

1988

Janette Haycock v. Donna Farrer, dba Donna's Ceramics (Uninsured) and Uninsured Employers' Fund : Brief of Respondent

Utah Court of Appeals

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Robert M. Orehoski; Attorney for Respondent.

Phillip B. Shell; Day and Barney; Suzan Pixton; Uninsured Employers Fund; Attorneys for Appellants. Mark Wainwright; Assistant Attorney General; Attorney for Industrial Commission.

Recommended Citation

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880418

IN THE UTAH COURT OF APPEALS

JANETTE HAYCOCK,	:	
	:	
Applicant/Respondent,	:	
	:	
v.	:	BRIEF OF THE APPELLANTS
	:	
DONNA FARRER dba	:	
DONNA'S CERAMICS	:	Docket No. 880418 CA
(UNINSURED) and	:	
UNINSURED EMPLOYER'S FUND,	:	
	:	
Defendants/Appellants.	:	Priority No. 6

PETITION FOR REVIEW OF FINAL DECISION OF THE
INDUSTRIAL COMMISSION OF UTAH
Administrative Law Judge Timothy C. Allen

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Defendants/Appellants.	:	Priority No. 6

PETITION FOR REVIEW OF FINAL DECISION OF THE
INDUSTRIAL COMMISSION OF UTAH

Administrative Law Judge Timothy C. Allen

STATEMENT OF JURISDICTION

Jurisdiction is vested with this Court pursuant to Section 35-1-86 and 78-2a-3(2)(a), Utah Code Annotated.

STATEMENT OF NATURE OF PROCEEDINGS

This is a petition to review a Final Order of the Industrial Commission wherein Appellant's Motion for Review was denied.

STATEMENT OF ISSUES

Issues on review are as follows:

a. Was there substantial and sufficient evidence before the

Industrial Commission on which to base an award of temporary total disability compensation extending from March 4, 1987 to April 4, 1988?

b. Did the Industrial Commission act in abuse of its discretion in finding that despite a light duty medical release given by the treating chiropractor on May 26, 1987, that the appellant/employer was still obligated to pay temporary total disability compensation after that date, despite no showing by the applicant that she sought work thereafter from the appellant nor was refused light duty work?

DETERMINATIVE STATUTES

Determinative statutes include:

Section 35-1-65(1), U.C.A. which reads in pertinent part:

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS On April 4, 1987 Respondent Janette Haycock filed an application for Worker's Compensation benefits. R.5. Appellant Donna Farrer contested the alleged accident and the claim for benefits and as a result, the matter came on for hearing before an Administrative Law Judge of the Industrial Commission on July 17, 1987. R. 11.

The case was referred to a medical panel after the hearing

for an evaluation of the medical issues. A report was made by the sole member of the panel on January 8, 1988. R. 135-139. The reviewing doctor felt that the respondent had not yet reached a fixed state of recovery because she was still suffering from her injury, that she hadn't received adequate medical care, and would improve upon receipt of future care. R. 136. This was in response to the question of the Commission as to when the applicant reached a fixed state of recovery. R. 134.

Appellant objected to the report on the basis that although the claimant/respondent may improve with further treatment, she may have reached a fixed state of recovery absent that treatment. R. 140.

The Administrative Law Judge sent the matter back to the medical panel doctor for clarification in light of the objection. R. 141. The doctor responded to the request by repeating that he felt that the applicant had not yet reached a fixed state of recovery because she had not essentially been treated to that point. He also indicted that if there was a question as to the applicant having reached a plateau of recovery prior to his seeing her, the matter should be addressed to Dr. Hansen, the treating chiropractor. R. 143-144.

The Administrative Law Judge issued an interim order awarding Worker's Compensation benefits by way of medical benefits and temporary total disability compensation that extended from the date of the accident on March 4, 1987 to the date of the order on April 4, 1988. R. 162-165.

A Motion for Review was filed on April 19, 1988 objecting to the award of temporary total disability benefits. R. 172-175. The Order denying review from which this Petition for Review is taken was issued on June 2, 1988. R. 179-180. A Motion for Reconsideration was filed with the Industrial Commission on June 10, 1988 but no ruling was made thereon by the Commission prior to the filing of the Petition for Review. R. 181-184.

