

1959

# Jared Looser v. The Industrial Commission of Utah et al : Defendants' Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; F. A. Trottier; Attorneys for Defendants;

---

## Recommended Citation

Brief of Respondent, *Looser v. Industrial Comm. Of Utah*, No. 8972 (Utah Supreme Court, 1959).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3227](https://digitalcommons.law.byu.edu/uofu_sc1/3227)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

In the  
**Supreme Court of the State of Utah**

JARED LOOSER,

vs.

THE INDUSTRIAL COMMISSION OF  
UTAH, THE STATE INSURANCE  
FUND and SPORTS CARS INCOR-  
PORATED,

*Plaintiff,*

*Defendants.*

**FILED**

FEB 17 1959

Clerk, Supreme Court, Utah  
Case No.  
8972

---

**DEFENDANTS' BRIEF**

---

E. R. CALLISTER,  
Attorney General,

F. A. TROTTIER,  
*Attorneys for Defendants.*

---

---

PRINTED BY PRESS, SALT LAKE

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS RELIED UPON .....	3
ARGUMENT .....	4
POINT I. THE INDUSTRIAL COMMISSION WAS NOT REQUIRED TO FIND OR CONCLUDE THAT JARED LOOSER'S ACCIDENT OF MAY 25, 1957, AROSE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT .....	4
POINT II. THE INDUSTRIAL COMMISSION DID MAKE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW .....	8
POINT III. THE INDUSTRIAL COMMISSION WAS NOT REQUIRED TO GRANT APPLI- CANT'S REQUEST FOR A REHEARING .....	14
CONCLUSION .....	21

## CITATIONS

Auerbach Company vs. Ind. Comm., 113 Utah 347, 195 Pac. (2nd) 245 .....	4
Callahan vs. Ind. Comm., 104 Utah 256, 139 Pac. (2nd) 214 .....	16
In re Clift's Estate, 70 Utah 409, 290 Pac. 859 .....	11
Consolidated Wagon & Machine Co. vs. Kay, 81 Utah 595, 21 Pac. (2nd) 836 .....	11
Gagos vs. Ind. Comm., 87 Utah 101, 48 Pac. (2nd) 449 ..	19
General Mills, Inc. vs. Ind. Comm., 101 Utah 214, 120 Pac. (2nd) 379 .....	4

# TABLE OF CONTENTS—Continued

	Page
Grasteit vs. Ind. Comm., 76 Utah 487, 290 Pac. 764 . . .	4
Intermountain Speedways, Inc. vs. Ind. Comm., 101 Utah 573, 126 Pac. (2nd) 22 . . . . .	7
Intermountain Speedways, Inc. vs. Ind. Comm., 102 Utah 126, 127 Pac. (2nd) 1045 . . . . .	7
Jensen vs. Logan City, 89 Utah 347, 57 Pac. (2nd) 708	20
Kavalinakis vs. Ind. Comm., 67 Utah 174, 246 Pac. 698	19
Kent vs. Ind. Comm., 89 Utah 381, 57 Pac. (2nd) 724 .	18
Miner vs. Ind. Comm., 115 Utah 88, 202 Pac. (2nd) 557	19
Morgan vs. United States, 304 U. S. 1, 82 L. Ed. 1129 .	20
Smith vs. Ind. Comm., 5 Utah (2nd) 50, 296 Pac. (2nd) 511 . . . . .	12
Spencer vs. Ind. Comm., 81 Utah 511, 20 Pac. (2nd) 618	13
Thompson vs. Ind. Comm., 82 Utah 247, 23 Pac. (2nd) 930 . . . . .	11
Utah-Idaho Central R. Co. vs. Ind. Comm., 71 Utah 490, 267 Pac. 785 . . . . .	19
Wherritt vs. Ind. Comm., 100 Utah 68, 110 Pac. (2nd) 374 . . . . .	4

In the  
**Supreme Court of the State of Utah**

---

JARED LOOSER,

*Plaintiff,*

vs.

