

1987

Jay Rekward v. Industrial Commission of Utah, Howard Foley Company, Travelers Insurance, and Second Injury Fund : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Rekward v. Industrial Commission*, No. 870371 (Utah Court of Appeals, 1987).

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DOCKET NO. 870371-CA IN THE UTAH COURT OF APPEALS

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JAY REKWARD,	:	
	:	
Plaintiff/Appellant	:	BRIEF OF RESPONDENTS
	:	TRAVELERS AND HOWARD
vs.	:	FOLEY CO.
	:	
INDUSTRIAL COMMISSION OF UTAH,	:	
HOWARD FOLEY COMPANY, TRAVELERS	:	
INSURANCE, and SECOND INJURY	:	
FUND,	:	
	:	Case No. 870371-CA
Defendants/Respondents.	:	

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This is a petition for review of an Order of the
Industrial Commission, the Honorable Timothy Allen,
Administrative Law Judge. Category 6 Appeal.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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JAY REKWARD,	:	
Plaintiff/Appellant	:	BRIEF OF RESPONDENTS
vs.	:	TRAVELERS AND HOWARD
	:	FOLEY CO.
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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
DETERMINATIVE STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENTS	4
ARGUMENT	5
I. PLAINTIFF IS NOT ENTITLED TO TEMPORARY TOTAL BENEFITS PAST THE DATE OF MEDICAL STABILIZATION	
A. Utah Law Is Clear that Plaintiff Is Not Entitled to Temporary Benefits Once He Became Eligible for Permanent Benefits	5
B. Other Authorities Agree with Utah's Analysis	8
C. Plaintiff Fails to Show Contrary Utah Authority Or To Distinguish Controlling Utah Decisions	9
II. THE INDUSTRIAL COMMISSION'S FINDING AS TO THE EXTENT OF PLAINTIFF'S PERMANENT PARTIAL DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND MAY NOT BE DISPLACED	12
III. PLAINTIFF IS NOT ENTITLED TO ANOTHER HEARING IN THIS CASE	15
A. Plaintiff Failed To Raise This Issue Below and Cannot Raise It for the First Time on Appeal	15
B. Such a Hearing Is Permissive, Not Mandatory, and the ALJ's Failure to Order Such a Hearing Without a Request from any Party Cannot Be Error	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<u>Booms v. Rapp Construction Co.,</u> 720 P.2d 1363 (Utah 1986)	4, 5, 6, 7, 8, 10, 11, 18
<u>Entwistle Co. v. Wilkins,</u> 626 P.2d 495 (Utah 1981)	6, 12
<u>Franklin Financial v. New Empire Development Co.,</u> 659 P.2d 1040 (Utah 1983)	16
<u>Intermountain Health Care, Inc. v. Ortega,</u> 562 P.2d 617 (Utah 1977)	10
<u>Johnson v. Harsco/Heckett,</u> 737 P.2d 986 (Utah 1987)	6, 7, 10
<u>Lane v. Messer,</u> 731 P.2d 488 (Utah 1986)	16
<u>Lewis v. Anaconda Company,</u> 168 Mont. 463, 543 P.2d 1339 (1975)	16
<u>Moore v. American Coal Company,</u> 737 P.2d 989 (Utah 1987)	17
<u>Rushton v. Gelco Express,</u> 732 P.2d 109 (Utah 1986) ...	13, 14
<u>Smith v. Workers Compensation Appeal Board,</u> 40 Pa. Commw. 117, 396 A.2d 905 (1979)	16

Statutes

UTAH CODE ANN. § 35-1-1, <u>et seq.</u> (1953, as amended)	1
UTAH CODE ANN. § 35-1-65 (1983)	1
UTAH CODE ANN. § 35-1-66 (1983)	11
UTAH CODE ANN. § 35-1-67 (1983)	11
UTAH CODE ANN. § 35-1-77 (1982)	17, 18
UTAH CODE ANN. § 35-1-82.51 (1965)	1, 18

Miscellaneous Authorities

2 Larson, <u>The Law of Workmen's Compensation,</u> § 57.12(b) (1983)	8, 9
3 Larson, <u>The Law of Workmen's Compensation,</u> § 77A.83 (1987)	16

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

Jurisdiction is proper in this Court pursuant to UTAH CODE ANN. § 78-2a-3(2)(a) (1987). This action is a petition for review of the Order of the Industrial Commission regarding Appellant's (hereafter "Plaintiff's") application for benefits due under the Utah Worker's Compensation Act, UTAH CODE ANN. § 35-1-1, et seq. (1953, as amended).