B. OTHER RELEVANT FACTS The treating chiropractor, Dr. Kenneth Hansen, submitted a Chiropractor's Supplemental Report to the Industrial Commission on June 10, 1987. The report, which is dated May 26, 1987, indicates, in response to the question of when the applicant would be able to return to work, that she has been given a light duty release only. R. 10.

At the evidentiary hearing of July 17, 1987, the respondent\employer testified:

Q. Did you ever offer to let her work there?

A. She asked me one time if I had any work, you know, that I wanted her to do. And I said, "Yeah." That I had some work, you know, that she could do there. And she said, you know, that she could take it home and do it. And I said, "No." That I prefer that it stayed there.

Q. Did she stay and work?

A. No.

R. 61-62.

Later in the hearing, the appellant testified:

Q. Is there any light duty work available there?

A. Yes.

Q. What could she do that is light duty work there?

A. Clean greenware. Organize the bisque in their little bins.

R. 66.

SUMMARY OF ARGUMENT

The Industrial Commission had insufficient information before it, by way of medical evidence and otherwise, to justify its award of temporary total disability benefits to the respondent.

The award was also contrary to the evidence in light of the light duty work release given the respondent. Temporary total disability benefits should not have been awarded beyond the date a light duty release was indicated by the treating doctor inasmuch as the respondent did not seek light duty work from the employer after that time.

ARGUMENT

POINT ONE

THERE WAS INSUFFICIENT INFORMATION BEFORE THE COMMISSION
UPON WHICH TO BASE THE AWARD OF TEMPORARY TOTAL DISABILITY

The Industrial Commission awarded the respondent temporary total disability benefits that extended from the date of the

accident on March 4, 1987 to the date of the Interim Order on April 4, 1988. R. 164.

The apparent basis for the finding was the report of the medical panel dated January 8, 1988. The evaluating doctor stated that the respondent had not yet reached a fixed state of recovery. The reasoning was that she was still suffering from her injury, had not received adequate care, and that future care might produce a significant improvement in her condition. R. 136.

Appellant objected to the medical panel's report on the basis that although a person may yet improve with future treatment, he or she may still have reached a fixed state of recovery absent that treatment. R. 140. The administrative law judge sent the matter back to the panel for clarification. The evaluating doctor then reported on March 1, 1988 that he felt that the respondent's condition had not stabilized because she had not been treated to that point. He also indicated that if there was a question as to her having reached a plateau in her recovery prior to his seeing her, then he would have to address that question to the treating chiropractor. R. 143.

Based solely on this information the Industrial Commission awarded temporary total disability benefits to the respondent from the date of the accident until the date of the Interim Order. R. 164.

This was improper and in doing so, the Commission acted in an arbitrary manner for there was and is not sufficient information on the record to support such an award. Solely

because an injured person may improve with further treatment does not mean that he or she is not stable without that treatment. It is often the case that without surgery or therapy that an individual's condition will not improve. In such a posture, the person is stable, having reached a plateau in his or her recovery. Such marks the end of a period of temporary total disability. This does not foreclose future periods of temporary total disability upon the person's receipt of additional medical care, but it properly marks the end of such disability until such care or treatment commences again.

The medical panel physician by his own statement indicated that he did not have enough information before him to answer whether the respondent stabilized or plateaued in her recovery prior to his seeing her. R. 143.

Accordingly, the Industrial Commission did not have sufficient information before it upon which to make the award of 13 continuous months of temporary total disability.

In fact, the Commission notes in its Order Denying Motion for Review that the respondent did not receive medical care and treatment after May 26, 1988 when a light duty release was given and did not see a doctor after then until her visit to the medical panel doctor in January 1988. R. 179-180.

In the case of Griffith v. Industrial Commission, 82 Ut. Adv. Rep. 51 (Ut Ct App 1988), the claimant therein was put in a leg brace to immobilize his ankle. This Court upheld the administrative law judge's denial to temporary total disability

benefits during the period in which the claimant was not being treated for his injured ankle, although he was in need of surgery which would benefit his condition.

In Griffiths the reason for the lack of treatment was due to the claimant's need to be treated for a non-industrial medical problem before surgery could be performed. However, the underlying rational carriers over to the matter currently before the Court. The respondent was not being treated for a period of time (after May 26, 1987), although she was apparently in need of additional treatment which the medical panel felt would be beneficial for her improvement. However, without the treatment, there is not evidence on the record to support a finding that her condition was not stable absent that further treatment. Any inference otherwise is not reasonable and is contrary to the record.

