Castagna notified Byrne that the Board had voted on August 3, 1987 to dismiss her from employment with the District.

Prior to hearing before a Worker's Compensation examiner on Byrne's Worker's Compensation claim for the period March 11, 1986 - June 8, 1987, Byrne's attorney, Gillick, and Employers' attorney, Stilp, entered into settlement discussions which resulted in a tentative oral agreement reached over the telephone. Stilp drafted the following compromise agreement dated November 17, 1988 to reflect his understanding of the oral agreement and sent it to Gillick for his review, which draft read, in relevant part, as follows:

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
WORKER'S COMPENSATION DIVISION

MARY ELLEN BYRNE, Employee

SCHOOL DISTRICT OF WEST
ALLIS/WEST MILWAUKEE, Employer LIMITED COMPROMISE AGREEMENT
Dept. No.: 85-11326

EMPLOYERS INSURANCE OF
WAUSAU, Insurance Carrier

That it is undisputed that the applicant was employed by the respondent employer, that she earned a weekly wage of maximum; that the date of injury or alleged injury is September 27, 1984; that the applicant's date of birth is January 16, 1943; that compensation heretofore paid is $19,113.34.

That the conceded disability is: none. Compensation previously paid in the amount of $19,113.34 is now asserted to have been paid under mistake of fact. Respondents do not concede causation, liability or disability in this case.

That there is a bona fide dispute between the parties as to whether the applicant sustained an injury or disease arising out of or in the course of her employment and, if so, the nature and extent of disability as a result thereof.

Therefore, the parties subject to the approval of the Department of Industry, Labor and Human Relations agree to a compromise settlement as follows: Employers Insurance of Wausau, on behalf of itself and School District of West allis/West Milwaukee agrees to pay to the applicant and her attorney the total sum of $25,000.00.

This compromise settlement is limited only in the sense that it shall not prevent the applicant from making future claim for medical expenses related to the alleged occupational condition. In all other respects it is a full settlement of any and all liability the respondent employer, its agents and servants or employees and/or its insurance carrier, its agent, servants or employees may have, including but not limited to Chapter 102 of the Wisconsin Statutes, 102.43(5), 102.46, 102.47, 102.48, 102.49, 102.50, 102.57, 102.58, 102.60 and 102.61.

The employee has the right to petition the Department of Industry, Labor and Human Relations to set aside or modify this Limited Compromise Agreement within one year of its approval by the Department. The Department may set aside or modify the Limited Compromise Agreement. The right to request the Department to set aside or modify the Limited Compromise Agreement does not guarantee that the compromise will, in fact, be reopened.

(page 2)

That incorporated herewith as part of this Limited Compromise Agreement are the medical reports as follows: reports of Jordan N. Fink, M.D. dated February 10, 1984, January 23, 1985, January 30, 1985, January 31, 1985, February 26, 1985, March 12, 1985, March 28, 1985 to Fred Ewig, March 28, 1985 to Attorney Gillick, May 20, 1985, October 10, 1985, November 20, 1985, February 27, 1986, March 11, 1986, January 27, 1987, February 10, 1987, July 15, 1987, and October 27, 1988; reports of Stuart A. Levy, M.D. dated September 3, 1985 and February 13, 1986; report of Thomas L. Sieger, environmental epidemiologist dated January 23, 1986; reports of Leslie H. Goldsmith, Ph.D. dated April 8, 1986, May 6, 1986, July 4, 1986 and November 10, 1988.

Gillick responded to Stilp's draft with the following letter of December 1, 1988, which read, in relevant part, as follows:

> Dear Tom:
>
> After discussing the case with Mary Ellen Byrne I have had to make some changes. You will note that I have added a sentence to the fourth paragraph and I have added a paragraph which is the second full paragraph of page 2 of the compromise. I would appreciate it if you would review those and if those are acceptable to you I would appreciate it if you would sign that and return it to me in the enclosed self-addressed stamped envelope. These things are done solely in order to preserve Mary Ellen Byrne's rights with respect to the action that she has pending though Art Heitzer. We do not intend to settle that action in this case and I'm

