

1949

# Jakes D. Laws v. Geneva Steel Company and The Industrial Commission of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

**FILE**

NOV 1 1949

JAMES D. LAWS

Appellant

vs

CLERK, SUPREME COURT,

GENEVA STEEL COMPANY  
and/or THE INDUSTRIAL  
COMMISSION OF THE  
STATE OF UTAH

Case No. 7253

Respondents

BRIEF OF APPELLANT

WRIT OF REVIEW OF INDUSTRIAL COMMISSION

of the

STATE OF UTAH

Dean E. Flanders

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IN THE SUPREME COURT

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STATE OF UTAH

JAMES D. LAWS

Appellant

vs.

GENEVA STEEL COMPANY  
and/or THE INDUSTRIAL  
COMMISSION OF THE  
STATE OF UTAH

Respondents

Case No. 7253

BRIEF OF APPELLANT

STATEMENT OF FACTS

On the 26th day of July, 1946, the appellant suffered an injury arising out of and in the course of his employment with the Geneva Steel Company at Draper-ton, Utah, when he fell and bumped his back on a corner of a tie (transcript of first hearing page 6)

It was admitted that the Geneva Steel Company was at the time of the accident on July 26, 1946, a self in-surer, with three or more employees and under the provi-

State of the Workmen's Compensation Act. It was also admitted that the applicant was injured in an accident arising out of and in the course of his employment with the Geneva Steel Company on the 26th day of July, 1946. The appellant went to the local hospital at Dragerton in the evening of the same day and an examination was made by Dr/Anderson and later by Dr. Columbo. Upon examination, Dr. Columbo diagnosed the case as bruised back and neck and left shoulder and filed his report with the Industrial Commission. The appellant was given treatment at the company local hospital to relieve the pain and was released for work on the 3rd day of September, 1946. Mr. Laws returned to work and continued on the job for three days when he was compelled to stay at home because of his pain and inability to work (transcript of first hearing page 7). On the 17th day of September, 1946, an application was filed with the Industrial Commission for the purpose of determining the nature and the extent of the appellant's injuries. At this time an examination of the appellant was made by Dr. Okelberry and a copy of this report was filed with the Commission and a copy furnished to Dr. Linden, head of the medical staff of the defendant, Geneva Steel Company. The hearing on the application was duly set for the 15th day of October, 1946. On the 10th day of

October, 1946, Dr. Linden requested the appellant to report to the St. Marks Hospital and he was there examined by Dr. Martin C. Linden, and Dr. Linden then concluded the appellant had a spondylolisthesis and had received some injury (transcript of first hearing page 47) and operated the Coccyx (transcript of first hearing page 47) and the appellant was again released for work on the 8th day of November, 1946 by Dr. Martin C. Linden, but the appellant was not able to immediately return to work, but after a period of one week he returned to work, but was unable to continue (transcript of first hearing page 9).

When the appellant's application was still pending the Industrial Commission called the appellant to appear before the Advisory Board for an examination on March 14, 1947, and at the conclusion of the examination the Board determined that his condition had become fixed on the 22nd day of December, 1946, and rated his permanent loss of bodily function as 15 per cent. This recommendation of the Advisory Board was rejected by the appellant and request was made that his application for a formal hearing on the issue be set for hearing.

At the hearing on October 22, 1947, it was stipulated by counsel that Mr. Laws received a compensable injury on the 26th day of July, 1946 (transcript of first

hearing page 43). Mr. Laws testified that he had worked continuously throughout his life at hard manual labor without any trouble to his back of any kind (transcript of first hearing page 11). The company examined Mr. Laws prior to his employment, but rated him unemployable for heavy work because of Pharyngitis and Sinusitis, but not because of any physical condition of his back (transcript of first hearing page 45).

Dr. Okelberry testified that he had examined Mr. Laws on the 13th day of September, 1946, and that it was his opinion at that time that Mr. Laws was disabled because of an injury received in an accident which occurred on July 26, 1946. That the injuries received by Mr. Laws were a contusion of the Dorsal region of the spine and to the Sacral Coccygeal junction with dislocation of the coccyx and a low back sprain with an aggravation of a pre-existing spondylolisthesis. That there was also some evidence of a partial rupture of the inter-vertebral disc. That there had been some degree of sprain at the base of the neck or at the cervical dorsal junction, That the pre-existing spondylolisthesis had been aggravated by the injury. That a culmination of the pre-existing congenital defect plus the injury resulted in a very persistent disability and in his opinion Mr. Laws would



Dr. Lindem made a physical examination was performed to stabilize the back (transcript of first hearing pages 17-18-19-20)

Dr. Lindem refused to recognize that any disability existed and summarized his findings in these words: The whole observation has been that myself and my colleagues is that Mr. Laws is suffering from something hysterical or he is a plain malingerer (transcript of first hearing page 49).

That Mr. Laws was not able to work when he was released for work by Dr. Lindem on September 3, 1946, but continued to suffer pain and was continually unable to work from the date of his injury on July 26, 1946 to the date of the hearing on October 22nd, 1946 (transcript of first hearing pages 11 and 22).

The Commission rendered its decision in this matter on the 24th day of December, 1946, and determined that the appellant was not in need of further medical treatment and that his condition had become fixed on the 22nd day of December, 1946 and that he had suffered a permanent loss of bodily function of fifteen per cent.

After this decision was rendered by the Commission, and within the time allowed by law in which to file a petition for a rehearing, the appellant went to the L.D.S. Hospital and on the 19th day of January, 1948 Mr. Laws

spinal fusion on the appellant's back. That on the 22nd day of January, 1948, and within the time allowed by law the appellant filed with the Industrial Commission a petition for a rehearing of the matter on the merits on the grounds of the newly discovered evidence made available by the operation, and this petition was duly granted and the matter came on regularly for hearing on the 7th day of June, 1948. At the rehearing of the matter the evidence was without dispute that the appellant had had a pre-existing congenital defect of the back which had been aggravated by the injury of July 26, 1946 and that this pre-existing congenital defect had prevented the injury of July 26, 1946 from recovering in the normal manner and that a spinal fusion was the proper therapeutics and that he was in fact totally disabled for work during the whole period from July 26, 1946 to the date of his spinal fusion operation on the 19th day of January, 1948 (transcript of rehearing pages 11-22).

In the decision of the Industrial Commission on the rehearing the Commission found:

"That there had been no change in the physical condition of the appellant since the award made the applicant on December 24th, 1947 and therefore conclude that the award made to the applicant on December 24, 1947 was considered adequate to cover the total disability suffered by the applicant as a result of his injuries on July 26, 1946 as

well as the permanent partial disability which the applicant had on December 24, 1946 as a result of such injuries."

ERRORS ON WHICH THE APPELLANT RELIES FOR  
ANNULING THE AWARD OF THE INDUSTRIAL COMMISSION

ERROR NUMBER ONE

The refusal of the Industrial Commission to render a decision on the rehearing modifying its previous decision of December 24, 1947 on the grounds that the applicant had shown no change in his physical condition since the date of the original decision of December 24, 1946 was contra to law and was error.

ERROR NUMBER TWO

The Commission committed error in not awarding the applicant further compensation from the 26th day of December, 1946 to the date of the rehearing.