Accordingly, the matter should be remanded to the Industrial Commission for further proceedings.

POINT TWO

THE PERIOD OF TEMPORARY TOTAL DISABILITY SHOULD CEASE AFTER THE LIGHT DUTY RELEASE WAS GIVEN

The record indicates that the respondent was given a light duty work release by her chiropractor on May 26, 1987. R. 122. There is also nothing in the record to indicate that she saw him after this date.

At the evidentiary hearing, appellant testified that the respondent had come to her at one point after the accident and

asked if work was available. She was told yes, but was asked to do any work at the work place and not take it home. R. 62. The appellant also testified that light duty work is available at the work place, a ceramics store. Such work includes cleaning greenware and orgainzing items in bins. R. 66.

There is, however, no evidence in the record to show that the respondent attempted or even sought light duty work from her employer after the light duty release was given on May 26, 1988.

Section 35-1-65(1), Utah Code Annotated states in relevant part:

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

It follows from this statute that if light duty work is available to the employee from the employer, then regardless of whether or not the employee actually attempts the light duty work, temporary total disability benefits should cease unless the light duty work cannot be preformed by the employee because of his or her industrial injuries.

In the matter currently before the Court, the record shows that light duty work was available and the respondent knew she could work if she wanted to come to the ceramics shop to do so.

Temporary total disability benefits should stop as of May 26, 1987 when the light duty release was given by the respondent's chiropractor because she apparently never attempted to do any light duty work for her employer after that date.

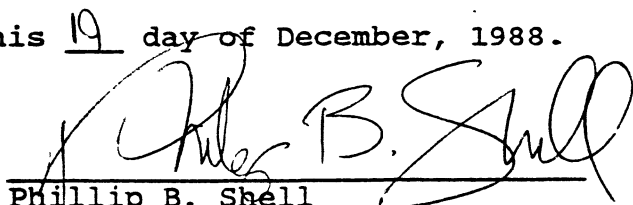
There is no basis in the record for the continuation of temporary total disability benefits after the light duty release was given. The Commission did not have substantial evidence upon which to base its award of temporary total disability benefits beyond May 26, 1988 and hence its action was arbitrary, capricious, and an abuse of its discretion.

For this reason, the award of disability benefits should be limited to the period from the date of the accident on March 4, 1987 to May 26, 1987 when the light duty release was given.

CONCLUSION

For the reasons stated above, the award of temporary total disability benefits should be limited to the period ending when the light duty release was given. Alternatively, the matter should be remanded to the Industrial Commission for further proceedings relative to when the respondent's condition stabilized.

Respectfully submitted this 19 day of December, 1988.


Phillip B. Shell
Day & Barney
Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

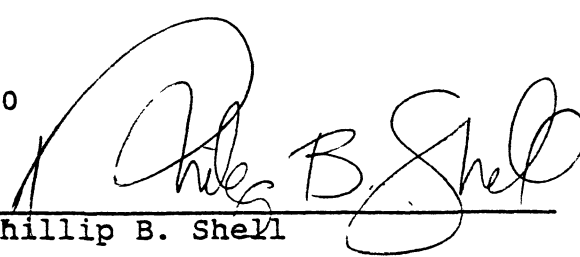
JANETTE HAYCOCK,	:	
	:	
Applicant/Respondent,	:	
	:	
v.	:	CERTIFICATE OF DELIVERY
	:	
DONNA FARRER dba	:	
DONNA'S CERAMICS	:	Docket No. 880418 CA
(UNINSURED) and	:	
UNINSURED EMPLOYER'S FUND,	:	
	:	
Defendants/Appellants.	:	

I hereby certify that two true and accurate copies of the above and foregoing Brief of Appellant were mailed, postage prepaid to each of the following on this 19 day of December, 1988:

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Phillip B. Shell

porary disability lasts more than fourteen days, compensation shall also be payable for the first three days after the injury is received.

1973

35-1-65. Temporary disability — Amount of payments — State average weekly wage defined.

(1) In case of temporary disability, the employee shall receive 66 $\frac{2}{3}$ % of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in Chapters 1 and 2 of this title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom.

1961

1 she had been to see the doctor. Actually, it would have been
2 on Monday morning. I remember.