> sure that that was not within your contemplation either. If that's acceptable, please sign it and return it to me in the enclosed self-addressed stamped envelope and I will attach all of the documents that you gave me and send it on to the department. If there are any problems please call as soon as possible.
>
> Very truly yours,
>
> GILLICK, MURPHY, GILLICK & WICHT
>
> Michael H. Gillick /s/

Enclosed with Gillick's letter was his draft of the compromise agreement which differed from Stilp's by the addition of the following sentence to the end of the fourth paragraph on Page 1:

> This amount is being paid in part in contemplation of a period of TTD from 3/25/86 - 10/1/87.

the insertion of the following paragraph on page 1:

> The amount of 20% should be reimbursed directly to Gillick, Murphy, Gillick and Wicht for costs in the above case.

and the addition of the following paragraph on page 2:

> Acceptance of this settlement is not an admission by Mary Ellen Byrne that she was unable to work at any other employer, nor at the West Allis/West Milwaukee School District with reasonable accommodation. Nor does this constitute any waiver of her rights other than under Chapter 102, Wis. Stats., such as claims for reinstatement or for contractual benefits.

Stilp responded to Gillick's draft by the following letter of December 28, 1988, which read, in relevant part, as follows:

> Dear Mike:
>
> I have reviewed your letter of December 1, 1988, as well as the redrafted Limited Compromise Agreement.
>
> In your letter you state you have made the changes solely to preserve your client's rights with respect to the action she has pending though Art Heitzer. Obviously, I had no intention of in any way interfering with whatever rights she may have in pursuing that claim. I do not, therefore, have any objection to the insertion of the second paragraph on page two of the Compromise Agreement. I believe your language should adequately protect any other claim she may have pending.
>
> I cannot agree, however, to the insertion of the last sentence to the fourth paragraph of the first page of the Compromise Agreement. I fail to see how that in any way addresses the concern of preserving the rights she has in the litigation pending with Art Heitzer. Furthermore, in paragraph three of the Compromise Agreement, we have denied any and all liability regarding both causation and extent of disability. I do not believe it would be appropriate, therefore, to subsequently delineate a period of disability as that which was contemplated at the time the settlement was made. That was not the sole contemplation and, in fact, the entire claim is in dispute. I have, therefore, deleted the last sentence of paragraph four on the first page.
>
> Assuming you have no objection to the deletion, please forward the Compromise Agreement to the Department for issuance of an Order. If there is a problem and you would like to discuss this further, please let me know.
>
> Thank you.
>
> Thomas P. Stilp

Stilp enclosed with his letter Gillick's draft of the compromise agreement, with the last sentence of paragraph four on page 1 deleted. The settlement negotiations broke down at that point over the inclusion/deletion of that sentence and a hearing before a Worker's Compensation examiner was ultimately

scheduled for September 20, 1989 on all the issues of Byrne's Worker's Compensation claim.

On September 20, 1989, prior to the start of the hearing, Gillick advised Stilp that Byrne was willing to accept the amount discussed and would no longer insist on the inclusion of language similar to that which he had proposed as the last sentence of paragraph four of page 1 of the compromise agreement. The Limited Compromise Agreement was then reached on Byrne's Worker's Compensation claim. The Worker's Compensation examiner then went on the record and stated the background of the matter, had the attorneys state their respective positions on the issues and then stated in a general manner the terms of the Limited Compromise Agreement. Byrne was then called to the stand and examined by the Worker's Compensation examiner and the attorneys to make clear that she knew and understood the terms of the Agreement and accepted them. Byrne indicated she understood and accepted those terms. The Worker's Compensation examiner then issued an order requiring payment pursuant to the Limited Compromise Agreement within ten days of the order and Byrne received a check for $19,625 from Employers on October 4, 1989 and a check was sent to Attorney Gillick for $5,375 for attorneys fees.