ERROR NUMBER THREE

The Commission committed error in not awarding the appellant the medical and hospital expenses incurred incidental to the operation of January 19, 1948.

ERROR NUMBER FOUR

The Commission committed error in not continuing the payment of compensation to the appellant from the date of the rehearing until such time as the Commission should determine in further proceedings the exact date the appellant's condition became fixed and at that time awarding to

the appellant such compensation for his partial permanent loss of bodily function as he was then entitled.

ARGUMENT ON ERROR NUMBER ONE  
THE REFUSAL OF THE INDUSTRIAL COMMISSION TO  
RENDER A DECISION ON THE REHEARING MODIFYING  
ITS PREVIOUS DECISION OF DECEMBER 24TH, 1947  
ON THE GROUNDS THAT THE APPLICANT HAD SHOWN  
NO CHANGE IN HIS PHYSICAL CONDITION SINCE  
THE DECISION OF DECEMBER 24TH, 1947 WAS  
CONTRA TO LAW.

The language of the Commission clearly indicates that the Industrial Commission misinterpreted the statute and was of the opinion that in order for the Commission to render a different award than was rendered on the 24th day of December, 1947, it was incumbent upon the applicant to show some change in his condition between the decision of December 24, 1947 and the rehearing on the 9th day of June, 1948. The language of the Commission in its findings is so plain and unequivocal as to preclude any doubt that the Commission was misguided as to the law.

"After hearing the testimony in the case and reviewing the same as set forth in the transcript and other documentary evidence, the Commission finds that there has been no change in the physical condition of the applicant since the award made on December 24, 1947, and therefore concludes that the award made on December 24, 1947 was adequate."

From such language it is perfectly apparent that the Commission assumed that before the applicant was entitled to a different award than the Commission made on December, 24,

1941, the applicant must show some change in his physical condition subsequent to December 24, 1947 and prior to the date of the rehearing. This interpretation of the law taken by the Commission is contra to law and resulted in the Commission disregarding virtually all of the evidence produced at the rehearing.

Section 42-1-76 U.C.A. 1943 provides that any party, including the Commissioner of Finance, to a proceeding before the Industrial Commission may and before he can seek a review in the Supreme Court, shall within thirty days after written notice of its decision, file an application before the Industrial Commission for a rehearing of the matter.

This is the only provision in the Workman's Compensation Act pertaining to a rehearing and it is entirely silent as to what the purpose of such rehearing is or what the duties of the Commission are upon such rehearing, but it is the view of the appellant that the Commission having granted a rehearing upon the merits the nature of the proceeding was that of a new trial and it was the duty of the Commission upon the rehearing to determine the original issues before the Commission upon the basis of all of the evidence then before the Commission the same as if such evidence had been produced at the original hearing and that the appellant was not required to show any change in his physical condition

subsequent to the decision rendered on December 24, 1947 an the rehearing, but was entitled to an award according to the evidence produced at the rehearing.

The generally accepted rule of law is that when the Commission grants a petition for a rehearing upon the writ the proceeding is in the nature of a new trial on the original issues before the Commission and the Commission is bound to consider the evidence submitted at the rehearing and decide the original issues before the Commission on the basis of a review of the evidence then before the Commission. 71 C.J. Workman Compensation, section 116, states the rule thus:

"Under a general application for a rehearing on specific grounds, without limiting the issues raised by the request, the whole subject matter is reopened for further consideration and determination and the issues raised are as broad as those raised in the original application."

) In the case of Western Power Company of California v Industrial Commission, 218 Pac. 1009 at page 1011 the California Court said:

"The petition made a general application for a rehearing on the merits on the ground already mentioned and without in any way limiting the issues raised by such request. Under such application the whole subject matter was reopened for further consideration and determination and the issues thus raised were as broad as those raised on the original application for compensation."





This Court has heretofore very clearly expressed its views on this question in the case of Carter vs Industrial Commission, 279 Pac. 776 and on page 783 this Court said:

"Assuming or refusing jurisdiction to hear and determine presented controversies is not a matter of discretion. If the right to apply for a rehearing exists the question of permitting or allowing the application therefore to be made and filed is not a matter of discretion but when the application or motion is made or filed the granting or refusing a rehearing may be a matter of discretion depending upon the matters alleged or made to appear as grounds for the rehearing or further hearing. In such respect the matter is analogous to a new trial under the Civil Code in a judicial proceeding. If the aggrieved party has the right to file or make a motion for a new trial and timely does so the Court is required to entertain the application and consider the motion, but depending upon what is made to appear the Court is given a sound discretion in determining whether a new trial will or will not be granted. Confessedly the Commission had jurisdiction to entertain and consider the first application made by the employee for a rehearing. The effect of granting the rehearing unless otherwise restricted or limited was to vacate and set aside the prior order of the Commission and try the cause anew."

This language of the Court in the case of Carter vs Industrial Commission is in harmony with the great weight of authority that when a rehearing is once granted and the issues are unrestricted the rehearing is in the nature of a new trial under the Civil Code and that the issues then before the Commission are the original issues presented by

by the authorities but effects justice to both parties.

The Commission in this case having granted a rehearing to the applicant, unrestricted as to the issue, in effect vacated its order of December 24, 1947 and there was no final judgment of the Commission. Since a rehearing is in the nature of a new trial on the original issues presented by applicant's original application it then became the duty of the Commission to consider the matter in the light of such evidence introduced at the original hearing as was made a part of the record on the rehearing and such further evidence as was presented at the rehearing and then upon the basis of all of the evidence before the Commission, determine the issues presented by the original application of the applicant. This the Commission obviously refused and failed to do, but decided the matter upon the theory that since the applicant had not shown that his physical condition had changed since the Commission made the award on December 24, 1947, that award must stand and the Commission disregarded all of the evidence submitted at the rehearings except such evidence as tended to show whether or not there had been any change in his physical condition since the award made on December 24, 1947 and the Commission did not decide or attempt to decide the original issues presented by the applicant's original application in the light of the



At the close of the applicant's testimony on the rehearing counsel for the Geneva Steel Company stated to the Commission (transcript of rehearing page 21):

"Mr. Commissioner, before the Geneva Steel Company presents its case I would call the Commission's attention to the decision of the Supreme Court of Utah to the effect that when the Commission has already given an award in the case of an applicant for compensation that that cannot be changed. That they cannot change that award without some evidence of a change or new development in the injury subsequent to the date of the award.

Secondly, that if such a change of new development has been brought into evidence, then any subsequent amendment of the award would have to be from the new change or discovery and not to be retroactive."

The defendant's counsel cited 102 Utah 252 Pac.567; Carter vs Industrial Commission 76 Utah 520, 290 Pac. 776, 61 Utah 514, 215 Pac. 1047.

The Commission followed this view of the law as expressed by counsel for the defendant, Geneva Steel Company, and disregarded all of the evidence introduced at the rehearing except such evidence as indicated that there was no change in the condition of the applicant since the decision of the Commission on December 24, 1947, which evidence consisted of the sole statement of the applicant that there were no new developments during that period (transcript of rehearing page 9) and the further statement of Dr. Okelberry

Q. Doctor, as a result of performing that operation on January 19, 1948, did you find any condition in Mr. Laws' back different than your previous diagnosis?

