

1989

Jannette Haycock v. Donna Farrer, Donna's Ceramics (Uninsured), Uninsured Empolyer's Fund : Petition for Writ of Certiorari

Utah Supreme Court

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Suzan Pixton; Robert M. Orehoski; Attorney for Respondent.

Mark Wainwright; Assistant Attorney General; Phillip B. Shell; Attorneys for Appellant.

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DOCKET NO:

UTAH SUPREME COURT

BRIEF

890232

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

JANETTE HAYCOCK,
Applicant/Respondent,

DONNA FARRER dba
DONNA'S CERAMICS
(UNINSURED) and
UNINSURED EMPLOYER'S FUND,

Defendants/Appellants.

PETITION FOR WRIT OF

CERTIORARI 890232

Docket No. 880418 CA

Priority No. 13

PETITION FOR WRIT OF CERTIORARI OF FINAL DECISION OF THE
UTAH COURT OF APPEALS

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ATTORNEYS FOR APPELLANT

1287

Court Clerk

UIC

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

JANETTE HAYCOCK,
Applicant/Respondent,

PETITION FOR WRIT OF

DONNA FARRER dba
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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

JANETTE HAYCOCK,
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CERTIORARI

Docket No.
Court of Appeals: 880418 CA

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Priority No. 13

PETITION FOR WRIT OF CERTIORARI OF FINAL DECISION OF THE
UTAH COURT OF APPEALS

Donna Farrer dba Donna's Ceramics, defendant below and
appellant herein, files this Petition for Writ of Certiorari
pursuant to Rules 43 and 46, Rules of the Utah Supreme Court.

QUESTION PRESENTED FOR REVIEW

Did the Appeals Court and Industrial Commission err in
refusing to limit the period of temporary total disability to the
period prior to the date the respondent was given a light duty
work release in light of the uncontradicted evidence on the
record that light duty work was available but that respondent did

not seek to perform such after the date of the release?

ACTION IN THE COURT OF APPEALS

On May 10, 1989, the Court of Appeals entered and issued an opinion in this matter wherein the award of the Industrial Commission was upheld on both issues presented to that Court for review.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review by a writ of certiorari the decision of the Court of Appeals pursuant to Sections 78-2-2(5) and 35-1-37, Utah Code Annotated.

CONTROLLING STATUTES

Section 35-1-65(1), Utah Code Annotated controls herein:

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. The Administrative Law Judge thereafter 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 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 with the Court of Appeals. R. 181-184.

The opinion of the Court of Appeals affirming the award of the Industrial Commission was entered and issued on May 10, 1989.

B. OTHER RELEVANT FACTS

The treating chiropractor, Dr. Kenneth Hansen, submitted a Chiropractor's Supplemental Report to the Industrial Commission on June 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 had been given a light duty release only. R. 10.

At the evidentiary hearing of July 17, 1987, the appellant\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. Has she been back to see if she can work since she left...?

A. ... No...

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.

ARGUMENT

This Court should grant certiorari and review this case

because the Court of Appeals has upheld the Industrial Commission on a matter that is fully contrary to factual evidence upon which the decision could be based. Rather, the facts on the record fully support a contrary finding.

This issue concerns whether the respondent should be awarded temporary total disability benefits beyond the date she was given a light duty medical release by her health care provider.

It is clear from Section 35-1-65(1) as cited above that temporary total disability benefits should continue beyond the date of a light duty work release only if no such light duty work is available to the employee from the employer.

The only evidence in the record is that:

1. At one time shortly after the injury, the parties talked about whether the respondent could take work home to do.

2. The employer offered light duty work at the place of employment prior to the date respondent was given a light duty work release, and at that time the respondent was unable to do it.

3. Respondent did not at any time after the date she was given the release, which was two and a half months post injury, seek such work from her employer.

With this factual basis, there are no grounds upon which the Industrial Commission could find that light duty work was not available for the respondent after she was given the release, or that respondent was refused such work by her employer.

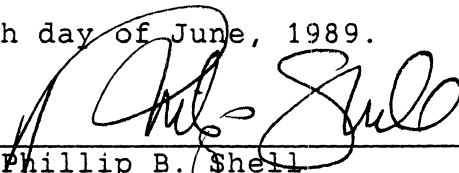
Nor is there any basis upon which the Court of Appeals could

affirm the Industrial Commission on this point.

Hence, on the basis of the record, the only conclusion that could be reached is that temporary total disability benefits should not have been awarded beyond the date the respondent was given the light duty release.

Accordingly, the Court should grant the Petition for Writ of Certiorari and review this matter. The award of the Commission of temporary total disability benefits should be limited to the period ending with the date a light duty medical release was given.