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether Plaintiff is entitled to receive temporary total disability benefits after reaching medical stabilization.

II. Whether the Industrial Commission's determination of the extent of Plaintiff's permanent partial disability was made without the support of substantial evidence.

III. Whether Plaintiff is entitled to a hearing regarding the medical panel's report when he failed to request one or to raise the issue below.

DETERMINATIVE STATUTORY PROVISIONS

UTAH CODE ANN. § 35-1-65 (1981), set out in full in the Addendum.

UTAH CODE ANN. § 35-1-77 (1982), set out in full in the Addendum.

UTAH CODE ANN. § 35-1-82.51 (1965), set out in full in the Addendum.

STATEMENT OF THE CASE

This case is brought on a petition for review of an Order of the Industrial Commission of Utah, Workers' Compensation Division. Plaintiff suffered an industrial accident on August 17, 1983, while employed by Howard Foley Company. (R. 229-230). He suffered lacerations to the back of his head, injured his neck, and was bruised when the backhoe he was operating fell over and rolled down the slope on which he was working. (R. 230). On August 10, 1986, Plaintiff signed an application for hearing seeking a determination of continuing temporary total disability, a referral to the Division of Vocational Rehabilitation, and a determination of his permanent partial disability. (R. 6-7). A hearing was held on these issues on December 10, 1986. (R. 25-71). At that time, the medical evidence in the record at pages R. 72-189 was admitted. After the hearing, the matter was referred to a medical panel, whose report is included in the record at R. 207-218, 221-223. The medical panel considered all of the other medical evidence in the record, and the panel concluded that Plaintiff's condition had stabilized as of July 21, 1986, and that his total permanent impairment was 18.5% resulting from the industrial accident and 4.5% resulting from pre-existing impairment. (R. 212, 214-15).

Plaintiff filed an Objection to the Medical Panel Report. (R. 224-227). In it, he objected to three things: the extent of the medical panel's rating for cervical spondylosis, the extent of the impairment rating for the right hand, and the determination that the hearing loss was entirely pre-existing. Most of the

Objection to the Medical Panel Report was directed to this third point. The Administrative Law Judge issued his Findings of Fact, Conclusions of Law and Order, dated May 29, 1987, and found that an industrial accident had indeed occurred and adopted the medical panel's findings as his own regarding the extent of Plaintiff's disability. The Judge also found that stabilization had occurred as of July 21, 1986. (R. 228-235).

Plaintiff filed a Motion for Review, dated June 11, 1987. (R. 236-38). In it, he again complained of the determination of permanent disability relating to the cervical spine injury, indirectly again raised his objection to the determination of a one percent (1%) impairment due to the injury to the right hand, and again raised his claim which was presented and rejected at the hearing that Plaintiff was entitled to temporary total disability payments until he could be retrained. Nowhere in the Motion for Review did Plaintiff argue that he was entitled to a hearing regarding the medical panel's report, or in any way request such a hearing.

The Industrial Commission issued an Order denying Plaintiff's Motion for Review on August 9, 1987. (R. 244-46). In it, the Commission determined that the Administrative Law Judge acted correctly in using the date of stabilization as the date on which temporary total compensation ends, and in adopting the medical panel's findings regarding the extent of the Plaintiff's disability. Plaintiff then filed a Petition for Review to this Court on August 27, 1987, alleging that Plaintiff "is entitled to

a higher impairment rating for his cervical injuries based upon the weight of the credible evidence presented." He further alleges he is entitled to temporary total disability payments until he can be retrained. (R. 248-49).

