

1988

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

Utah Court of Appeals

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Robert M. Orehoski; Attorney for Respondent Haycock. Mark Wainwright; Assistant Attorney General; Attorney for Industrial Commission.

Phillip B. Shell; Day and Barney; Suzan Pixton; Uninsured Employers Fund; Attorneys for Appellants.

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DOCKET NO. 880418 IN THE UTAH COURT OF APPEALS

FILED

JAN 24 1989

Wm. T. McMan
Clerk of the Court
Washington, D.C.

ROBERT M. OREHOSKI, ESQ.
1415 North State Street
Orem, Utah 84057
Attorney for Respondent, Haycock

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IN THE UTAH COURT OF APPEALS

Jeannette Haycock,
Applicant/Respondent,

BRIEF OF THE RESPONDENT

vs:

Case No. 880418-CA

Priority Category #6

Donna Farrer, dba
Donna's Ceramics
(Uninsured) and Uninsured
Employers' Fund,

Defendants/Appellants.

RESPONDENT'S BRIEF

JURISDICTION OF THE COURT

Jurisdiction over this appeal is conferred upon the Utah Court of Appeals pursuant to Section 35-1-86 and Section 78-2A-3(2)(A), Utah Code Annotated 1953 as amended.

NATURE OF PROCEEDINGS BELOW

After having been injured in the course of her employment, the Applicant/Respondent filed an application for hearing on April 4, 1987. As a result of that application hearing, a hearing was held before Administrative Law Judge, Timothy C. Allen, into Jeannette Haycock's Application for Workers' Compensation

Benefits. As a result of that hearing, Administrative Law Judge, Timothy C. Allen, referred this matter to the medical panel appointed. On or about January 8, 1988 the medical panel, consisting of Dr. Russell L. Sorenson issued its report to the Administrative Law Judge. On March 1, 1988 the same medical panel consisting of Dr. Russell L. Sorenson issued a supplemental report. This supplemental report was as a result of Appellant questioning the initial report of the medical panel.

Upon the receipt of the Supplemental Report, the Administrative Law Judge on April 4, 1988 issued an interim order awarding workers' compensation benefits, which include medical benefits and total temporary disability benefits, covering the period of March 4, 1987 to April 4, 1988.

Appellants filed an objection to the award of temporary total disability benefits on April 19, 1988. The Industrial Commission reviewed this matter and issued an Order denying the Motion for Review on June 2, 1988. A Motion for Reconsideration was filed on June 10, 1988 for which the Commission sought fit to not provide a ruling thereon within a ten (10) day period of time.

On the 26th day of July, Appellants then filed this Appeal to the Utah Court of Appeals.

STATEMENTS OF ISSUES PRESENTED ON APPEAL

This Appeal presents the question of whether the evidence of record, when scrutinized under the proper standard of

appellant review, supports the conclusions of the Industrial Commission that the Respondent's medical condition had not stabilized and was entitled to total disability benefits from March 4, 1987 to April 4, 1988. An additional question is raised upon review of this matter whether or not light-duty employment was available to the Applicant/Respondent in light of Section 35-1-65(1), Utah Code Annotated 1953.

STATUTES AND RULES APPLICABLE TO THIS CASE

The following statutes and rules, which are determinative in this matter, are set forth verbatim below:

Section 35-1-65(1) Utah Code Annotated (1953) provides in pertinent parts that "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".

SUMMARY OF ARGUMENT

The Workers' Compensation Act provides payment of total temporary disability benefits for an injured employee when said injured employee is totally disabled. More than ample evidence has been presented in this matter, that the Applicant/Respondent, Jeannette Haycock, was temporary and totally disabled from March 4, 1987 to April 4, 1988. That ample evidence was presented to the Industrial Commission to support the conclusion that Jeannette Haycock was totally and temporarily disabled from

March 4, 1987 to April 4, 1988.