Respectfully submitted this 9th day of June, 1989.



Phillip B. Shell
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

JANETTE HAYCOCK,
Applicant/Respondent,

v.

CERTIFICATE OF DELIVERY

DONNA FARRER dba
DONNA'S CERAMICS
(UNINSURED) and
UNINSURED EMPLOYER'S FUND,

Docket No. _____
Court of Appeals No 880148-CA

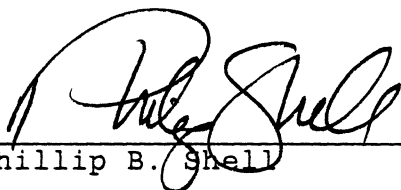
Defendants/Appellants.

I hereby certify that four true and accurate copies of the
above and foregoing Petition for Writ of Certiorari were mailed,
postage pre-paid to each of the following on this 9th day of
June, 1989:

ROBERT M. OREHOSKI, ESQ.
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Phillip B. Shell

APPENDIX

FILED

IN THE UTAH COURT OF APPEALS

MAY 10 1989
Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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Donna Farrer, d/b/a Donna's)
Ceramics, and Uninsured)
Employers' Fund,)
)
Petitioners,)
)
v.)
)
Industrial Commission of Utah)
and Janette Haycock,)
)
Respondents.)

OPINION
(Not For Publication)

Case No. 880418-CA

Original Proceeding in this Court

Attorneys: Phillip B. Shell, Murray, for Donna Farrer
Suzan Pixton, Salt Lake City, for Uninsured
Employers' Fund
Robert M. Orehoski, Orem, for Janette
Haycock
Mark E. Wainwright, Salt Lake City, for Industrial
Commission

Before Judges Davidson, Bench, and Orme.

BENCH, Judge:

Plaintiff Donna Farrer appeals from an Industrial Commission decision to grant defendant Janette Haycock compensation for temporary total disability. Farrer contends that the Commission granted the compensation without substantial evidence. We affirm.

Haycock injured her back on March 4, 1987, while moving shelves at work. Farrer was Haycock's employer at the time. On April 4, 1987, Haycock filed a claim for workers' compensation. Farrer was uninsured and contested the claim for benefits. On May 26, 1987, Haycock's chiropractor released Haycock for light duty work. Farrer testified at the evidentiary hearing that light duty work was available, but Haycock did not accept it. Haycock claimed that she attempted, but could not perform, the work offered.

The matter was heard by an administrative law judge (A.L.J.) who referred the case to a medical panel. The panel found that, as of January 1988, Haycock had not reached a fixed state of recovery. The A.L.J. adopted the panel's findings, concluding that the injury was work-related, and awarded Haycock medical benefits and temporary total disability compensation through April 19, 1988.

Farrer filed a motion for reconsideration. She contested the period of compensation, arguing that temporary total compensation was unavailable after Haycock declined light duty work. The Industrial Commission denied the motion and affirmed the A.L.J.'s order. This appeal followed.

In reviewing the Commission's findings of fact, "the findings . . . as to the facts if supported by evidence, are conclusive" and our review "is confined to questions of law." Utah Code Ann. § 35-4-10(i) (1988). We must, therefore, afford the Commission's factual findings "the greatest degree of deference" and sustain them "if they are supported by evidence of any substance whatever." Mayes v. Department of Employment Sec., 754 P.2d 989, 991 (Utah App. 1988); see also Rizzo v. Industrial Comm'n, 716 P.2d 789, 790 (Utah 1986). This means that the Commission's findings will be "set aside only if they are so without foundation in fact that they 'must be deemed capricious and arbitrary.'" Stegen v. Department of Employment Sec., 751 P.2d 1160, 1162 (Utah App. 1988) (quoting Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 609 (Utah 1983)).¹

Farrer first asserts that the A.L.J. lacked substantial evidence regarding the stability of Haycock's medical condition in order to make an award of temporary total disability compensation. Farrer's contention focuses on the initial medical report stating that Haycock had not received adequate care and her condition would improve with future care. The medical panel concluded that she was still suffering from her injury and had not reached a "steady state." Farrer objected to the report, and the A.L.J. referred the matter back to the medical panel for clarification. The medical panel doctor reported that Haycock had not reached a state of fixed recovery because she had not been appropriately treated. He also suggested that questions as to her state of recovery should be referred to Haycock's chiropractor. Farrer made no effort to contact the chiropractor, and the A.L.J. adopted the panel's report.