By letter of November 7, 1989 to Castagna, Schwellinger advised the District that Byrne was claiming the difference between her full salary for the period March 11, 1986 through June 8, 1987 and the amount she received under the Compromise Agreement, pursuant to Article XV, A of the parties' Collective Bargaining Agreement, and asked for the District to respond. By letter of November 13, 1989, the District's labor counsel, Attorney Wiedemann, responded to Schwellinger's letter stating that no temporary disability had been established for the period in question and that Byrne was not entitled to additional salary from the District. By letter of November 24, 1989 to Castagna, Schwellinger confirmed her telephone conversation with Castagna on November 21, 1989, wherein he had indicated Wiedemann's letter constituted the District's response, and also requested a sixty day extension of the time line for filing an initial grievance on the matter. By letter of December 5, 1989, Wiedemann advised Schwellinger that her request for a sixty day extension running from November 21st was agreeable, but that the District was not waiving its right to contest the timeliness of such a grievance based on the passage of time prior to November 21, 1989. The instant grievance was filed on January 18, 1990 where it was processed through the steps of the parties' contractual grievance procedure and ultimately to arbitration before the undersigned.

POSITIONS OF THE PARTIES

ASSOCIATION

With regard to the issue of timeliness, the Association takes the position that the grievance was timely filed. The Association asserts that the date the grievance arose was November 13, 1989 when Byrne received the District's denial for full payment of her salary under Article XV after she had received payment under the Limited Compromise Agreement reached on September 20, 1989. By letter of November 24, 1989, Schwellinger requested a sixty day extension of the time for filing a grievance. That request was granted by the District running from the date of November 21, 1989, and the grievance was filed on January 18, 1990, well within the sixty day extension. The grievance was then timely processed through the steps to arbitration.

As to the substantive issue, the Association takes the position that the District violated Article XV, Section A, of the 1985-1987 Agreement when it denied Byrne full salary for the period March 11, 1986 through June 8, 1987. In support of its position, the Association first argues that the wording of the provision does not specifically require that an employe must obtain a formal finding by the Department of Industry, Labor and Human Relations (DILHR) that his/her injury is job-related before the co-payment provision becomes operative. The provision does not preclude monetary settlements for Worker's Compensation claims that are otherwise compensable under Worker's Compensation laws, especially where, as here, the settlement amount exceeds the amount of temporary total disability (TTD) payments in dispute. The Association contends that failure to consider the settlement as compensation under the Worker's Compensation law for the purposes of Article XV, A would lead to harsh and absurd results, such as higher attorney fees for the employe and lengthy delays with no additional Worker's Compensation benefits for the employe, and would encourage unfair collusion between the employer and its Worker's Compensation carrier. Hence, the District's interpretation should be rejected.

The Association also contends that the lump sum settlement payment is compensation under the Worker's Compensation law because it must be approved by DILHR. The provision was intended to pay full salary to employes whose injuries are compensable under Worker's Compensation law. Approval and issuance of the Limited Compromise Agreement in this case by the Worker's Compensation Division of DILHR should be recognized as "an administrative act, agreed to by the parties, which provided compensation under the worker's compensation law ...." Thus, Article XV, A, should apply to the settlement.

Secondly, the Association contends that Article XV, A provides that "salary continuation shall continue only during the period of temporary partial or temporary total disability as determined by medical examination" (Emphasis added) It is asserted that the only medical evidence in this case supports Byrne's claim. The Association cites Dr. Fink's testimony and reports and the report of Dr. Levy, whose examination of Byrne was requested by Employers. The Association asserts that Dr. Levy's report corroborates Dr. Finks' report and conclusions. It further asserts that the District's contention that the medical evidence is irrelevant since there is no formal finding by Worker's Compensation, places form over substance and is not supported by the language of the provision. The provision requires only that the employe absent due to injury or disease must provide medical evidence to support the claim, and Byrne has satisfied that requirement. While the contract does not require the Worker's Compensation Division to approve or disapprove the medical examination, it implicitly did so in approving the Limited Compromise Agreement. If the parties desired a more specific role of the Worker's Compensation Division in this regard, they would have specified this in the provision, but did not, and the Arbitrator should not read such a provision into the Agreement.