A. No.

From these two statements, one of the appellant and the other of Dr. Okelberry, the Commission found that there had been no change in the condition of the applicant subsequent to the decision of the Commission on December 24, 1947, and completely disregarded all the rest of the testimony introduced at the rehearing which was pertinent to the real issues before the Commission for decision, to-wit: What was the real condition of the applicant at the time he filed his petition for compensation and whether further medical treatment was advisable.

The statement of the law as made to the Commission by counsel for the Geneva Steel Company and which the Commission followed was not a correct statement of the law and the Commission committed error in following this view of the law.

None of the cases cited to the Commission by counsel for the Geneva Steel Company express any such view as argued by counsel in support of his view that before the Commission could modify or change the decision of December 24, 1947, the applicant must show a change in his physical condition since the decision of December 24, 1947.

Carter vs Industrial Commission were brought under and construed section 42-1-72 U.C.A. 1943, giving the Commission continuing jurisdiction and which provides:

"The powers and jurisdiction of the Commission over each case shall be continuing and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified."

The foregoing provision of the Workman's Compensation Act deals with final judgments of the Commission and has no application to rehearings granted under section 42-1-76 U.C.A. 1943.

All of the cases cited to the Commission by counsel were decided under and construed section 3134 Compiled Laws of Utah 1917 (section 42-1-72 U.C.A. 1943) and none of the cases cited assume or attempt to determine the rights of the parties or the duties of the Commission under section 42-1-76 U.C.A. 1943, providing for rehearings except the case of Carter vs Industrial Commission as stated by the Court in the case of Salt Lake City vs Industrial Commission, 215 Pac. page 1047 (cited to the Commission by counsel.)

"The sole question to be determined is: When the Industrial Commission has made an award either granting or denying compensation and on rehearing the award is set aside or reversed, is the party bound to apply to this Court within thirty days for a writ of review, as provided by law or may such party at any time thereafter make application again to the Commission for compensation

the case as if the case had never been before it and previously determined. In the opinion of the writer there is but one logical view to take of the question."

In this case of Salt Lake City vs Industrial Commission, the applicant made application for compensation, a hearing was had and compensation was granted, the City requested a rehearing as provided for in section 42-1-76 U.C.A., 1943. A rehearing was granted and on the rehearing the Commission vacated this award and from this decision of the Commission the applicant did not either file a petition for a rehearing or file a petition for a writ of review, but allowed the decision of the Commission to become a final award, but after the time for appeal had expired the applicant filed a new application for compensation. When the applicant failed to either file a petition for a rehearing or a petition for a writ of review as provided by the statute, then the award of the Commission became a final judgment. All that the Court decided in this case was that when the applicant failed to apply to this Court for a writ of review within thirty days allowed by law the award of the Commission became a final award and that he could not thereafter file a new application for compensation without showing some change in his circumstances. This seems to be a reasonable statement of the law and when the Commission has made an award and that award has been

allowed to become final the applicant could not the next day file a new application and have adjudicated the same issues all over again, otherwise there would never be an end to litigation. But the case now before this Court is not a case in which the applicant allowed the decision of the Industrial Commission to become a final judgment and then afterwards files a new application for compensation. The case now before the Court is a case in which, after the original award was made a timely petition for a rehearing, unrestricted as to the issues, was made on the grounds of newly discovered evidence and the Commission granted a rehearing and the matter then came before the Commission on rehearing and not by virtue of a new application for compensation filed by the applicant after the decision of the Commission had become final as in the case of Salt Lake City vs Industrial Commission and Aetna Life Insurance Company vs Industrial Commission, cited to the Commission by counsel for defendant Geneva Steel Company.

The case of Aetna Life Insurance Company vs Industrial Commission also cited to the Commission by counsel for the defendant Geneva Steel Company also construes section 42-1-72 U.C.A. 1943 and does not attempt to construe section 42-1-76 U.C.A. 1943 determining the rights of the parties and the duties of the Commission upon a rehearing.

Industrial Commission 169 Utah 102,252 Pac. 567, the applicant filed an application for compensation. A hearing was duly had and the Commission made an award and the award was paid. Neither party applied for a rehearing nor filed a petition for a writ of review and the decision became a final award and the issues presented by the original application were finally adjudicated. Several months later the applicant filed a new application for further compensation (the applicant's second application for compensation) which was denied by the Commission. A rehearing on this second application was had and the Commission refused further compensation. From this decision of the Commission on the rehearing on applicant's second application no appeal was taken and the award of the Commission became final. Then after the applicant's second application had been finally adjudicated the applicant was examined by Dr. D. K. Allen and it was determined that there had been a change in his physical condition and the applicant filed a new application for compensation (the applicant's third application.) Upon the hearing of this third application of the applicant for compensation for the same injuries the Industrial Commission awarded the applicant compensation from the date of the hearing on the first application up to the date of the hearing on applicant's third application for compensation.

was only entitled to compensation from the date that the new and changed condition was made known to the Commission and reaffirmed the decision of this Court in the case of Salt Lake City vs Industrial Commission that before the applicant was entitled to further compensation he must show a change in his condition and that compensation could only be awarded from the date that change of condition was made known to the Commission.

In the case of Aetna Life Insurance Company vs Industrial Commission the issues presented by the original petition of the applicant had been finally judicially determined and the extent of the applicant's injuries had been determined by the Commission when it heard the applicant's first application for compensation and rendered its decision on those issues. The Commission at that time determined all of the issues presented to it by the original application of the applicant. /From this decision determining the extent of the injuries of the applicant no appeal was taken and the decision of the Commission became a final award.

The vital distinction between the case of Aetna Insurance Company and the case now before the Court is that the case now before the Court came before the Commission on a rehearing of the applicant's original application for



Insurance Company case the original issues presented by the original application had been finally determined and the judgment of the Commission had become final and then long after the original issues had been determined the applicant filed a new application in accordance with the provisions of section 42-1-72 U.C.A. 1943 and the Court was construing 42-1-72 U.C.A. 1943 and the Court reaffirmed the language of Justice Thurman in the case of Salt Lake City vs Industrial Commission where the Court said after quoting section 3134 Compiled Laws of Utah, 1917 (now sec. 42-1-72 U.C.A 1943)

"It certainly was not intended by that section that the Commission might resume jurisdiction of a case that had once been regularly determined without some change or new development in the injury complained of not known to the parties when the former award was made\*\*\*."

The Court in both the cases of Salt Lake City vs Industrial Commission and Aetna Life Insurance Company vs Industrial Commission were construing section 42-1-72 and made no attempt to define or determine the rights of the parties or the duties of the Industrial Commission under the provisions of section 42-1-76.

It is now the duty of this Court to construe section 42-1-76 and determine the rights of the parties and the duties of the Industrial Commission in a case where a rehearing has been granted on the original application of the applicant

for compensation and there has never been a previous final



determination of the issues presented by the applicant's original application for compensation. And on this question this Court has heretofore expressed its views in the case of Carter vs Industrial Commission 76 Utah 520, 290 Pac. 776, where the Court said:

"The effect of granting the rehearings unless otherwise restricted or listed was to vacate and set aside the prior order of the Commission and try the case anew."