SUMMARY OF ARGUMENTS

Plaintiff is not entitled to temporary total disability benefits after he reaches medical stabilization. Once an applicant recovers sufficiently to become medically stable, he or she is eligible for permanent disability benefits, but is no longer entitled to temporary total disability benefits. This case is controlled by Booms v. Rapp Construction Co., 720 P.2d 1363 (Utah 1986), and its rule should not be altered.

Plaintiff's permanent partial disability rating is a finding of fact by the Industrial Commission. Plaintiff fails to show how the Industrial Commission's decision was incorrect under the applicable standard of review. The Industrial Commission's determination was supported by substantial evidence, and should not be upset by this Court.

Finally, Plaintiff has no right to a hearing he did not request. This issue was not raised below and should not properly be considered on appeal. Moreover, Plaintiff's failure to request a hearing waived any claim to such a hearing and precludes any error by the Industrial Commission on this issue. The statute permits such hearings but does not mandate them. The Industrial Commission did not wrongfully deny Plaintiff a hearing on the credibility of the medical evidence, he did not even request such

a hearing. The Industrial Commission's failure to act in such a situation cannot be considered error.

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO TEMPORARY TOTAL BENEFITS PAST THE DATE OF MEDICAL STABILIZATION

A. Utah Law Is Clear that Plaintiff Is Not Entitled to Temporary Benefits Once He Becomes Eligible for Permanent Benefits.

Plaintiff's first claim of error is that he is entitled to temporary total disability benefits until he is retrained, since he cannot return to his former employment and is unable to find employment. This claim was directly dealt with by the Utah Supreme Court in Booms v. Rapp Construction Co., 720 P.2d 1363 (Utah 1986). There the Court stated:

The first issue raised on appeal is whether the Industrial Commission can terminate temporary total disability benefits after a finding of medical stabilization without making a finding that the worker is able to return to work.

720 P.2d at 1365. The Court concluded that "the Commission is not required to make findings of ability to work when, as in this case, it makes an award for permanent partial disability." Id. at 1366, n. 2. That is exactly what occurred in this case. The Commission awarded the Plaintiff permanent partial disability benefits and he is seeking continued temporary total benefits after the date of medical stabilization because he claims that he is not able to work. Just as no finding of ability to work is necessary for the Commission to terminate temporary total

benefits, neither is the Commission required to determine that the applicant is adequately trained to return to work before ending temporary total benefits, at least if it awards permanent disability benefits.

The Court in Booms stated that:

(t)he purpose of those (temporary total disability) benefits is to "provide income for an employee during the time of recuperation from his injury and until his condition has stabilized."
. . . Thus, temporary total disability benefits are to continue until the Commission determines that the disability fits into another disability classification or until benefits have been paid for the statutory maximum of 312 weeks.

Id. at 1366 (quoting Entwistle Co. v. Wilkins, 626 P.2d 495 at 497 (Utah 1981)). In this case, the Commission properly determined that the Plaintiff fit into another disability classification, permanent partial disability, and terminated his temporary total benefits.

The Utah Supreme Court reaffirmed Booms' analysis of the structure of the Workers' Compensation Statute in Johnson v. Harsco/Heckett, 737 P.2d 986 (Utah 1987). The Court summarized that structure stating:

Moreover, the result Plaintiff urges is inconsistent with the statutory structure which provides for both temporary and permanent benefits. In this regard, under Utah's workers' compensation statutes, there are four categories of disability, each controlled by a separate statutory provision. The common denominator for compensation under each category is the loss of employability resulting from the injury. Generally, temporary total disability benefits are awarded when an individual suffers a

job-related injury that prevents him or her from returning to work. These benefits continue until the Commission determines that the disability fits into another classification or until benefits have been paid for the statutory minimum of 312 weeks. Determination of the temporary or permanent nature of a disability is typically made when the claimant reaches medical stabilization. Once stabilization has occurred and the claimant moves from temporary to permanent status, "he is no longer eligible for temporary benefits." Therefore to award Plaintiff temporary total disability compensation regardless of the permanent nature of his impairment contravenes the statutory structure which provides for both temporary and permanent benefits.