Third, the Association contends that if the medical examination supports a finding of a job-related temporary partial or temporary total disability, the District agrees to pay the employe full salary, less the indemnity from the Worker's Compensation carrier, for the period of disability. The District is protected against false claims by the requirement of the medical examination, and now the District is attempting to elude its obligation in the face of the medical examination. The Association contends that the District may not rely on Schwellinger's letter of January 6, 1988 where she stated that the Association's intent was to enforce Byrne's claim under Article XV for the period in question if the Worker's Compensation Division determined that Byrne was in a period of TTD during that time period. It is contended that Schwellinger was not offering an interpretation of Article XV, rather, she was giving the District notice that the Association was not waiving Byrne's right to insist on full salary if the Worker's Compensation hearing was favorable to her. The possibility of a Limited Compromise Agreement was not contemplated by Schwellinger when she wrote the letter.

Lastly, the Association contends that the District's attempt to use the bargaining history of the Limited Compromise Agreement to show the settlement amount was not related to the period of TTD is unpersuasive. It is asserted that deletion of the proposed last sentence of paragraph four by Stilp occurred after he conferred with District's labor counsel, and the amount of the

settlement was not altered by the eventual agreement to not include the sentence. Acceptance of the settlement without the sentence did not constitute a waiver by Byrne. She received the same amount in the settlement that she would have received had she prevailed on her Worker's Compensation claim. Further, the Limited Compromise Agreement expressly contained a provision that acceptance only relinquished further claims under Ch. 102, Stats. and a provision expressly stating she did not waive her rights" other than under Ch. 102, such as claims for reinstatement or for contractual benefits." Thus, Byrne preserved her right to pursue her state and federal handicap discrimination claims and to enforce her rights under the parties' collective bargaining agreement.

DISTRICT

The District asserts as to timeliness that the grievance was not timely filed and should be denied on that basis. In support of its position the District cites the parties' contractual grievance procedure as providing that all complaints arising under the Agreement should be filed expeditiously. Specifically, Step 1 of Section D, requires that a grievance be submitted "promptly." The District asserts that while the term "promptly" is not defined, it is as much a time limit as a specific number of days, the only difference being that it is open to interpretation. It is contended that by letter of December 2, 1986, Castagna advised Schwellinger and Byrne that the District did not consider her to be in a period of temporary disability after March 10, 1986 and that, therefore, the District owed her no additional salary continuation under Article XV, A. Thus, both Byrne and the Association were put on notice of the District's denial more than three years before the grievance was filed. The District contends that if the Association argues that the time should not start to run until a determination was made in a Worker's Compensation proceeding, it is trying to have it both ways. That argument might be valid if the Association agreed with the District's interpretation of Article XV, A; however, if as the Association asserts, Byrne's right to salary continuation may be independently established by medical evidence in arbitration, the grievance was filed three years late. In the alternative, the District contends that if the District's salary obligation is dependent upon a determination in a Worker's Compensation proceeding, as it argues, the grievance is still late, albeit by months instead of years. The Compromise Agreement was reached on September 20, 1989 and the Association did not request on extension of time for filing a grievance until November 21, 1989, and two months is not to be considered "promptly." This is true since the Association was put on notice in a prior arbitration involving Byrne that four months delay in filing a grievance would not be construed in the future as meeting the requirement that it be filed "promptly." The Association was therefore forewarned.

With regard to the merits, the District takes the position it did not violate Article XV, A. In support of its position, the District contends that Article XV, A sets three conditions that must be met before the District is obligated to make salary payments under that provision:

(1) it must be established that there was an injury or disease compensable under Wisconsin law;

(2) there must be a weekly indemnity otherwise due under Wisconsin law; and

(3) checks made payable for the weekly indemnity must be endorsed over to the District.

The District contends that these conditions can only be met by the District's Worker's Compensation carrier conceding liability for a weekly indemnity in response to a Worker's Compensation claim having been filed or by a decision by the Worker's Compensation Division of DILHR that liability for a weekly indemnity has been proved. Citing, Secs. 102.16, 102.17, and 102.18, Stats. The District argues that the administrative procedure is exclusive and that there is no provision in the Worker's Compensation Act for such a determination to be made elsewhere. Thus, the District's obligation to make salary payments under Article XV, A, is derivative and depends on what happens with regard to the Worker's Compensation claim.

It is asserted that where, as is the case here, there is no concession by the Worker's Compensation carrier and no finding of liability by the Worker's Compensation Division, the District does not owe the salary and the claim cannot be relitigated in another forum. In this case there was instead a compromise reached whereby Employers agreed to pay Byrne a lump sum and nobody admitted to anything. It is asserted that, therefore, the Association cannot meet any of the three conditions for receiving salary payment under Article XV, A.