3 Q Okay.

4 When did you make these notes you have?

5 A I made the notes, probably, about a week and a half
6 after the accident. My husband mentioned to me that perhaps
7 I better start taking notes on things. And then I started
8 doing it on a daily basis.

9 Q And how long have you kept notes?

10 A Until the time that I had lost contact with her in
11 April.

12 Q Okay.

13 What contact have you had with Janette since March 10th
14 when she first told you, apparently, that she hurt her back
15 moving shelves?

16 A She came in almost every day. In and out. To get
17 greenware and to pick up firings or paints or whatever. She
18 said that, you know, since she wasn't feeling well that she
19 was going to at least get her Christmas items done while she
20 was home. And so she came in a lot to pick up her things and
21 to take them back, you know, to be fired and painted.

22 Q Uh-huh.

23 Did you ever offer to let her work there?

24 A She asked me one time if I had any work, you know,
25 that I wanted her to do. And I said, "Yeah." That I had

1 some work, you know, that she could do there. And she said,
2 you know, that she could take it home and do it. And I said,
3 "No." That I prefer that it stayed there.

4 Q Did she stay and work?

5 A No.

6 Q Have you observed any of her activities since then?

7 A Well, she came to work on the 18th. Is that what
8 you mean?

9 Q Well, whatever.

10 A She came to work on the 18th. She called me. It
11 was about 10:30--probably about 20 after 10:00 I guess. In
12 the morning. And it was a Wednesday morning.

13 And she had been teaching this Wednesday morning class.
14 And it was about 20 after 10:00. And she called and said her
15 husband had just gotten home from work and she was fixing him
16 breakfast. But she was wanting to know if I wanted her to
17 come in and to teach the class.

18 And I said, "Well, nobody's even showed up yet, you
19 know, and so I don't really know if it's going to be a very
20 big class. And if it's not, then I think that I can handle
21 it. So, you know, let's not worry about it right now." And
22 she said, "Well, I'll call you back after I get done with
23 breakfast, and then we'll see." And I said, "That will be
24 fine. Call me back."

25 Q Uh-huh.

1 talked for a little bit and then she proceeded to go through
2 the line. And of course, in the meantime, we went ahead and
3 just left.

4 Q Did you observe her have any trouble with her back
5 on that occasion?

6 A No.

7 Q Has she been back to see if she can work since she
8 left on-- What would it have been? The 18th or 23rd or
9 whatever?

10 A She-- Until about probably five days or so before
11 the wedding-- No. It would be even sooner than that because
12 I remember the night they were to set up for the reception
13 she was offering to help Marci. So probably about two days
14 before the wedding. Since that time she has not been in to
15 ask about a job or anything. No.

16 Q Is there any light duty work available there?

17 A Yes.

18 Q What could she do that is light duty there?

19 A Clean greenware. Organize the bisque in their
20 little bins.

21 Q Okay.

22 How much are you paying her an hour?

23 A \$3.50.

24 Q And what type of hours does she work--had she
25 worked before March 4th?

THE INDUSTRIAL COMMISSION OF UTAH
160 East 300 South, P.O. Box 5800
Salt Lake City, UT 84110-5800

CHIROPRACTOR'S SUPPLEMENTAL REPORT
To be filed after each 15 treatments

Name of Injured Janette Haycock Address 863 S. 50 E. Orem, Ut 84058
Date of Injury 3-4-87 Name of Employer Dohnd's Ceramics

Employer's Workmen's Compensation Insurance Carrier No Insurance Carrier

- | | |
|---|---|
| 1. How many treatments have been rendered since date of last report? Generally describe treatments? | 10- specific spinal adjustments, Intersegmental spinal traction; Diathermy pass. Motion as necessary Re-exam for updated evaluation purposes. |
| 2. What results or benefits has injured received from foregoing treatments? | The pain down leg has improved. Her pain and energy levels are good. |
| 3. What are present complaints, symptoms and conditions of injured? | The following tests are positive: Rotation, Flex Advance., Derfield-Lt., Short Leg, Knee Raiser, Pelvic Tilt-Rt. She still has pain down her leg when bending over. |
| 4. How many additional treatments are anticipated? (Total number) | 10 |
| 5. What benefits or improvements are anticipated from the additional treatments? | Janette continues to improve. Conservative care is recommended at this time. I will order an IME if her prognosis is not downgraded in the next four weeks. |
| 6. When will injured be able to return to work? (If injured has returned to work, give date of release for work.) | Released for light duty only. |

Amended Rule 31, Rules and Regulations, concerning medical and surgical practice before the Commission requires this form be completed after the initial 15 treatments and after each 15 treatments thereafter, and such form shall be filed with the Commission, and a copy thereof shall be mailed to the patient and the employer or its insurance carrier. Failure to do so shall absolve the employer or its insurance carrier from liability for payment for treatment rendered after the initial 15 treatments where such form has not been completed, filed and mailed.