737 P.2d at 988 (footnotes omitted, quoting Booms, 720 P.2d at 1366). Plaintiff does not dispute that he has reached medical stabilization, neither does he claim that the permanent partial disability award was improper and should not have been given. Instead, he claims that he should not only receive on-going temporary total disability benefits, but that his permanent partial disability benefits should be increased. The Industrial Commission acted properly in finding that Plaintiff had reached medical stabilization and in awarding permanent benefits. Plaintiff is not entitled to continue to receive temporary benefits after he has been transferred to permanent status. Therefore, Plaintiff's claim for additional temporary total benefits must fail.

It should also be pointed out that in this case, Plaintiff is not being penalized for not requesting permanent total disability benefits as intimated in Plaintiff's Brief. He is not eligible for such benefits. A consideration of the

relevant factors in determining permanent total disability shows that Plaintiff fails to meet the standard. He is too little disabled for his age and education level to be permanently totally disabled. Instead, he was awarded permanent partial disability by the Commission. Plaintiff did not allege below and does not claim on appeal that he is entitled to permanent total disability benefits.

B. Other Authorities Agree with Utah's Analysis.

The leading authority in the workers' compensation field agrees with the Utah Supreme Court's analysis. Professor Larson discusses the four-way classification of disabilities which Utah and many other states employ, and states that with regard to temporary total disability awards,

The commonest question is: when does the "healing period" end and "stabilization" occur? The answer to this question determines in most states when temporary benefits cease and when the extent of permanent disability can be appraised, for purposes of making either a permanent partial or a permanent total award.

2 Larson, The Law of Workmen's Compensation, § 57.12(b) (1983). He goes on to state that "the issue may be a purely medical one." Id., § 57.12(c). That is clearly the case in Utah under Booms, which states that "identifying when the healing period has ended does not require a finding of ability to work; stabilization is strictly a medical question." 720 P.2d at 1367.

Professor Larson also addressed the problem Plaintiff complains of in this case--where stabilization occurs but the

claimant is unable to return to work. After criticizing a statutorily compelled result in Minnesota that a claimant is entitled to get temporary total benefits until he finds work, he states:

Once the physical condition is stabilized, the question becomes: is the inability to get work the result of the injury? If it is, the straightforward approach would then be to find the claimant permanently disabled by his residual impairment. If later the claimant gets steady employment, the case can be reopened. In the meantime, the claimant is definitely disabled in the compensation sense, because his physical impairment causes his unemployment; but at the same time the disability cannot accurately be characterized as temporary, since it has become stable and what remains is permanent. By the process of elimination, one comes to a total permanent award, subject of course to reopening.

Id. § 57.12(d). It is clear that Professor Larson would not agree with Plaintiff's attempt to obtain continued temporary benefits after medical stabilization in a state with both temporary and permanent benefits.

C. Plaintiff Fails To Show Contrary Utah Authority Or To Distinguish Controlling Utah Decisions.

The cases cited in Plaintiff's brief are not helpful in determining the issue before the Court and their selection evidences a fundamental misunderstanding of Utah's statutory structure which provides for both temporary and permanent benefits. Plaintiff argues that since he is unable to return to his former occupation, he is entitled under Utah law to temporary total benefits. As support for this proposition, he cites a number of Utah cases, every one of which deals with permanent

total disability, not temporary total disability. The standard of total disability discussed in the cases Plaintiff cites is for an award of permanent total disability. It is not applicable in cases of temporary total disability, due to the different standards used and purposes served by the categories. Booms and Johnson, supra, are controlling law as to when temporary total disability benefits terminate, and they do not permit the award of additional temporary benefits of any kind to Plaintiff in this case since he has been transferred to permanent status.