The District also contends that a review of the negotiations between Byrne's attorney, Gillick and Employer's attorney, Stilp, that eventually resulted in the compromise, establishes that Byrne was aware that the three conditions were not met. The draft from Stilp recited that a bona fide dispute existed as to both causation and liability. Gillick's counter made two changes solely to preserve Byrne's rights in the action she had pending with another

attorney, and one of the changes was the additional sentence to paragraph four which would state that the amount was being paid partially "in contemplation of a period of TTD from 3/25/86 - 10/1/87." Stilp replied that such a change was not agreeable, especially in light of Employer's denial of liability, causation and extent of disability set forth in the draft. The negotiations broke down on the issue of whether or not the sentence would be added, and it was the day of the hearing that Gillick advised Stilp that Byrne would agree to the amount without the inclusion of such language. The Worker's Compensation examiner opened the hearing and affirmed the compromise agreement and noted the existence of a bona fide dispute on the issue of liability and causation. Byrne was questioned on the record as to whether she understood the terms of the settlement and accepted the settlement and Byrne responded in the affirmative.

DISCUSSION

Timeliness

The record indicates that the District's Worker's Compensation carrier, Employers, conceded liability under Worker's Compensation for a certain period ending March 10, 1986. Employers disputed liability, causation and extent of disability for the period of claimed TTD following March 10, 1986, and by Castagna's letter of December 2, 1986 the District put Byrne on notice that on that basis the District did not owe her salary continuation payments under Article XV, A for the post-March 10, 1986 period. Byrne's Worker's Compensation claim for that period was contested by Employers and when negotiations for a compromise agreement broke down, the matter was set for hearing before a Worker's Compensation examiner. Since Employers did not concede liability for Byrne's Worker's Compensation claim, the issue of whether Byrne was entitled to Worker's Compensation benefits for the period in question would have to be determined by the Worker's Compensation Division. The Arbitrator does not read the District to assert that it would not have owed salary continuation benefits under Article XV, A, even if the Worker's Compensation Division ultimately held that Byrnes had a compensable claim, rather, it asserts that absent concession of liability by the carrier, such a determination was the only way in which the District would be obligated under that provision. Hence, it would not be until Byrne's disputed claim was resolved that either the District or Byrne would know whether Byrne was entitled to the salary continuation payments under Article XV, A.

It was not until the Limited Compromise Agreement was reached on September 20, 1989 and the Order issued on September 27, 1990 that Byrne's Worker's Compensation claim was resolved. Byrne subsequently received a check for payment under the compromise agreement from Employers and on November 7, 1989, Schwellinger sent Castagna a letter stating that it was Byrne's position that she was entitled to the salary benefits under Article XV, A and asked that the District respond. The District's response came by letter of November 13, 1989 from Wiedemann to Schwellinger wherein he indicated it was the District's position that Byrne was not entitled to benefits under Article XV, A. On November 21, 1989, Schwellinger orally requested a sixty day extension for filing a grievance, which request she confirmed in writing on November 24, 1989. Her request was granted by the District per Wiedemann's letter of December 5, 1989 and the grievance was ultimately filed on January 18, 1990, within the sixty day extension.

Given the agreed upon sixty day extension for filing a grievance, the Arbitrator finds that once Byrne's disputed Worker's Compensation claim was resolved and she and the Association were informed of the District's position with regard to her claim for salary under Article XV, A, the Association "promptly" filed a grievance on Byrne's behalf. Thus, the grievance is held to have been timely filed.

Merits

The Association's arguments are clever and, at first blush, appear persuasive; however, in order to prevail the Association has to establish that Byrne was absent from work for the period in question due to "injury or disease compensable under the Wisconsin Worker's Compensation Law . . . . . " The Association has contended that the lump sum payment made to Byrne under the Limited Compromise Agreement approved by the Worker's Compensation examiner constituted compensation received under the Worker's Compensation law and established for purposes of Article XV, A, that her injury or disease was compensable under the Worker's Compensation law. The Arbitrator is not convinced that is so for the following reasons.