This language of the Court clearly indicates the intention of this Court to follow the great weight of authority, that when a rehearing is granted unrestricted as to the issues the nature of the proceeding is in the nature of a new trial under the Civil Code and the issues then before the Commission are the original issues presented by the original application for compensation. This seems to be the only fair and reasonable construction that can be given to section 42-1-76. It seems that the very obvious purpose of the legislature by enacting section 42-1-76 was to give to the parties every reasonable opportunity to present all available evidence to the Commission so as to secure a fair adjudication of the issues presented by the applicant's application for compensation. This construction is not only sound in principle but it is supported by the authorities and effects justice to both the parties.

in' .....ling with the continuing jurisdiction of the Commission, that this section should deal only with changes in condition that arise after a final adjudication of the original issues so as to effect justice between the parties in view of circumstances as they may change from time to time.

If this Court should adopt the view of the law as expressed by counsel to the Industrial Commission and followed by the Commission that before the Commission could modify or make a different award than was made on December 24, 1947, it was incumbent upon the applicant to show some change in his physical condition subsequent to the decision rendered by the Commission on December 24, 1947 it would not only virtually nulify section 42-1-72 and deny to the applicant his legal right to a fair and complete adjudication of the issues presented by his original application, but such a holding would virtually deprive the applicant of substantially every benefit conferred by the Workman's Compensation Act. The plain intent and purpose of the Workman's Compensation Act was to give to an injured employee such medical treatment as shall be required for the treatment of his injury and to pay his compensation during his period of total disability and in addition, such compensation as he is entitled for his permanent loss of bodily function.

The theory upon which the Industrial Commission

decided this case clearly deprived the applicant of the benefits of the Act.

Mr. Laws suffered his injury on the 26th day of July, 1946, and in fact continued totally disabled for work from that date to the date of the rehearing and was not at that time able to return to his work as was conclusively shown by the testimony submitted at the rehearing based upon the clinical findings at the time the operation was performed on the 19th day of January, 1948. When Mr. Laws suffered his injury the Geneva Steel Company refused to recognize that he had suffered a serious injury and released him for work and refused to give him the necessary and proper medical treatment required to properly relieve him from his injuries. This failure to give Mr. Laws the proper and necessary medical treatment was either due to the inability of the company's medical staff to properly diagnose his injury or the arbitrary refusal to give the necessary medical treatment. The applicant made application to the Commission for the purpose of having the issues as to whether his condition was fixed and whether he was in need of further medical treatment determined. Dr. Linden, testifying for the Company, testified that the applicant had no injuries requiring further medical treatment, but the applicant was either suffering from hysteria or was a plain malingerer (transcript of

Dr. Oksberry, testifying for the applicant, testified that his study of the Xrays and his subjective findings led him to believe that Mr. Laws had received an injury which aggravated a pre-existing spondylolisthesis and that he would not recover from his injury until a spinal fusion was performed to stabilize the back and that he was totally disabled for work and that he had been in that condition continually since the date of his injury (transcript of first hearing pages 17, 18, 19 and 20.)

After the conclusion of the hearing the Commission accepted the opinion of Dr. Linden and made the award of December 24, 1947, and determined that the condition of the applicant had become fixed on the 22nd day of December, 1946 and that he was in need of no further medical treatment. Immediately after this decision and within the time allowed by law for the applicant to file a petition for a rehearing in the matter the applicant went to the hospital and a spinal fusion operation was performed, and after the operation was performed the applicant made a motion for a rehearing, setting forth in said motion that the operation had revealed the true state of facts concerning the nature and extent of his injuries. This motion for a rehearing was granted by the Commission. When the matter came before the Commission on rehearing, the positive, undeniable

to the commission and this evidence established the fact that Mr. Laws had in fact suffered an aggravation of a pre-existing spondylolisthesis, and that the pre-existing condition of the back prevented the injury from recovering in the normal manner, and that the spinal fusion stabilizing the back was necessary before a recovery would be made and that this condition had rendered the applicant totally disabled for work since the time of his injury on July 26, 1946 (transcript of first rehearing pages 10,11,12,13). Dr. Richards, called to testify for the defendant Geneva Steel Company, did not dispute the clinical findings of Dr. Okelberry, but agreed that it was good therapeutics (transcript of rehearing page 27). Dr. Paul Richards did, however, testify that in some cases similar to that of Mr. Laws, the back would stabilize itself without an operation, but it sometimes required a period of forty years (transcript on rehearing page 26.) This only corroborates the testimony of Dr. Okelberry that the operation was necessary and was good therapeutics because it is preposterous to expect the applicant to wait any such period of time and endure his suffering and disability to see if the condition would fuse on its own accord, when it could be presently relieved and remedied by the spinal fusion which Dr. Okelberry performed. Dr. Richards did not attempt to refute the clinical find-

spondylolisthesis which aggravated the injury received on July 26, 1946 and prevented a normal recovery and require a spinal fusion to stabilize the back and that he had been totally disabled continuously since his injury. This evidence, when taken with that of the applicant, that the spinal fusion had in fact relieved him of his pain and stabilized his back and he was well on the way to recovery, as far as his back was concerned, at the time of the rehearing was sufficient to require as a matter of law an order by the Industrial Commission awarding the applicant compensation during his entire period of temporary disability as provided in section 42-1-61 U.C.A 1943, together with the necessary hospital and medical expenses incurred as provided in section 42-1-75 U.C.A 1943. Unless this Court should follow the view of the law as proposed by counsel for the Geneva Steel Company and followed by the Industrial Commission that the decision of the Commission on December 24, 1946 was a final judgment and that before the Commission could modify or change that award it was incumbent upon the applicant to show some change in his physical condition subsequent to the decision on December 24, 1946.

The facts of this case show the absurdity of treating the decision of the Industrial Commission of December 24, 1946 even after a rehearing was granted, as a final judgment and

construction as was laid down by this Court in *Salt Lake City vs Industrial Commission* and *Aetna Life Insurance Company* wherein this Court interpreted section 42-1-72 U.C.A. 1943,

But if this Court follows the language of this Court as expressed in *Carter vs Industrial Commission* and holds that the order of the Commission on December 24, 1947 was not a final judgment after the petition for rehearing was granted and that the nature of the proceeding before the Commission on the rehearing was in the nature of a new trial on the original issues presented by the applicant's original application for compensation, then the applicant was not required to show a change in his physical condition subsequent to the decision of the Commission on December 24, 1947 before the Commission could modify or change that award and it was the duty of the Commission to consider all of the evidence then before the Commission and decide the original issues presented to the Commission by the original application for compensation in view of all of the evidence then before the Commission in the same manner as a new trial under the Civil Code and this gives to the applicant the benefits to which it was the plain intention of the legislature to give an injured workman by the Workman's Compensation Act.

It is not claimed that there was any change in the condition of the applicant after the decision on December



undisputed evidence at the rehearing established without dispute that the medical staff of the defendant Gereva Steel Company had improperly diagnosed the case either through their inability to properly do so or their willful refusal to recognize the true condition of the applicant, and the same condition of the applicant's back continued from the date of the injury to the 19th day of January, 1948 when the spinal fusion was performed, stabilizing the back and relieving the pain. It is not a question of a changed condition but a question of the same condition existing all of the time continuously from the date of the injury.