Plaintiff also asserts that under Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617 (Utah 1977), a claimant is entitled to temporary total benefits "until he is able to return to work." 562 P.2d at 620. This is not controlling law in Utah. Neither Booms (Utah 1986) nor Johnson (Utah 1987) can be read to support the claim that an applicant is entitled to receive temporary total benefits after he or she is moved to permanent status, regardless of ability to work. Booms expressly rejected the argument that a claimant must be able to work before temporary total benefits cease. Therefore, the dicta in Ortega relied on by Plaintiff has been implicitly overruled by more recent cases and is of no weight.

Plaintiff asserts that he is unable to work. If that is true and he is not able to be retrained for any other job, then he might become eligible for permanent total disability benefits. The Industrial Commission retains jurisdiction over all its cases and could impose such additional liability on the employer if the

circumstances warrant. If Plaintiff does turn out to be permanently totally disabled, he will get his compensation. If he does not, then he is not entitled to more than the temporary total disability benefits received during his period of healing and the permanent partial disability compensation he was awarded as a result of the permanent impairment he suffered from the accident. To permit Plaintiff to receive additional temporary total disability benefits would violate the letter, spirit and structure of the workers' compensation statute, and directly contradict the Supreme Court's opinion in Booms.

Plaintiff does not attempt to distinguish Booms, except to refer to "the statute and case law . . . interpreting the Worker's [sic] Compensation Act." Appellant's Brief, p.10. As discussed above, the structure of the Act requires that no temporary benefits be awarded once the claimant reaches permanent status, and the only Utah case law Plaintiff refers to are cases involving permanent total disability awards, which is not an issue in this case. There is no authority under Utah law to permit a claimant to continue to receive temporary total benefits because he is unable to return to work once he reaches medical stabilization and is awarded permanent benefits under UTAH CODE ANN. § 35-1-66 or 35-1-67. Booms is controlling in this area, and Plaintiff's first claim of error should be dismissed, affirming the Order of the Industrial Commission.

II. THE INDUSTRIAL COMMISSION'S FINDING AS TO THE EXTENT OF PLAINTIFF'S PERMANENT PARTIAL DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND MAY NOT BE DISPLACED.

Plaintiff's second point on appeal is that he is entitled to a higher impairment rating for his permanent partial disability. It is well established that such a rating is a question of fact. Entwistle Company v. Wilkins, 626 P.2d 495, at 498 (Utah 1981) ("The extent and duration of an employee's disability are questions of fact to be determined by the Commission."). While Plaintiff urges this Court to adopt a different impairment rating, it is clearly improper for this Court to make findings of fact. Instead, its function is to determine if the Commission acted properly in coming to its conclusions, and if not, to remand for further action. The standard of review of the Industrial Commission's findings of fact is not, as Plaintiff's brief discusses, whether they are supported by the most "credible" evidence, but rather whether there is "substantial evidence" to support the facts as found by the Commission. As stated in Entwistle,

We review the evidence in the light most favorable to the Commission's findings, and when there is substantial evidence to support the facts as found by the Commission, its order will not be disturbed.

626 P.2d at 498.

In this case, it is clear that there is substantial evidence to support the Commission's findings as to the extent of Plaintiff's impairment. The Commission adopted the determination

of the medical panel, which was in turn substantially the same total amount of impairment as determined by Dr. Orme.

The Utah Supreme Court recently dealt with a very similar case in Rushton v. Gelco Express, 732 P.2d 109 (Utah 1986). There the Administrative Law Judge (ALJ) granted certain medical benefits and temporary total disability benefits, but denied claims for additional temporary total benefits and permanent partial benefits. The Court affirmed this determination and stated:

. . . this Court will not disturb the findings and orders of the Commission unless they are arbitrary and capricious, and they are arbitrary and capricious when they are contrary to the evidence or without any reasonable basis in the evidence. Plaintiff argues, in essence, that the findings in this case are arbitrary and capricious because the administrative law judge adopted the findings of the medical panel rather than those of Dr. Kimball, the treating physician.

732 P.2d at 111 (citations omitted). After refusing to rule that a treating physician's findings should be given preference as a matter of law, the Court went on to find that the Commission's adoption of the medical panel's report was not arbitrary and capricious because it was supported by substantial evidence.