Temporary total disability benefits end when stabilization

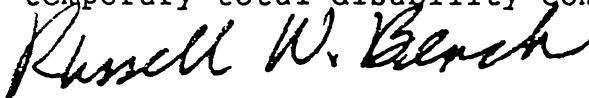
1. We apply this standard of review because the proceeding was commenced prior to the effective date of new standards set forth in the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-16(4) (1988).

of the medical condition occurs. Entwistle Co. v. Wilkins, 626 P.2d 495, 497 (Utah 1981). "Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve." Booms v. Rapp Constr. Co., 720 P.2d 1363, 1366 (Utah 1986). It is essentially a question of fact to be determined by medical evidence viewed in the light most favorable to the Commission's ruling. Griffith v. Industrial Comm'n, 754 P.2d 981, 983-84 (Utah App. 1988).

We have reviewed the record and conclude that the Commission's findings were adequately supported by the evidence. The A.L.J. found that, based on the medical panel's report, Haycock's condition had not stabilized as of January 1988. Upon review, the Commission determined that Haycock received insufficient medical care after the accident. The Commission also found that delays in determining Farrer's liability may have financially prevented Haycock from receiving adequate medical attention, thus confirming the medical panel's report. These findings are conclusive. Deference to the Commission prohibits us from reassessing or overturning these factual findings.

Farrer argues in the alternative that the compensation period for temporary total disability should have ceased at the time Haycock was released for light duty work, relying on Utah Code Ann. § 35-1-65(1) (1988) ("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."). Although Farrer claims that light duty work was available, the Commission considered this claim and determined as a matter of fact that no such work was available. This finding is also supported by the evidence and is conclusive.

Since the decision of the Commission is amply supported by substantial evidence and we find no legal error, the award of temporary total disability compensation is affirmed.

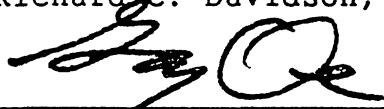


Russell W. Bench, Judge

WE CONCUR:



Richard C. Davidson, Judge



Gregory K. Orme, Judge

JANETTE HAYCOCK,

Applicant,

vs.

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

Defendants.

ORDER DENYING

MOTION FOR REVIEW

* * * * *

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,

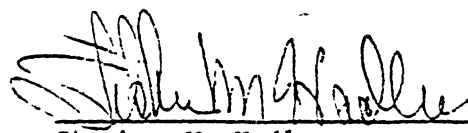
ORDER DENYING MOTION
PAGE TWO

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.

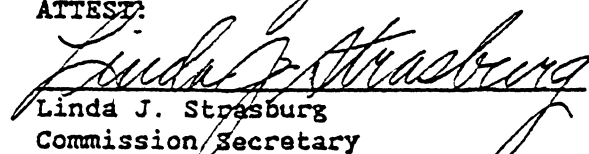
ORDER:

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.

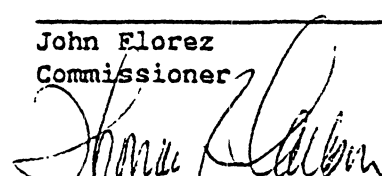

Stephen M. Hadley
Chairman

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
20th day of June 1988.

ATTEST:


Linda J. Strasburg
Commission Secretary

John Elorez
Commissioner


Thomas R. Carlson
Commissioner

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 87000434

JANETTE HAYCOCK,

Applicant,

vs.

DONNA FARRER dba
DONNA'S CERAMICS (uninsured)

Defendants.

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INTERIM

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

* * * * *

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on July 17, 1987 at 10:00 a.m. o'clock. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The applicant was present and represented by Robert M. Orehoski, Attorney at Law.

The defendants were represented by Phillip Shell, Attorney at Law.

At the conclusion of the evidentiary hearing, the matter was taken under advisement and referred to a medical panel for its evaluation. The medical panel report was received and copies were distributed to the parties. The defendant, by and through counsel, filed a request for clarification of the medical panel report. No objections having been received to the supplemental panel report, the panel report and the supplemental panel report are admitted into evidence.

Being fully advised in the premises, the Administrative Law Judge is prepared to enter the following

FINDINGS OF FACT:

Janette Haycock started working for Donna's Ceramics in August of 1986. She discontinued her employment, but then resumed towards the end of December of 1986. On March 4, 1987, at approximately 6:30 p.m., she was helping move some shelves which contained paint. The shelves were six feet tall, and were fastened back to back and full of paint products. The bottom

JANETTE HAYCOCK
ORDER
PAGE TWO

shelf contained gallon jugs of paint, and the remainder of the shelves had four ounce bottles of paint. The shelves were gouging the linoleum floor, and the applicant was helping others lift and push on the set of shelves, when she had a sharp pain in her low back. The pain subsided, which lead the applicant to believe that she would be better. She went home that evening, and reported to work the following day. She told Donna Farrer that she had hurt her back the night before lifting the paint shelves, and Mrs. Farrer instructed her to do some light duty. Since she was having back pain, she left work early that day.