Referring again to the language of this Court in *Sal Lake City vs Industrial Commission*:

"It certainly was not intended by that section that the Commission might resume jurisdiction of a case that had once been regularly determined without some change or new development in the injury complained of not known to the parties when the former award was made."

It will be noted that the Court limited itself to a situation where the matter had been once regularly determined and this presents the question: "When a workman is injured in an accident and he files with the Industrial Commission application for the purpose of having the Commission determine the nature and extent of his injuries and the Commission renders its decision, is this decision a final award, can it



Application have been regularly determined? We think the answer to this question is plainly in the negative. The decision of the Industrial Commission is not a final award at the time it is rendered and to so hold is to entirely overlook section 42-1076 giving either party the right to apply to the Commission for a rehearing and asking it mandatory before applying to this Court for a writ of review. If at the time the Industrial Commission renders its decision that decision is a final award and the issues presented by the applicant's application for compensation can be said to have been regularly determined within the meaning of this Court in the case of Salt Lake City vs Industrial Commission it completely nullifies section 42-1076 for what beneficial purpose can be gained by the statute granting to the applicant the right to apply for a rehearing if the issues have already been judicially and finally determined and the award is already final?

Such a construction seems to be perfectly absurd and it seems that the only fair and consistent interpretation of section 42-1-76 is that the decision of the Industrial Commission is not a final award at the time it is made, but becomes a final award after the expiration of thirty days from its rendition, if an application for a rehearing has not been made by either party. But if an application has

is not a final award until the petition for rehearing is disposed of on its merits. If the Commission denies the petition for a rehearing, the decision of the Commission becomes a final award adjudicating and finally determining the issue presented by the application for compensation as that term is used by this Court in *Salt Lake City vs Industrial Commission* subject to a review by this Court. But if the Commission grants the petition of the party for a rehearing, the decision of the Commission does not become a final award, but the order granting a rehearing in effect vacates and sets aside the previous order of the Commission and the proceeding before the Commission then becomes in the nature of a new trial under the Civil Code and the same questions are then before the Commission for determination as were presented by the original application for compensation. Such a construction not only gives meaning to section 42-1-76, but it is consistent with the general purposes of the Act which are to give to the injured employee such medical and hospital treatment as are necessary to properly care for his needs and effect a complete recovery as possible and to pay him compensation during such period as he is totally disabled from the injury and then to pay him for such permanent loss of bodily function as he shall have received from said injury.

It will be noted that section 42-1-76 not only grants

for a rehearing, but it also makes it mandatory upon the parties to make such a petition before it can apply to this Court for a writ of review. It seems only fair to assume that the first part of this section, giving the parties the right to petition for a rehearing within thirty days was enacted for the purpose of giving to the parties every opportunity within limits of presenting all available evidence and generally to insure a fair and complete presentation of the original issues before the Commission as presented by the application for compensation and by the last part of the section making it mandatory upon the parties to file a petition for a rehearing before a writ of review could be applied for seems obviously to have been enacted for the purpose of enabling the Commission to correct any errors it may have made either as to its judgment or as to the law before the matter could be brought before this Court. Now if the decision of the Commission is a final award at the time it is made and before the expiration of the thirty days granted by the statute for filing a petition for a rehearing, it seems quite inconsistent on the part of the legislature to enact this last part of the section making it mandatory to file a petition for a rehearing before appealing to this Court if the issues are finally judicially determined and the order of the Commission is

legislature did not intend that the decision of the Industrial Commission would become at once upon its rendition a final award, but would only become a final order after the expiration of thirty days, and if either party files a petition for a rehearing within that time it does not become a final order until that petition is disposed of and if the petition is granted it then becomes a new trial under the Civil Code.

This seems to be the proper interpretation of section 42-1-76 and certainly represents the view taken by this Court in *Carter vs Industrial Commission* where this Court was called upon to construe the meaning of section 42-1-76 and said:

"When a case on its merits is fully heard and tried by the Commission and on due consideration an order is made or judgment rendered on merits the Commission ought not to grant a rehearing or further hearing though timely and properly applied for except on averments or a showing of sufficient grounds or good cause therefore when such is not reasonably or satisfactorily made to appear, the application for a rehearing should be denied. When, however, such is made to appear on a timely application made therefor and when an unrestricted rehearing of the case on merits is granted the Commission must understand that the order theretofore made or judgment rendered is displaced and vacated and it becomes its legal duty to again hear and try the case anew."

and precludes the idea that the decision of the Commission is a final award at the time it is made and gives a new trial on the issues presented by the original application for compensation and precludes the idea entertained by the Industrial Commission when it decided this case on the rehearing on the theory that since the applicant had shown no change in his condition since the award of the Commission on the 24th day of December, 1947, therefore the award of December 24, 1947 was considered adequate.

WHEREFORE, we respectfully submit that the Commission committed error and decided this case on the rehearing on a misconception of the law when it assumed that since the applicant had shown no change in his physical condition since the award on December 24, 1947, therefore he was entitled to no further award and he had been fully compensated. That the nature of the proceeding at the rehearing was that of a new trial and that it was the duty of the Commission to determine the issues presented by the original application of the applicant in the light of all of the evidence then before the Commission. This the Commission obviously failed and refused to do.

It is very obvious that it was the plain intention of the legislature in the enactment of section 42-1-76 U.C.A. 1943 to grant to the parties every reasonable opportunity

evidence and to correct any errors that might have been committed before the decision of the Commission became a final award to the end that there would be a fair determination of the original issues presented to the Commission by the application of the applicant and that the legislature intended by section 42-1-72 U.C.A. 1943 to provide for changing conditions subsequent to the final award of the Commission determining the original issues before the Commission on the applicant's application for compensation. Such construction gives effect to both sections of the statute and effects justice to both the parties.

#### ARGUMENT ON ERROR NUMBER TWO

THE APPLICANT WAS ENTITLED TO COMPENSATION FROM THE DATE OF HIS INJURY TO SUCH TIME AS HIS CONDITION FINALLY BECAME FIXED TOGETHER WITH HIS HOSPIITAL AND MEDICAL EXPENSES INCURRED IN THE OPERATION ON JANUARY 19, 1948.

If at the rehearing the applicant was not required to show a change in his condition after the decision of the Commission on December 24, 1947 and the proceeding before the Commission on the rehearing was in the nature of a new trial on the merits presented by the original application for compensation then under the law and the evidence the applicant was entitled to an award allowing him compensation from the date of the last payment of compensation for temporary disability, December 2, 1946, up to the

... on the rehearing on the 9th day of June, 1946, and the Commission erred in finding that the condition of the applicant had become fixed on the 22nd day of December, 1946 and denying the applicant compensation during the period of his total disability from December 22, 1946 to the date of the rehearing.

Under the uncontradicted evidence presented on the rehearing, the applicant had received his injury on July 26, 1946 an aggravation of a pre-existing loose condition of the back which required the performance of a spinal fusion before this condition of the back would become sufficiently stable to relieve the applicant of his pain and suffering and permit him to return to his work. Then if the applicant was in fact totally disabled from the date of his injury on July 26, 1946 up to the date of the rehearing then on what theory of law can the Commission deny the applicant compensation during the period of total disability?