Dr. Kenneth Hansen, D.C.
(Printed Name of Chiropractic Physician)

Signed: 

Address: 274 W Center

Orem, UT 84057

Phone Number (801) 225-2457

Russell L. Sorensen, M.D., F.C.

Orthopedics

870 East 9400 South

Suite #109

Sandy, Utah 84070

(801) 571-1552

January 8, 1988

Timothy Allen
Administrative Law Judge
Industrial Commission of Utah
160 East 300 South
P.O. Box 45580
Salt Lake City, Utah 84145-0580

RE: Janette Haycock

Dear Mr. Allen:

I have seen Janette Haycock, have evaluated her, and gone over all of her findings. The following is a summary of my recommendations and answers to your questions. Included with this letter is a copy of my initial summary for records.

Janette Haycock has continued back pain and problems related to the lower lumbar spine which relate to an injury that occurred on 3/4/87 while at work. She has only been in chiropractic care and I think that she needs medical attention and would recommend that she seek the aid of an orthopedist. She knows a very excellent orthopedist in Orem and she is going to seek out his care.

In regards to your specific questions in the letter of November 12, 1987:

1. When did applicant reach a fixed state of recovery? I believe that she is still suffering from her injury, that she has not received adequate care and that future care may produce significant improvement in her condition. She therefore has not reached as steady state at this point.
2. What is permanent impairment? I think that that is not ratable at this time because of her expected further recovery.
3. What future medical care, including surgical intervention, would be necessary? I have recommended that Janette seek the care of an orthopedists in Utah County, that she may need some physical therapy, that she may need further evaluation in the form of further scans or invasive evaluations such as diskograms, and that she may even come to having disc excision surgically.

Haycock, Janette
Page Two

I think that the essence of this evaluation is that Mrs. Haycock has received inadequate care to this point regarding her problem and that she needs further attention. She knows someone close by her home who can see her frequently and manage her care. I think that that would be appropriate.

I appreciate the opportunity to assist in the evaluation of this patient and hope that it brings this case to some future resolution for you and some satisfaction for Mrs. Haycock.

Sincerely,



Russell L. Sorensen, M.D.
RLS:TS5

Enclosure

Russell L. Sorensen, M.D., P.C.

Orthopedics

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Sandy, Utah 84070

(801) 571-1552

March 1, 1988

The Honorable Timothy C. Allen
Administrative Law Judge
Industrial Commission of Utah
P.O. Box 45580
Salt Lake City, Utah 84145-0580

RE: Janette Haycock
Inj. Date: 3/4/87
Employer: Donna Farrer

Dear Mr. Allen:

I have seen Janette Haycock on one occasion, which was January 8, 1988 and performed one evaluation on her. I have sent to you copies of all of my files and evaluation.

In response to specific questions asked of me in the letter dated November 12, 1987 and then asking for clarification in a letter from Day and Barney, dated February 10, 1988 regarding question #1: When did the applicant reach a fixed state of recovery following the industrial injury of March 4, 1987? I answered that I felt that she had not reached a state of fixed recovery because she had not, essentially, been treated to that point. I have not seen Janette Haycock back since that time, and I feel that I answered that question with the best information I had. Therefore, I feel that if Janette Haycock is receiving care from an orthopedic surgeon in Orem, he may be able to better evaluate her current status. Also, if there is a question as to her having reached a state or plateau of recovery prior to my seeing her, then I would address that question to Dr. Kenneth Hansen, a chiropractor.

In summary, I feel that Janette Haycock had not received appropriate care for her injury, that her current and future treatment may help her, but I cannot evaluate that since I have not seen her.

Haycock, Janette
Page Two

Should you have other questions regarding my evaluation, please
feel free to call or contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Sorensen".

Russell L. Sorensen, M.D.

RLS:CMTS5