In this case, Plaintiff is, in essence, arguing that the Commission's findings were arbitrary and capricious because the administrative law judge adopted the findings of the medical panel rather than those of Dr. Orme, the independent medical examiner. In this case, just as in Rushton, the medical panel's report was based on "not only its examination of and interview with

Plaintiff, but also on the reports, test results, and x-rays from the previous examinations of Plaintiff's treating physicians," 732 P.2d at 112, as well as of the independent medical examiners. The medical panel report (R. 207-218) refers to the reports of both Dr. Baer and Dr. Orme, which are relied on by Plaintiff, as well as the many other doctors who had seen Plaintiff.

The medical panel report drew approximately the same overall conclusion regarding the total extent of Plaintiff's permanent disability and the amount attributable to the industrial accident as Dr. Orme, but divided the amount of impairment attributable to the various causes in a different manner. As the Industrial Commission stated in its Order Denying Motion for Review,

It is clear that, prior to hearing, there existed considerable medical controversy regarding the Plaintiff's overall permanent partial impairment. It is the resolution of exactly this kind of medical controversy that causes the need for medical panels. The Commission considers it entirely proper for the Administrative Law Judge to rely on the medical panel findings absent some good reason to believe the medical panel did not thoroughly or impartially review the matter. In this case, counsel for the applicant fails to point out bias on the part of the medical panel or their failure to consider all the evidence. He simply states that the medical panel's rating differs with that of two other doctors. The Commission finds this is insufficient to support the contention that the Administrative Law Judge erred in relying on the medical panel findings.

(R. 245-246). The Defendant Employer and Insurer submit that the Industrial Commission was correct, and that there is no reason to upset the factual determination of the Commission.

Plaintiff's complaint is basically that he was not awarded enough permanent partial disability for his back problems. The medical panel was chaired by Dr. Moress, a neurologist, and included Dr. Holbrook, an orthopedic surgeon. They interviewed Plaintiff and had access to all his medical records. Their opinion regarding the extent of Plaintiff's permanent disability due to his back problems is well-founded and credible. There is no indication that the panel failed to consider any of the medical evidence, and Plaintiff did not present any additional medical evidence after the panel's report or claim that the panel was in any way biased. There is no reason for this Court to determine that the Commission's conclusion regarding the extent of Plaintiff's permanent partial disability is not supported by substantial evidence is therefore proper. The Industrial Commission's determination of Plaintiff's permanent partial disability should be affirmed.

III. PLAINTIFF IS NOT ENTITLED TO ANOTHER HEARING IN THIS CASE.

A. Plaintiff Failed to Raise This Issue Below and Cannot Raise for the First Time on Appeal.

Plaintiff also argues that in the event the Court does not overstep its function and make new findings of fact, as he requests, he should be given a hearing regarding the credibility of the medical evidence. Plaintiff did not request such a hearing in his Objection to the Medical Panel's Report (R. 224-227), and did not submit any other request, either written or oral, for such a hearing to the ALJ. Moreover, he did not raise the issue

in his Motion for Review to the Industrial Commission (R. 236-238). Plaintiff even fails to raise it in the Petition for Review filed with this Court, dated August 27, 1987 (R. 248-249). The first time the issue appears is in the Docketing Statement he filed with this Court, dated September 16, 1987 (R. 251-253).

Utah law is well established that a party may not raise an issue on appeal which was not presented for decision to the trial court below. See, e.g., Lane v. Messer, 731 P.2d 488 (Utah 1986); Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983). While no Utah cases have been found on this issue in the context of review of an administrative agency's decision, the same principle should apply.

Professor Larson agrees with this proposition, stating:

. . . when the rule whose relaxation is in question is more than a merely formal requirement and touches substantial rights of fair play, the relaxation is no more justified on a compensation appeal than on any other. Such a rule is that forbidding the raising on appeal of an issue that has not been raised below or the revieval of an issue that has been conceded, abandoned, or otherwise resolved.