In the present case, when scrutinized under the proper standards of review, the record supports the determination of the Administrative Law Judge and the Industrial Commission that Jeannette Haycock was total and temporarily disabled from March 4, 1987 until April 4, 1988. Therefore, the decision of the Industrial Commission that Jeannette Haycock is entitled to Workers' Compensation benefits ordered by the Industrial Commission should be affirmed.

ARGUMENT

POINT 1

Was there sufficient information before the Industrial Commission on which to base an award of temporary total disability? Jeannette Haycock was awarded total temporary disability benefits from March 4, 1987 to April 4, 1988. This award was based upon the Findings of Fact and Conclusions of Law as set forth by Administrative Law Judge, Timothy C. Allen. In his Order, dated April 4, 1988, the Administrative Law Judge adopted the findings of the medical panel as his own. The reports of the medical panel are attached hereto as Appendix A. It is apparent that not only would the medical panel recommend physical therapy, and anti-inflammatories to improve her condition. By definition, an injured employee would not have reached a state of fixed recovery if improvement could still have been made in her condition. It should be noted that the medical panel has recommended the use of anti-inflammatory drugs which the

respondent had not been receiving prior to the January 8, 1988 report by Dr. Russell L. Sorenson.

Further, the Applicant had been receiving medical treatment from Dr. Kenneth Hansen, a chiropractor, from shortly after the date of her injury on March 11, 1987. The Appellants in their brief claim stated that the patient did not receive medical care and treatment after May 26, 1988, when the light-duty release was given to the Applicant by her Doctor. This simply is not the case. The Administrative Law Judge in his Findings of Fact contained on Page 2 of that Order, stipulates as follows, "Because of worsening problems with left-leg pain, the Applicant was sent by Dr. Hansen to the Utah Valley Hospital for a CP Scan and July 13, 1987. The Applicant testified that Dr. Hansen had been treating her with adjustments every two weeks, but because of right-leg pain, her adjustments at the time of the hearing had been every two days. At present, the Applicant complains of low back pain which radiates down her right leg to her knee. The Applicant denied any pre-existing problems or treatment with her back".

It is interesting to note as to the question of whether or not light-duty was available to the Respondent. Attached hereto as Appendix B is the note dated 6-4-87, initialled by Dr. Kenneth Hansen, which states as follows: "Employer will only allow the patient full-work load - not modified available". Further, attached hereto as Appendix C is Page 28 of the transcript, the essence of which is that approximately two weeks after March 10, 1988 the Respondent attempted to perform light-duty work at the place of the

employer. The Respondent testified that all she was able to do was to sit and talk to the students in her ceramics class. In addition, the Appellant had not raised the question of light work and availability of light work until the date of the hearing.

POINT II

Did the period of total temporary disability cease after the light-duty release was given on May 26, 1987? As was referred to earlier, there is a note on the light-duty release form initialled by Dr. Hansen that no light-duty work was available to the Applicant and only full-time work was available.

The Respondent stated that she had attempted light-duty work even prior to the release for light-duty and was unable to accomplish even the most menial of functions. Further, the Industrial Commission states on Page 2 of its order denying motion, attached hereto as Appendix D, "it should be noted that the Applicant was not working during that time and had past-due medical expenses related to the industrial injury at that time. Also, she was pursuing her eligibility for workers' compensation benefits at the Industrial Commission during that time". "It appears that the Applicant's unemployed status and no final determination as to the Defendant's liability could have prevented the Applicant from affording or obtaining the proper care she needed, thus resulting in the medical instability as of January, 1988."

It would also seem that there was an issue of creditability relating to the question of whether light-duty employment had been

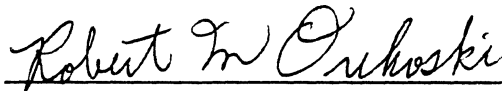
offered to the Applicant after the date of her light-duty release by the treating physician, Dr. Hansen. The Applicant testified that she had a conversation about light-duty with the employer on or about March 24, 1987. The employer states that she offered light-duty employment to the Respondent. It is therefore obvious that the Administrative Law Judge chose to believe the Respondent and not the Petitioner. Further, it must be realized that the resolution of items of creditability may have in fact been resolved for the Respondent and not the Petitioner, based upon the fact that the Petitioner was uninsured at the time and has a personal financial stake in the result of the award.