Section 42-1-61 is so clear in its meaning as not to require the citation of authorities and the clear meaning of this section is that the applicant is entitled to compensation as long as he is in fact temporarily totally disabled provided this period of temporary disability does not continue for more than six years or exceed the sum of five thousand dollars. But the Commission while making no



result of the decision was to fix the date at which applicant's temporary disability ended was on December 22, 1946 in spite of the uncontradicted evidence at the rehearing that on June 9th, 1948 the applicant was in fact unable to return to work and was in need of a spinal fusion operation to stabilize his back and relieve his pain and suffering. The Commission made no finding on the rehearing as to whether the operation performed on January 17, 1948 in which a spinal fusion was performed was a necessary or proper operation but avoided the whole matter by simply saying that since there had been shown no change in the condition of the applicant since the decision of the Commission on December 24, 1946 therefore the applicant had been fully compensated.

Since the evidence presented at the rehearing was without substantial conflict that the applicant had been totally disabled for work from the date of his injury to the date of his operation and was at the date of the rehearing on the 9th day of June, 1948 still totally disabled for work but was recovering nicely and well on the way to recovery and would probably be able to return to his work in another three months the Commission was bound as a matter of law to award the applicant compensation from the last payment of compensation on December 22, 1946 to the date of the rehearing and as his temporary total



discovery, the Commission was able to make a finding that the condition from which the applicant was suffering and had continued to suffer from the date of his injury on July 26, 1946 to the time of the rehearing was not occasioned by the accident and there is no evidence in this record to sustain such a finding.

There seems to be no dispute that the applicant had a defective spinal condition that had probably existed from his birth but which had never interfered with the ability of the applicant to work and that this condition was aggravated by the injury of July 26, 1946 and did not improve or become well until after the operation was performed by Dr. Okelberry and the spinal fusion was performed on January 19, 1948. There is also no dispute in the evidence before the Commission on the rehearing that this pre-existing congenital defect of the back prevented the injury he received on July 26, 1946 from recovering in a normal manner as shown by the following testimony of Dr. Okelberry (transcript on rehearing page 10.)

(Q) Now Doctor, will you state in your own words your findings when you operated on Mr. Laws?

(A) I will read the first page on our operative findings: A spondylolisthesis, between the fifth lumbar and the sacrum, the spinous processes and lamina of the fifth lumbar vertebra were very loose. There was relatively little motion between the fourth and fifth lumbar vertebra, now that simply constitutes a defect of the arch of the

fourth lumbar vertebra in which there was a loss in continuity between the arch and the body of the vertebra and consequent instability.

(c) Now Doctor, what in your opinion was the cause of this condition?

(A) I don't know the basic cause of this condition. It may have been due to a developmental defect, or an injury in early life possibly at the time of birth or during the first year after. We are not absolutely sure what the cause is.

(Q) Now Doctor, what would be the effect of an injury to this condition of the spine?

(A) In our experience, injury to this type of spine causes more trouble and symptoms and disability than a similar injury to a normal spine and the patient either does not get well or are apt to have some very long periods of disability.

(Q. In your opinion would this man have gotten well without an operation?

(A) I don't think so.

(Q) Considering the fact, Doctor, that this man who had been accustomed to working and had worked for years at hard physical labor, is there any explanation for this prolonged inability to work and the pain than this injury?

(A) Not that I know of. We have seen a number of similar cases to this case where the first time the individual knew he had anything wrong with his back was following an injury and the condition showed up and his attention was called to the back and then he revealed just such a thing as this. Not that a normal back does get injured, but a normal back tends to get well easier.

**How Doctor, you testified in the previous**  
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was unable to work from the time of his injury up to the time of the hearing because of this condition. Did you find anything in your opinion different as to that?

(A) No.

(Q) He was disabled then for work from the time of the accident?

(A) I think so.

This testimony of Dr. Okelberry was based upon the positive clinical findings made at the time of the operation on the 19th day of January, 1948 and stands uncontradicted in the record.

Dr. Paul Richards testified that his examination of the X-rays taken both before and after the operation revealed this congenital defect in the back of Mr. Laws which Dr. Okelberry testified he found present at the time of the operation.

(transcript of rehearing page 25.)

(Q) Would you concur in Dr. Okelberry's opinion that Mr. Laws back had a defect arising from some condition prior to his injury on July 26, 1946?

(A) I think that is a reasonable conclusion.

Dr. Richards, concurring with Dr. Okelberry that Mr. Laws had a pre-existing congenital defect did not attempt to contradict or vary the testimony of Dr. Okelberry that the injury had aggravated this congenital defect which prevented a normal recovery, but the testimony of Dr. Richards in fact

corroborated the testimony of Dr. Okelberry that the all-pin

the loosening of Mr. Laws' back definitely required a fusion and that he would never have got well without it at least it might take a period of forty years (transcript of hearing pages 27,28.)

(Q) Doctor, the encroachment on these nerves running to the extremities as you say would be the cause of this man having pain running from that area down to the legs, wouldn't it?

(A) That is the way we look at it.

(Q) The purpose of the operation is to prevent any further slipping along there or any further encroachment which will do away with the pain?

(A) Yes.

(Q) That is the purpose of it?

(A) Yes.

(Q) And that is what was done in this case?

(A) That is what I would conclude.

(Q) You don't have anything to say about this that contradicts Dr. Ozelberry?

(A) I think that is good therapeutics.

Thus we have a plain unequivocal refusal on the part of Dr. Richards to contradict or vary the testimony of Dr. Ozelberry, that because of the pre-existing congenital defect in his back Mr. Laws did not recover in a normal manner from the injury and that in order to relieve his pain and give him normal stability a spinal fusion was

therapautics.

Since there was no dispute that Mr. Laws suffered an injury in the course of his employment and that at the time of the injury the applicant had a pre-existing spondylolisthesis which<sup>was</sup> aggravated by the injury and prevented the injury from recovering in the normal manner and that this condition continued to exist from the date of the injury to the time the spinal fusion operation was performed, since this testimony stands in the record uncontradicted, the applicant was entitled as a matter of law to an award for compensation from the 22nd day of December, 1946 to the date of the rehearing and to continue to such time as the Commission should in a further proceeding determine that the disability had terminated or become fixed.

If this Court should determine that the record does not justify such a finding as a matter of law the applicant is certainly entitled to have the Commission determine this question according to the facts as they appeared to the Commission at the close of the rehearing. This the Commission obviously failed and refused to do.

ARGUMENT ON ERROR NUMBER THREE  
THE COMMISSION COMMITTED ERROR IN NOT  
AWARDING THE APPLICANT HIS MEDICAL AND  
HOSPITAL EXPENSES INCIDENTAL TO THE  
OPERATION OF JANUARY 19, 1948.

Immediately after the decision of the Commission on December 24, 1947 in which the Commission determined that the applicant was well and needed no further

medical treatment and within the thirty days allowed by the statute in which to petition the Commission for a rehearing and a spinal fusion was performed by Dr. Okelberry and the true condition was determined and at the rehearing this evidence was presented to the Commission and on the decision of the Commission the Commission made no finding as to whether this was a necessary or proper operation but refused to allow the applicant the expenses of his medical and hospital expenses.

