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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAY REKWARD, :
 :
 Plaintiff : REPLY BRIEF
 :
 vs. :
 :
 INDUSTRIAL COMMISSION OF : Case No. 870371-CA
 UTAH, HOWARD FOLEY COMPANY : Category 6 Appeal
 TRAVELERS INSURANCE AND :
 SECOND INJURY FUND, :
 :
 Defendants, :

This is a petition for a writ of review from an order of the Industrial Commission, the Honorable Timothy Allen, administrative law judge, presiding.

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SUMMARY OF ARGUMENT

I. REKWARD IS ENTITLED TO TEMPORARY TOTAL DISABILITY PAYMENTS UNTIL HE HAS COMPLETED RETRAINING.

Rekward is unable to return to any type of employment without retraining. He is , therefore, entitled to receive temporary total disability payments until he completes vocational rehabilitation. This is in harmony with the purposes of the workers compensation law, which are to compensate an employee for the loss of employability resulting from an industrial injury.

II. REKWARD IS ENTITLED TO A HIGHER IMPAIRMENT RATING, OR A REMAND FOR AN EVIDENTIARY HEARING TO ASSESS THE CREDIBILITY OF CONFLICTING MEDICAL OPINIONS.

Rekward is entitled to a higher impairment rating based upon the credible evidence. The Industrial Commission erroneously concluded that the medical panel report and Doctor Orme's report were consistent. In the alternative, Rekward is entitled to a hearing to properly assess the credibility of the witnesses. Rekward's objection to the panel report and motion for review,

pointing out the disparities and arguing the credibility of the same, has preserved the issue for appeal.

ARGUMENT

I. REKWARD IS ENTITLED TO TEMPORARY TOTAL DISABILITY PAYMENTS UNTIL HE HAS COMPLETED RETRAINING.

The respondent (hereinafter Foley) does not dispute the fact that Rekward cannot perform any vocational function without vocational rehabilitation and retraining. Rekward does not challenge the finding that he has reached the point of medical stabilization, ie, his physical condition is not likely to improve nor deteriorate from its present status. The issue, then, is how should Rekward be compensated. Rekward argues he is entitled to temporary total disability payments until he completes his vocational rehabilitation, at which point compensation on a permanent partial basis may be made. Foley argues Rekward must receive permanent partial payments from the date of medical stabilization, even though Rekward is incapable of returning to any form of employment. Thus, the issue presented goes to the very purpose of the workers compensation laws, which, as stated in Marshall vs. Industrial Commission 681 P.2d 208, 210 - 211 (Utah 1984), is to compensate for the loss of employability.

Rekward feels he can be retrained and thus is not permanently disabled. Foley agrees and insists that Rekward "is too little disabled for his age and education level" [respondent's brief, page 8] to be permanently disabled. Thus Foley desires to contravene the entire purpose of the workers compensation laws by denying any compensation despite Rekwards present inability to work.

Foley relies heavily on Booms vs. Rapp Construction Company 720 P.2d 1363 (Utah 1986) in claiming that temporary total disability fully ends when medical stabilization occurs. In Booms the injured worker objected to the termination of temporary total benefits without a finding by the Commission that he would be able to return to work. The court held, on the facts of that case, that it was not necessary to make such a finding after medical stabilization had occurred. The facts of this case are different, requiring a different result. Rekward is seeking retraining, something which Booms did not. Thus, after the retraining, Rekward will be in the same position as Booms, that temporary total payments should be terminated, regardless of ability to work. If Rekward were unable to work, his remedy would then be to seek permanent total disability, something he cannot now do without vocational rehabilitation, pursuant to Utah Code Annotated section 35-1-67 (1953 as amended).

The facts of this case and the facts of Booms are significantly different in another respect. In Booms, the medical panel made a finding of Booms ability to work, even in his former profession of a carpenter, with some restrictions. In addition, Booms own expert testified that there was work available that Booms was capable of performing at that very time. Thus, the actual issue was one of returning to his former work with no restrictions. Obviously such a factual situation does not qualify one for temporary total benefits. On the other hand, even Foley's medical expert acknowledged that Rekward would need retraining [R. p. 179] to be employable. Indeed, all of the evidence suggests that Rekward is in need of retraining to be employable at all.

Foley argues that temporary total benefits cease immediately upon medical stabilization, arguing that the status automatically shifts to a permanent status at that point. While that is often the case, it not necessarily so. Johnson vs. Harsco/Heckett 737 P.2d 986 (Utah 1987), in discussing temporary total benefits states:

Determination of the temporary or permanent nature of 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". [Footnotes and citations omitted]. Emphasis added. 737 P.2d at 988.

Thus, although the usual case would find the worker moving from a temporary to a permanent status upon medical stabilization, such is not always the case. Here, medical stabilization has occurred, but the status should not change from temporary to permanent until the completion of vocational rehabilitation. It can only change earlier if Rekward fails to cooperate in that rehabilitation, pursuant to Utah Code Annotated section 35-1-67 (1953 as amended). Rekward has always argued and continues to maintain that he is not entitled to a permanent partial award until his temporary total status terminates, which cannot occur, under the facts of this case, until he completes retraining.

Foley argues that if Rekward cannot work and cannot be retrained, he might be eligible for permanent disability [respondent's brief pp.10-11], meanwhile maintaining that Rekward is ineligible for permanent total status due to his age and education [respondent's brief p. 7-8]. What is to happen to Rekward in the meantime? Here is a worker, injured in an industrial accident, who is unable to work at any occupation at present, as a result of the accident, and who is now being told he is entitled to no compensation while he struggles to overcome his disabilities and be retrained in a new occupation. Such a result is contradictory to the purpose and intent of the workers compensation laws. Such result should not take place in this case, where temporary total benefits should continue through retraining, at which time Rekward should be classified to a permanent classification.