3 Larson, The Law of Workmen's Compensation, § 77A.83 (1987) (footnotes omitted).

Other states have also reached this conclusion. In Lewis v. Anaconda Company, 168 Mont. 463, 543 P.2d 1339 (1975), the Montana Supreme Court noted in a footnote that the claimant could not raise a constitutional question of due process for the first time on appeal, and therefore did not consider it. Similarly, in Smith v. Workmen's Compensation Appeal Board, 40 Pa. Commw. 117,

396 A.2d 905 (1979), the court stated that the claimant could not complain of the referee's actions if he had not raised the issue to the Board.

Since Plaintiff failed to raise any claim of entitlement to a second hearing to either the ALJ or the Commission, they did not have an opportunity to rule on the issue, and Plaintiff should be precluded from raising it now on appeal.

B. Such a Hearing Is Permissive, Not Mandatory, and the ALJ's Failure to Order Such a Hearing Without a Request from any Party Cannot Be Error.

Even if the Court were to permit Plaintiff to raise this issue for the first time in this appeal, there is no basis for remand. UTAH CODE ANN. § 35-1-77 (1982) states in pertinent part that if objections are filed to a medical panel's report, "the commission may set the case for hearing to determine the facts and issues involved. . . ." It is clear that a hearing after the medical panel submits its report is, under the 1982 amendment, not mandatory, but within the discretion of the ALJ. See, e.g., Moore v. American Coal Company, 737 P.2d 989 (Utah 1987). Therefore, mere failure to have a hearing which is not mandated cannot be error. If Plaintiff had requested a hearing and been refused, he would at least arguably have a claim that the ALJ had abused his discretion in refusing to grant the hearing. In this case, however, there was no request for a second hearing to inquire into the credibility of the medical panel's report, and the Court cannot decide as a matter of law that the failure to provide a

hearing is error when the legislature left that decision to the discretion of the ALJ.

Plaintiff relies on UTAH CODE ANN. § 35-1-82.51 (1965), which protects the parties' right to cross-examine. There was no denial of that right in this case. Plaintiff did not request any opportunity to cross-examine the members of the medical panel, as § 35-1-77 expressly provides, and cannot claim that his failure to so request entitles him to a remand. This case is analogous to a case where an attorney fails to cross-examine at the hearing and then attempts to complain on appeal that he was denied the opportunity to cross-examination when in fact he did not take his chance. Plaintiff has waived any right to complain of the lack of a second hearing in this case.

CONCLUSION

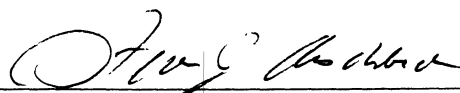
There is no dispute that Plaintiff's healing period ended and that he had reached medical stabilization by, at the latest, July 21, 1986. The Booms case holds that eligibility for temporary benefits ends upon stabilization and that no determination of ability to work need be made. It controls this action and requires that the Commission's decision be affirmed as to Plaintiff's first point, and that no additional temporary total disability benefits be awarded during Plaintiff's rehabilitation.

Plaintiff also claims that he is entitled to a higher permanent partial disability rating. This determination of fact by the Commission is based on substantial, credible evidence and

may not be disturbed on appeal. Finally, Plaintiff claims that he is entitled to a second hearing to investigate the credibility of the medical panel's report, despite the fact that he never requested such a hearing. That failure waives any claim of error Plaintiff could have regarding this point. Moreover, Plaintiff failed to raise this issue below, or even in his Petition for Review, and is precluded from asserting it now on appeal. Therefore, Plaintiff's appeal is without merit, and the Order of the Industrial Commission should be affirmed.

DATED this 8th day of January, 1988.

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and the Travelers Insurance

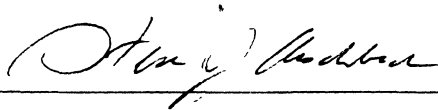
CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 1988,
four true and correct copies of the Brief of Respondents Travelers
and Howard Foley were mailed, postage prepaid, to the following:

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