On March 6, 1987, the applicant called Mrs. Farrer and advised her that she would not be in because of back pain. On the following day, she took one of her husband's pain pills and then reported for work. She was cleaning greenware and was able to do so until 1:00 p.m. Although Saturday is the busiest day at the shop, Mrs. Haycock could not work beyond 1:00 p.m., so she left. During this time she was in back pain and was unable to stand up straight. On March 9, 1987, she took some pain pills and was able to work that whole day. On March 10, she reported for work but was only able to work until approximately 3:00 p.m. due to her back pain.

On March 11, 1987, the applicant reported to Kenneth Hansen for chiropractic treatment, and was also given an x-ray. Dr. Hansen took the applicant off work and has not yet released her for full duty. On March 14, 1987, the applicant contacted her employer concerning workers compensation insurance, and was told there was none. Mrs. Farrer suggested to the applicant that her medical bills should be paid by her husband's insurance, and that she and Mrs. Haycock would then talk about the balance.

Because of worsening problems with left leg pain, the applicant was sent by Dr. Hansen to the Utah Valley Hospital for a CT scan on July 13, 1987. The applicant testified Dr. Hansen had been treating her with adjustments every two weeks, but because of worsened 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.

With the file in this posture, the case was referred to a medical panel for its evaluation. The medical panel found that as of March 1, 1988, that the applicant's condition had not yet reached a fixed state of recovery. The panel felt that the applicant had not received appropriate care for her injury, and that the applicant should seek the care of an orthopedist in Utah County. The medical panel felt that she may need further physical therapy and diagnostic studies in the form of scans or diskograms and that she might even need disc excision surgery. The panel concluded that it was too early to rate the applicant's permanent impairment because of her expected significant recovery. The Administrative Law Judge adopts the findings of the medical panel as his own.

JANETTE HAYCOCK
ORDER
PAGE THREE

Pursuant to the findings of the medical panel, the applicant should immediately present herself to an orthopedic surgeon in the Utah County area for medical care. Mrs. Haycock should also furnish the orthopedist with a copy of the medical panel report. Accordingly, she should discontinue any further chiropractic care. In addition, the applicant is also entitled to temporary total compensation benefits commencing effective March 12, 1987, and continuing through the date of this Order. Thereafter, additional temporary total compensation will be awarded upon receipt of a report from an orthopedic surgeon in the Utah County area indicating that further temporary total disability is indicated.

On March 4, 1987, Janette Haycock was earning \$3.50 per hour, working 40 hours per week and was married with three minor dependent children, which entitles her to weekly benefits in the amount of \$113.00 per week when rounded to the nearest whole dollar.

Since the defendant, Donna Farrer was uninsured for workers compensation purposes, the medical expenses and compensation benefits due the applicant are her responsibility.

CONCLUSIONS OF LAW:

IT IS THEREFORE ORDERED that Donna Farrer dba Donna's Ceramics pay Janette Haycock compensation at the rate of \$113.00 per week commencing effective March 12, 1987, and terminating on the date of this Order. These benefits shall be paid in a lump sum and shall include interest of 8% per annum.

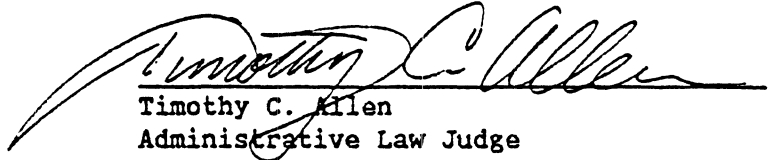
IT IS FURTHER ORDERED that Donna Farrer pay Robert M. Orehoski 20% of the aforesaid award of temporary total compensation, the same to be deducted from the award to the applicant and remitted directly to his office.

IT IS FURTHER ORDERED that Donna Farrer pay all medical expenses incurred as the result of the industrial accident of March 4, 1987.

IT IS FURTHER ORDERED that Janette Haycock shall be entitled to additional temporary total compensation upon the submission of a medical report from an orthopedic surgeon indicating additional temporary total disability as the result of the industrial accident of March 4, 1987. At that time, the Administrative Law Judge will enter a supplemental order awarding additional benefits. The issue of the extent of the permanent impairment due to the industrial accident is also hereby reserved.

JANETTE HAYCOCK
ORDER
PAGE FOUR

IT IS FURTHER ORDERED that Donna Farrer pay the amounts provided herein to the persons entitled thereto within ten (10) days from the receipt hereof.


Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
4th day of ~~March~~, 1988.

ATTEST:


Linda J. Strasburg
Commission Secretary