Section 42-1-75 provides as follows:

"In addition to the compensation provided for in this title the employer or insurance carrier or the Commission of Finance out of the State Insurance fund, shall in ordinary cases also be required to pay such a reasonable sum, medical, nursing and hospital services and for medicines and for such artificial appliances and means as may be necessary to treat the patient as in the judgment of the Industrial Commission may be just, not exceeding the sum of \$500.00, provided, that if on application to and investigation by the Industrial Commission it shall find that in particular cases such amount is insufficient, it shall determine and fix such a reasonable amount as under all of the circumstances may be fair and just."

It seems to be the plain meaning of this provision of the statute to require the defendant Geneva Steel Company to provide for the applicant such medical and hospital services as are reasonably required to properly care for the applicant's injuries.

At the conclusion of the hearing before the Commission the evidence then before the Commission was undisputed that the operation performed by Dr. Okelberry on the 19th day of January, 1945 was a necessary, and proper operation in order to relieve the applicant from his pain and suffering and to stabilize the back and effect a recovery so that the applicant could return to his work. Even Dr. Richards, called to testify for the Geneva Steel Company, did not attempt to deny this fact and agreed with Dr. Okelberry that this was good therapeutics. When it was admitted that the operation was necessary and proper and that in fact relieved the applicant from his pain and suffering and he was as admitted by every one at the rehearing, that he was well on the road to recovery and would soon be able to return to his work as far as the injury to his back was concerned, then on what theory can the defendant Geneva Steel Company be relieved from its obligation under the statute to pay for this medical and hospital services?

At the rehearing counsel for the Geneva Steel Company argued to the Commission (transcript on rehearing page 22) that:

"I would like to call your attention to the rules and regulations of the Commission which state that where the employer has a panel of doctors, such as the Geneva Steel Company has, that an injured employee will not change from that panel of doctors with  
 no obligation from the



Industrial Commission and in those cases where permission is not secured, such expenses as the employee entails are for the employee' own account. In this instance both Mr. Laws and Dr. Okelberry testified that no such consent was secured."

It seems very obvious that the Commission applied this rule in this case and denied the applicant the right to have his employer pay for his hospital and medical expenses which without dispute was a reasonable and necessary operation to relieve the applicant of his pain and suffering and stabilize his back so that he could return to his work. It may be conceded that under the statute the Commission may make certain rules governing its procedure, but the Commission should not be permitted to make rules and regulations that deprive the injured employee of the plain benefits conferred by the statute as the Commission did in this case. This does not present a case where the employee changes doctors without the consent of the Industrial Commission. The facts of this case present a situation the medical staff of the defendant Geneva Steel Company was either utterly incapable of diagnosing the true nature of the injury suffered by the applicant or deliberately refused to render to him the proper medical treatment. Dr. Linden, Chief of the medical staff of the Geneva Steel Company, testified that it was the conclusion of himself and the whole medical staff of the Geneva Steel Company that Mr. Laws was suffering



from plain hysteria or was a plain malingerer (transcript of first hearing page 49.) Under such circumstances what is an injured employee reasonably expected to do? Is he required to resign himself to his fate and continue his suffering throughout the rest of his life, accepting the decision of the medical staff of his employer as final, or is he entitled to have his condition relieved and properly treated by competent medical treatment when such treatment and services are readily available.

This case does not present a question of the applicant refusing to accept the medical services offered by the employer and choosing his own doctor, but this is the case of an absolute refusal on the part of the employer to render the necessary and proper medical treatment required to properly relieve the applicant from his injuries. Counsel for the defendant Geneva Steel Company argued to the Commission that Mr. Laws had not received the consent of the Industrial Commission and therefore he must pay his own expenses, but counsel did not tell us how the applicant could have secured the consent of the Industrial Commission under such circumstances. The applicant filed a formal application to the Commission alleging that he had received certain injuries and that he desired the Commission to determine the nature of those injuries and whether additional medical services

the applicant produced evidence indicating that further medical treatment was required to relieve the applicant from his injuries. Dr. Linden testified that it was his opinion and that of his medical staff that Laws was in need of further medical treatment and that he was either suffering from hysteria or was a plain malingerer (transcript on hearing page 49.) and on the basis of this evidence the Commission determined that he was in need of no further medical treatment and that his condition had become fixed on the 22nd day of December, 1946, a year previous to the date of the decision. Since the principle issue before the Commission on the first hearing was whether the applicant needed further medical treatment, the Commission's refusal to grant any further medical treatment is in fact a refusal to grant the applicant any further medical treatment.

We know of no other method of obtaining the consent of the Commission except by proper application and the presentation of evidence, all of which was done in this case and the Commission, after hearing all of the evidence, determines that no further treatment is necessary, it seems that the employee has done everything in his power to secure the consent of the Commission.

This Court said in the case of Gunnison Sugar Company

**v. Industrial Commission, 73 Utah 535, 275 Pac. 777:**

such obligation as provided for by this section is an affirmative one on the part of the employer or his insurance carrier to provide and furnish an injured employee with medical, nursing and hospital services, when the employer neglects or fails to do so, the employee may procure such services and the employer or the insurance carrier becomes liable for the reasonable value thereof."

The evidence before the Commission on the rehearing was undisputed that the applicant had received an injury which did not in fact properly recover until the spinal fusion was performed. Dr. Okelberry testified at the rehearing that the applicant had a pre-existing congenital defect that prevented a normal recovery of the injury and that the operation was necessary before a recovery was made as shown by the clinical facts revealed by the operation. (transcript on rehearing pages 10-11-12-13.) The applicant testified that he had been in fact relieved of his pain and that he was well on his way to recovery as far as his back was concerned. Dr. Paul Richards, called to testify for the defendant Geneva Steel Company, did not dispute the testimony of Dr. Okelberry that the operation was a necessary and proper operation, but agreed that it was poor therapeutics. Under these facts which were before the Commission on the rehearing it was the plain duty to award the applicant the expenses of his operation on January 19, 1948 regardless of the fact that the operation had not been authorized by the

The facts in the record of this case do present a little unusual situation in that the applicant went to the hospital after the Commission had rendered a decision in which it had in effect determined that the applicant was in need of no further medical treatment. But this was not a final award on the part of the Commission and the applicant did the only thing possible under the circumstances. Immediately after the decision of the Commission denying him the benefits of such medical treatment, he went to the hospital and had the services performed on his own accord and within the time allowed by law in which to file a petition for a rehearing. He did so and the Commission granted the rehearing and at the time of the rehearing the true evidence was then before the Commission showing that the decision of the Commission on December 24, 1947 was based upon opinions of the medical staff of the Geneva Steel Company that were unsound and not true and contra to the true facts as they existed at the time the award was made on December 24, 1947. Under such circumstances we do not believe that the Geneva Steel company should be permitted to be relieved of its plain obligation under the statute to provide the necessary medical and hospital expenses incurred to relieve him from his injury which were made necessary for him to incur because of either the failure of the medical staff of the Geneva Steel