CONCLUSION

There was sufficient evidence presented to the Administrative Law Judge and in the record before the Court of Appeals to find that the Administrative Law Judge was correct in his conclusions, in the instance case.

WHEREFORE, Respondent prays the Court affirm the decision of the Administrative Law Judge.

Respectfully submitted this 24th day of January, 1989.



ROBERT M. OREHOSKI
Attorney for Applicant/Respondent

IN THE UTAH COURT OF APPEALS

Janette Haycock,
Applicant/Respondent,

CERTIFICATE OF DELIVERY

vs:

DOCKET NO. 880418-CA

Donna Farrer, dba
Donna's Ceramics
(Uninsured) and Uninsured
Employers' Fund,

Defendants/Appellants.

I hereby certify that two true and accurate copies of
the Respondent's brief were hand-delivered to the following on
this 24th day of January, 1989:

Mr. Mark Wainwright, Esq.
Assistant Attorney General
236 State Capital
Salt Lake City, Utah 84114

Ms. Suzan Pixton, Esq.
Uninsured Employers' Fund
P. O. Box 510250
Salt Lake City, Utah

Mr. Phillip B. Shell, Esq.
Day & Barney
45 East Vine Street
Murray, Utah 84107

Robert M. Ouhoski

APPENDIX A

APPENDIX A

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

870 East 9400 South
Suite #109
Sandy, Utah 84070

(801) 571-1552

Initial visit of Janette Haycock.

Mrs. Haycock is a 34-year-old woman who was lifting some shelves at work on 3/4/87 and injured her back. She had an extensive history and evaluation done and then was seen by a chiropractor in Orem, Dr. Kenneth Hansen, who treated her with multiple adjustments and chiropractic care. Since that time, her back has persisted in being painful and she has had some difficulty with her employer and State Insurance Fund relations and has had her case in for litigation because of this problem. Initially, she had pain in her lower right back area which radiated into her right leg and down her leg into her ankle. Most of this sciatica has resolved at this point, but she continues to have difficulty.

Presently; Mrs. Haycock complains of pain in the right sacroiliac joint area posteriorly, which is nearly constant but is made worse by any prolonged standing or sitting. She has noted on occasion that forward flexion, such as making a bed, produces significant pain in her back and some radiation of pain into the posterior upper thigh area. This pain usually lasts for three or four days when it does occur. Since her injury, she has been unable to lift anything greater than ten pounds, because of it producing back pain for her. She is occasionally noting some sciatic pain still, but it only radiates into the posterior thigh and not down below her knee at this point. She is currently on no medications and has quit seeing the chiropractor.

Past History:

1. Medical: She is hypothyroid.
2. Surgery: She has had three cesarean sections and varicose vein stripping of her right leg.
3. Medications: Thyroid supplement.
4. Allergies: none.
5. Family and Social: She is married, has three children. She does not use tobacco or alcohol. She has been unable to work since her injury.

Physical exam is limited briefly to her spine. She forward flexes and reverses lumbar lordosis without pain. Straight-leg raising produces pain in her lower back, but without radiation into her legs. Reflexes in knee and ankle jerks are symmetrical and normal. Sensation in L5/S1 dermatomes is normal. Extensor hallucis longus strength is equal.