First, as the District argues, there are only two methods by which the employe's injury or disease can be determined to be compensable under the Worker's Compensation law: (1) a determination by the Worker's Compensation Division; or (2) the employer's Worker's Compensation insurance carrier concedes that point. Absent a determination by the Worker's Compensation Division or concession by the carrier, there is only the opinion of individuals on each side of the issue. The fact that the payment was made under the compromise agreement reached by Byrne and Employers does not by itself establish that her injury was compensable under Worker's Compensation law.

That is not to say that a compromise agreement could not establish that fact, obviously it could where the carrier conceded liability in the terms of the agreement. That is not the case here; however, since the compromise agreement contained an express denial of liability by Employers. Also, Byrne's attorney had proposed the addition of the sentence that indicated the settlement amount "is being paid in part in contemplation of a period of TTD from March 25, 1986 - October 1, 1987." Employers would not agree to inclusion of that wording and ultimately the compromise agreement was reached without such a statement being included in it. While Byrne's agreeing to the compromise agreement without such a statement does not constitute a waiver on her part of any contractual rights she might have, it does support the conclusion that there was no concession by Employers, even tacitly, that Byrne had a compensable injury or disease. Moreover, under questioning by her attorney at the hearing before the Worker's Compensation examiner on September 20, 1989, Byrne indicated that she understood that the compromise agreement made no statement with respect to any collateral contract issues between herself and the District and that she was willing to accept the agreement. (Association Exhibit No. 10, pp. 9-10).

The conclusion that Employers did not concede that Byrne's injury or disease was compensable under Worker's Compensation law, and that approval of the Compromise Agreement by the Worker's Compensation Division does not in some manner constitute a determination by that agency that Byrne's condition was compensable, is further supported by the following statement of the Worker's Compensation examiner taken from the transcript of the hearing on September 20, 1989:

> The parties have appeared here today and have agreed to enter into a compromise on the record.
>
> It should be noted that to date the insurance carrier has paid TTD for the intermittent period to March 11, 1986, in the total amount of $19,3l3.34, however, the insurance carrier contends that these payments were made by mistake of fact.
>
> I have reviewed the Department's file and the exhibits received here today, and they show there is a bonefied (sic) dispute on the issue of whether the applicant sustained an occupational lung disease arising out of her employment while performing services growing out of and incidental to her employment with a date of injury of September 27, 1984, and the nature and extent of disability.
>
> (Association Exhibit No. 10, p. 4)

The above statement also establishes that, contrary to the Association's assertion, approval of the compromise agreement by the Worker's Compensation Division is not an implicit approval of Byrne's medical examinations as establishing a period of TTD. The compromise agreement was merely the settlement of a dispute confirmed on the record by the Worker's Compensation Division, and did not reflect or establish that Byrne in fact had a compensable injury or disease.

The Association has noted potential problems that could result if a compromise agreement is not found to establish that the employe has a compensable injury or disease under Worker's Compensation law, which problems for the most part are based on the premise that there would be collusion on the part of the District and its Worker's Compensation carrier. The Arbitrator is unwilling to presume that the District will act in bad faith in the future, and whether the Worker's Compensation carrier will concede liability for a certain period and to what extent, and the impact if such a concession is included or not in the compromise agreement, are matters to be considered by both sides in negotiating the terms of such an agreement.

The bottom line is that Article XV, A, of the parties' Agreement requires a determination that the injury is compensable under Wisconsin Worker's Compensation law, either by way of a decision by the Worker's Compensation Division or by the employer's Worker's Compensation carrier conceding the point. In this case there was neither for the period in question and, therefore, Byrne's situation did not meet the first requirement of the provision. Hence, it is concluded that the District did not violate Article XV, A, when it refused to pay her the salary continuation benefit under that provision for the period March 11, 1986 - June 8, 1987.

On the basis of the above and foregoing, the evidence and the arguments of the parties, the Arbitrator makes and issues the following

AWARD

1. The grievance is timely.

2. The grievance is denied.

Dated at Madison, Wisconsin this 20th day of December, 1990.

By _____
David E. Shaw, Arbitrator

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