or its complete failure to render the necessary and proper medical treatment. If the results of the operation which was performed by Dr. Oshelberry had shown a different result and the clinical findings had shown that such an operation was not the necessary and proper medical treatment and that the Geneva Steel Company had not failed to properly diagnose the extent of the applicant's injuries, then in that event the defendant Geneva Steel Company would not be required to pay the hospital and medical expenses incurred and they could be on the applicant's own account. But since the clinical findings established conclusively that the medical staff of the Geneva Steel Company were mistaken and did not present the true facts to the Commission and the Commission on the first hearing did not have before it the true facts when it rendered its decision on December 24, 1947, that the applicant cannot be deprived of the benefits clearly conferred by the Act simply because the Geneva Steel Company failed to properly diagnose the true nature of the injury and refused to give what was proven to be the proper medical treatment, and these facts were all made to appear to the Commission in proper time at a rehearing of the issues presented by the applicant's original application. Even if the applicant had waited beyond the thirty days allowed by the statute in which to file a petition for a rehearing

had become a final award even then the applicant was entitled to his medical and hospital expenses unless the evidence should show that the operation was unnecessary and on this point there is little dispute in the evidence at the re hearing, unless this Court deprives the applicant of these benefits simply because the applicant did not secure the consent of the Industrial Commission before going to the hospital, a consent which it was impossible to obtain. We submit that the applicant did everything required of him by the statute and everything within his power to obtain that consent by filing his application and presenting to the Commission competent and substantial evidence showing that he was in need of such treatment.

Section 42-1-75 provides as follows:

"In addition to the compensation provided for in this title the employer or insurance carrier or the Commissioner of Finance out of the State Insurance fund, shall in ordinary cases also be required to pay such a reasonable sum for medical, nurse and hospital services and for medicines and for such artificial means and appliances as may be necessary to treat the patient as in the judgment of the Commission may be just, not exceeding the sum of \$500.00 provided that if upon application to and investigation by the Industrial Commission it shall find that in particular cases such an amount is insufficient, it shall determine and fix such reasonable amount as under all the circumstances may be fair and just, etc."

but it is mandatory upon the employer to pay such medical expenses as are in fact necessary to care for his injuries. Under this provision of the statute the Commission must determine what sums shall be just under the circumstances. Since the evidence showed without dispute that the operation performed on January 19, 1948 was the necessary and proper medical treatment required to relieve the applicant from his pain and suffering and that the appellant had in fact been relieved from his pain and suffering and was well on the way to recovery at the time of the rehearing it became mandatory upon the Commission to fix a reasonable sum under the circumstances and make such an award to the appellant. The decision of the Commission on the rehearing in effect nullifies the first part of section 42-1-75 making it mandatory upon the employer to pay for the necessary medical and hospital expenses required to relieve the employee from his injuries and in this case it has relieved the employer completely of all responsibility for the expenses that were mainly necessary from the injury. It is true that the last part of section 42-1-75 gives the Commission some discretion in fixing what are reasonable sums to be allowed but it does not permit the Commission to arbitrarily refuse to make any award for medical and hospital expenses necessarily incurred to properly treat the injury.



the Commission was able to find from the evidence before the Commission on the rehearing that the operation performed on January 19, 1948 by Dr. Okelberry was not the necessary and proper treatment required by the appellant, it was bound as a matter of law to award to the appellant either the actual costs of the operation or to fix such reasonable sums under the circumstances the Commission should determine to be fair and just. But the Commission did not attempt to determine what was fair and just, but deprived the appellant entirely of all medical and hospital expenses incurred in the operation performed on January 19, 1948.

The evidence before the Commission at the time of the rehearing would not support any other finding than that the operation performed by Dr. Okelberry was a necessary and proper operation and was required by reason of the injury. Dr. Okelberry testified that the actual physical findings revealed at the time of the operation showed that the appellant had received an injury and that because of the pre-existing congenital defect of his back the injury would not recover without the aid of the spinal fusion which he performed (transcript of rehearing pages 10, 11, 12 and 13.) Dr. Paul Richards, testifying for the Geneva Steel Company, testified that the operation was good therapeutics (transcript of rehearing page 27.) Dr. Richards testified further

years for it to fuse of its own accord (transcript of rehearing page 28.) The applicant testified that his pain had in fact been relieved and had disappeared entirely since his operation and that he was able to get around without pain. In such evidence the Commission could reasonably make only one finding, that the operation performed by Dr. Okelberry was a necessary and proper medical treatment and the Commission was bound to award him such expenses as were necessarily incurred or at least to determine from the facts what sums were reasonable and make an award accordingly. This the Commission obviously refused to do.

WHEREFORE, we submit that the Industrial Commission committed error in its refusal to award the appellant the expenses necessarily incurred in the operation of January 19, 1948.

ARGUMENT ON ERROR NUMBER FOUR.  
THE COMMISSION COMMITTED ERROR IN NOT CONTINUING THE PAYMENT OF COMPENSATION FROM THE DATE OF THE REHEARING UNTIL SUCH TIME AS THE COMMISSION SHOULD DETERMINE IN FURTHER PROCEEDINGS THAT THE APPLICANT'S CONDITION HAD BECOME FIXED.

The evidence at the rehearing was undisputed that the applicant was at the time totally disabled for work and was suffering from pains in the legs, the usual post operative result and this condition would continue for two or three months.

Under this evidence it was the plain duty of the



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opinion of both Dr. Richards and Dr. Okelberry that he would soon be able to return to some light work, but just when that would be was pure speculation. At the time of the rehearing the appellant was suffering from pains and swelling in the legs as a post operative result, which is not unusual in such cases (transcript of rehearing page 25.) While it was the opinion of the doctors that this condition would soon disappear, this was plain speculation and the appellant was entitled to have his compensation continued until such time as his condition was in fact fixed and his temporary total disability terminated and then at that time to have the Commission determine the question of his permanent loss of bodily function in the light of the facts as they should then appear.

#### CONCLUSION

WHEREFORE, we respectfully submit that the Industrial Commission in rendering its decision on the rehearing decided the case under a wrong conception of the law and assumed that before it could change the award made to the applicant on the 24th day of December, 1947, it was incumbent upon the applicant upon the rehearing to establish some change in his physical condition subsequent to the 4th day of December, 1947, and that this view of the law as entertained by the Industrial Commission resulted in the

hearing, except such evidence as tended to show whether or not there had been any change in his condition since the 24th day of December, 1947, when the Commission rendered its decision on the first hearing. That the Commission did not regard the proceeding on rehearing in the nature of a new trial for the purpose of determining the original issues presented to it by the applicant's application for compensation. That because of the Commission's refusal to regard the proceeding as a new trial on the original issues and decide the matter on the basis of all of the evidence then before it, the Commission deprived the applicant of the benefits to which he was justly entitled, which were:

1. Compensation during his entire period of temporary disability, commencing with the 22nd day of December, 1946, the date the company ceased its payments, and the date of the rehearing.
2. The expenses of his medical treatment in the operation performed by Dr. Okelberry on the 19th day of January, 1948.
3. Compensation from the date of the rehearing until such time as the Commission should determine in further proceedings that the applicant's condition had become fixed.
4. That when his condition became finally fixed,

he was then entitled to have his percentage of loss of bodily function determined by the Commission according to the fact in the light of the conditions as they should then appear to the Commission.

Respectfully submitted:

Dean C. Flanders

Earl Gibson