X-rays are those from Dr. Kenneth Hansen's office, as well as a CT scan from July of 1987 from Utah Valley Hospital. The x-rays show a minimally decreased L5/S1 disc height. The CT scan shows, on serial sections, multiple levels to be essentially normal with a question of some mild or Grade I to II disc herniation on the

Haycock, Janette
Page Two

Impression is that Janette Haycock has continued back pain resulting from a lifting injury that occurred on 3/4/87. At this point, I feel that she ought to have medical evaluation and treatment as opposed to chiropractic care. I would recommend that she be in physical therapy, on anti-inflammatories, using multiple modalities to improve her condition and if her condition worsens, or if she wishes, then further evaluation such as diskograms or MRI imaging may be helpful in elucidating her problem. She lives in Orem and there are very excellent orthopedists in Orem, namely Drs. Mendenhall, Nielsen, Jackson and Jackson, which her family has been to and she wishes to seek their attention. I have written a letter to the Industrial Commission of Utah, Timothy Allen, and recommended the same as above.

R. Sorensen, M.D.

Russell L. Sorensen, M.D., P.C.
January 6, 1988

RLS:TS5

Russell L. Sorensen, M.D., P.C.
Orthopedics
870 East 9400 South
Suite #109
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,



Russell L. Sorensen, M.D.

RLS:CMTS5

APPENDIX B

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

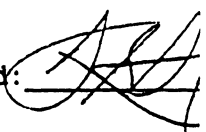
Name of Injured Janette Haycock Address 863 So. 50 E. Orem, Ut. 84058

Date of Injury 3-4-87 Name of Employer Donna'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.

mended Rule 31, Rules and Regulations, concerning medical
he Commission requires this form be completed after the in
ach 15 treatments thereafter, and such form shall be file
opy thereof shall be mailed to the patient and the employ
ailure to do so shall absolve the employer or its insuran
ayment for treatment rendered after the initial 15 treatmen
een completed, filed and mailed.


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

Address: 274 W Center

Orem, UT 84057

Phone Number (801) 225-2457

*Employer will
only allow the
patient full
work load -
no modified
available.*


6-4-87

APPENDIX C

APPENDIX C

28

1 that?

2 A Not at all.

3 Q Have you ever gone in to work trying to do light
4 duty?

5 A Did I go in to work-- What?

6 Q Yes. Since--Let's say since March 10th. Have you
7 gone in to work to see if there was any light duty work you
8 could do?

9 A Yes, I did.

10 Q Give us an example.

11 A I went in on the Wednesday after I was injured--
12 No. Two weeks after I was injured. And tried to teach my
13 class.

14 Q And how did that go?

15 A Terrible. They had to take their own things into
16 the firing rooms and things because all I could do was sit
17 there and talk to them.

18 Q Okay.

19 Have you had any injuries to your back since this--

20 A No, sir.

21 Q --incident you're speaking of?

22 What type of activities have you been involved in since
23 March 4th?

24 A Well, I wasn't crippled. I've been doing things
25 that I could do.

APPENDIX D

APPENDIX D

THE INDUSTRIAL COMMISSION OF UTAH

Case No: 87000434

JANETTE HAYCOCK,

Applicant,

vs.

DONNA FARRER dba
DONNA'S CERAMICS
(UNINSURED)
UNINSURED EMPLOYERS FUND,

Defendants.

ORDER DENYING

MOTION FOR REVIEW

EXHIBIT "A"

* * * * *

On April 4, 1988, an Administrative Law Judge of the Industrial Commission issued Findings of Fact, Conclusions of Law and Order awarding the applicant in the above-captioned case temporary total compensation from March 12, 1987 until April 4, 1988 for a March 4, 1987 back injury. The Administrative Law Judge based his award of temporary total compensation on the medical panel report which indicated that, as of the date the medical panel doctor examined the applicant (January 1988), the applicant was not medically stable as she had not gotten proper medical attention up to that point. Based on that report, the Administrative Law Judge awarded temporary total compensation from the date of injury until April 4, 1988.

On April 19, 1988, counsel for the defendant/uninsured employer filed a Motion for Reconsideration contesting the extent of the period of temporary total compensation awarded. Counsel for the defendant objects to the temporary total compensation awarded from June of 1987 to January 1988 as there was no medical treatment offered during that period of time. Furthermore, counsel for the defendant points out that the medical panel doctor indicated he could not assess the applicant's medical stability prior to the time he examined her in January 1988. Finally, counsel for the defendant notes that the employer testified at the hearing that the applicant was offered light duty work (presumably in the summer of 1987) and that she refused to accept the same. Counsel for the defendant maintains that the applicant should not be awarded temporary total compensation if she was capable of performing light duty work offered to her by her employer.