REKWARD IS ENTITLED TO A HIGHER IMPAIRMENT RATING BASED
UPON THE CREDIBLE EVIDENCE, OR IN THE ALTERNATIVE, A
REMAND FOR AN EVIDENTIARY HEARING TO ASSESS THE
CREDIBILITY OF CONFLICTING MEDICAL OPINIONS

The extent of Rekward's cervical impairment was greatly disputed by the three physicians who rated these impairments. Only Dr. Orme, the orthopedist selected by Foley to conduct an independent evaluation, stated the factors on which he relied in arriving at his determination of impairment. Despite Dr. Orme's reliance on the guidelines established by the American Academy of Orthopaedic Surgeons [R.p. 178] in determining the percentage of impairment, the administrative law judge blindly accepted the panel report, without any indication of how the impairment was obtained. Foley argues that the Commission is the fact finding body and therefore must be affirmed. Rekward does not challenge the prerogative of the Commission to find the facts. However, as set forth in Utah Annotated Code Section 35-1-77 (1953 as amended), the Commission is not bound to follow the panel report and to disregard the other evidence before it. The Commission did so in this case on the erroneous conclusion that, upon the bigger view, the reports of Dr. Orme and of the medical panel were consistent [R.p. 229]. The reports are not consistent, as Dr. Orme did not rate the hearing and psychological impairments, contained in the panel impairment rating. Dr. Orme found a cervical impairment of 20%, based upon the guidelines of the American Academy of Orthopaedic Surgeons [R.p. 178]. The

panel found a 10% impairment for the cervical injuries, with no indication what guidelines were used to determine the impairment [R.p. 212]. Thus, Rekward maintains there is not credible evidence to sustain the decision of the Commission.

Rekward maintains, in the alternative, that this case must be remanded for an evidentiary hearing to determine the credibility of the evidence. At a hearing, cross examination will bring out the required information to help the administrative law judge assess the credibility of the ratings and properly find the facts. As set forth in Rekwards brief, the right of cross examination is a fundamental right that is preserved to all applicants before the Industrial Commission.

Foley argues that a hearing was not requested below and so cannot be sought on appeal. Rekward maintains that this issue was preserved in both the Objection to the Medical Report and Motion for Review filed with the Industrial Commission. Both of these documents point out the disparity between the rating of Dr. Orme and the panel. Both of these documents refer to the fact that only Dr. Orme indicated how he had arrived at his conclusions. The Motion for Review specifically raises the credibility of the various reports (R. p. 237). Rekward maintains that these challenges to the credibility of the medical reports, together with the fundamental nature of the right of cross examination has preserved this issue for appeal.

Foley maintains that this case is analogous to a matter where an attorney fails to examine at the hearing and then claims on appeal that this right was denied [respondent's brief p. 18].

The problem with this analysis is that there was no hearing where cross examination could take place, the credibility of the reports assessed, and the proper factual determination made by the Commission.

While the Commission clearly has the discretion to hold the hearing or to deny were the same, as set forth in Utah Code Annotated section 35-1-77 (1953 as amended) and Moore vs. American Coal Company, 737 P.2d 989 (Utah 1987), when the credibility of reports is in issue, a hearing is required to allow cross examination in order to assess the credibility of the reports. Justice Stewart, dissenting in Moore succinctly stated:

I recognize that the medical panel is supposed to constitute a panel of neutral expert witnesses, but that does not make it's determinations error free. Clearly, the members of the medical panel who prepared the report, are not intended to be adjudicators of the claimants right of compensation.

The Claimant submitted a claim to be adjudicated. Instead, the commission disposed of the claim without even a pretext of due process. Due process requires that a person who asserts a legally cognizable claim be accorded a hearing and the opportunity to cross examine witnesses against him or her. (citations omitted). 737 P.2d at 991.

As Justice Stewart noted, the issue of cross examination was not raised on appeal in Moore. As it was, the majority reviewed only the narrow issue presented, whether or not a hearing was mandatory or discretionary under the amended statute.

In this case, where the issue has been raised, and the credibility of the reports questioned, Rekward is entitled to cross examine the physicians preparing the medical panel report.

This is the only way that the credibility of various reports can be determined and a proper factual finding made.

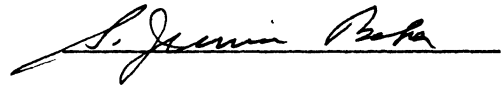
The Commission has abused its discretion in failing to grant Rekward the right of cross examination following the objection to the panel report, when the credibility of the medical opinions were questioned. The Commission further abused its discretion by following the panel report, under the erroneous conclusion that upon the bigger view, the panel report and Dr. Orme's report were consistent.

CONCLUSION

Rekward has suffered an industrial injury that will require him to undergo vocational rehabilitation before he can be productive in the work force. Thus, this is the rare case where his status has not yet changed from temporary to permanent even though he has reached a stage of medical stabilization. Rekward is entitled to temporary total payments until he completes vocational rehabilitation, at which point he is entitled to a permanent partial award whether or not he can find work.

Rekward has objected to the panel report, drawing into question the credibility of the same. Rekward is either entitled to higher award based upon the credible evidence, or an evidentiary hearing to properly assess the credibility. This award of this permanent partial impairment should be made at the end of his temporary total status, when he completes his vocational rehabilitation.

Respectfully submitted this 3 day of February, 1988.



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MAILING CERTIFICATE

I hereby certify that I have mailed four true and accurate copy of the foregoing Reply Brief to:

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On the 5 day of February, 1988.