The Commission finds that the only issue on review is the period of temporary total compensation awarded by the Administrative Law Judge. In this case, it appears the Administrative Law Judge made a presumption that the applicant was not medically stable from the date of injury (March 4, 1987) until the medical panel doctor examined her in January 1988 (and thereafter until the date of the Administrative Law Judge's Order). The applicant saw a chiropractor from just after the date of injury until May 26, 1987, when the chiropractor gave her a light duty release. The light duty release makes it unclear whether the applicant was medically stable or not as of May 26, 1987. The applicant got no further treatment and did not see a doctor from May 26,

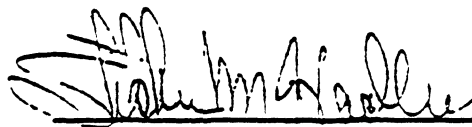
JANETTE HAYCOCK
ORDER DENYING MOTION
PAGE TWO


1987 until the medical panel doctor examined her in January 1988. The medical panel doctor found the applicant to be unstable as of January 1988 due to improper medical care.

Although it is possible the applicant stabilized sometime after the date of injury and prior to when she saw the medical panel doctor in January 1988, this seems unlikely considering the fact the applicant was not receiving any medical care during that time, which the medical panel doctor states caused her instability in January 1988. It should be noted that the applicant was not working during that time and had past due medical expenses related to the industrial injury at that time. Also, she was pursuing her eligibility for workers compensation benefits at the Industrial Commission during that time. Problems setting up a medical panel appointment caused delays in resolving the liability of the defendant. It appears that the applicant's unemployed status and no final determination as to the defendant's liability could have prevented the applicant from affording or obtaining the proper care she needed, thus resulting in the medical instability as of January 1988. Therefore, the Commission finds it was logical for the Administrative Law Judge to presume that the applicant was not medically stable due to the March 4, 1987 injury from the time when the chiropractic treatments were discontinued until when the medical panel doctor confirmed the applicant's instability. As there is no corroboration of the defendant's alleged offer of light duty work, the Commission finds the Administrative Law Judge's presumption of medical instability and award of temporary total compensation is not unreasonable. Therefore the Commission must affirm the Administrative Law Judge and deny the defendant's Motion for Review.

ORDER:


IT IS THEREFORE ORDERED that the defendant's April 19, 1988 Motion for Review is denied and the Administrative Law Judge's April 4, 1988 Order is hereby affirmed and final with further review per U.C.A. 63-46b-13 and appeal to the Court of Appeals only within 30 days of the final agency action per U.C.A. 35-1-83.


Stephen M. Hadley
Chairman

John Elorez
Commissioner

Thomas R. Carlson
Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
2nd day of June 1988.

ATTEST:


Linda J. Strassburg
Commission/Secretary

CERTIFICATE OF MAILING

I certify that on June 2, 1988, a copy of the attached ORDER DENYING MOTION FOR REVIEW in the case of JANETTE HAYCOCK was mailed to the following persons at the following addresses, postage paid:

Jeanette Haycock
413 East 100 South
Orem, UT 84058

✓ Robert Orahoski
Attorney at Law
1415 North State
Orem, UT 84057

Phillip B. Shell
Attorney at Law
45 East Vine Street
Murray, UT 84107

Donna Farrer
777 North State
Orem, UT 84057

Suzan Pixton, Administrator, Uninsured Employers Fund

Timothy C. Allen, Administrative Law Judge

Richard G. Sumsion, Administrative Law Judge

Janet L. Moffitt, Administrative Law Judge

INDUSTRIAL COMMISSION OF UTAH

By Pamela Hayes
Pamela Hayes