THE INDUSTRIAL COMMISSION OF  
UTAH, THE STATE INSURANCE  
FUND and SPORTS CARS INCOR-  
PORATED,

*Defendants.*

Case No.  
8972

---

**DEFENDANTS' BRIEF**

---

**STATEMENT OF FACTS**

We agree with the first sentence in the Plaintiff's Brief, namely the happening of the accident and the injury of plaintiff on May 25, 1957. But we think that most of the other purported statements of the facts, as set out in his attorneys' brief, are not complete and correct. For example, the second sentence in the brief (page 1), that "plaintiff was employed as a mechanic and test driver by the defendant, Sports Cars Incorporated," is only partially

correct. Plaintiff was employed as a mechanic. He was not employed as a test driver. Their Statement of Facts has many inferences and arguments intermixed with the facts, and several of the stated facts are only partially correct. We therefore feel that we must here make a brief statement of the essential facts, without any inferences or arguments.

Jared Looser, the plaintiff, was in the employ of Sports Cars Incorporated as a mechanic. During the months of April and May 1957, there was considerable conversation on the premises of Sports Cars Incorporated among employees of that company, relating to the sports car races which were going to be run during the latter part of May and the first part of June, 1957. From the transcript of testimony of the Industrial Commission's hearing of May 26, 1958, it is quite apparent that the witnesses could not all remember in exactly the same way, how many conversations there were or the exact words of each person. Some of these conversations culminated in an arrangement whereby Jared Looser and Vaughn Funk drove the MG from Salt Lake City to LaJunta, Colorado on May 24, 1957 to participate as contestants in the races which were to be held at LaJunta on May 25 and 26, under the auspices of Sports Car Club of America. This MG was a used car which was owned by Sports Cars Incorporated and had been assigned to Vaughn Funk as a demonstrator in his work as salesman for the company. Mr. Funk held the position of Secretary of the company and salesman. He was not connected with the mechanical part of the business. He was interested in sports car racing as a hobby. Pursuant to a conversation in the shop one day between Jared Looser and Vaughn Funk, it

was agreed that Jared Looser would put in his own time preparing this car for the LaJunta races; then both Looser and Funk would drive it in the races. At their request Mr. Schettler, the president of the company, agreed that the company would pay for the parts that were necessary to prepare the car for the races. Looser and Funk each paid his own entrance fee of \$7.50. Looser put in 50 hours of his own time working on the car. Funk helped a little. Funk paid for the gasoline and oil out of his own pocket. Each of them paid for their own meals on the trip. While driving the car in a practice run prior to the races, Jared Looser was injured.

The Industrial Commission held a hearing relating to Jared Looser's application for compensation. On August 1, 1958 the Commission rendered its decision in which it denied his application. Plaintiff and his attorneys have brought the matter to this Court for review.

## STATEMENT OF POINTS RELIED UPON

### POINT I.

THE INDUSTRIAL COMMISSION WAS NOT REQUIRED TO FIND OR CONCLUDE THAT JARED LOOSER'S ACCIDENT OF MAY 25, 1957, AROSE OUT OF OR IN THE COURSE OF HIS EMPLOYMENT.

### POINT II.

THE INDUSTRIAL COMMISSION DID MAKE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

## POINT III.

THE INDUSTRIAL COMMISSION WAS NOT  
REQUIRED TO GRANT APPLICANT'S RE-  
QUEST FOR A REHEARING.

## ARGUMENT

## POINT I.

THE INDUSTRIAL COMMISSION WAS NOT  
REQUIRED TO FIND OR CONCLUDE THAT  
JARED LOOSER'S ACCIDENT OF MAY 25,  
1957, AROSE OUT OF OR IN THE COURSE  
OF HIS EMPLOYMENT.

It is now well settled that in an Industrial Commission case the burden of proof is upon the applicant to establish a claim for compensation. *Grasteit vs. Ind. Comm.*, 76 Utah 487, 290 Pac. 764, *Wherritt vs. Ind. Comm.*, 100 Utah 68, 110 Pac. (2nd) 374, *General Mills, Inc. vs. Ind. Comm.*, 101 Utah 214, 120 Pac. (2nd) 379.

We think that the Supreme Court of Utah has already settled the law relating to factual situations such as that which existed in the case at bar. In *Auerbach Company vs. Industrial Commission*, 113 Utah 347, 195 Pac. (2nd) 245, the injured person, Rela Wardle was in the employ of Auerbach Company as a cashier. She also played basketball, being a member of a team sponsored by the Company as a part of their public relations and advertising program. She had not been hired as a basketball player. She was paid only as a cashier. The expenses of herself and all the



other members of the team, were paid during their trips to play basketball. Miss Wardle played on the basketball team because she wanted to, and not because she was required to do so. Some of the players were in the employ of Auerbach Company, and some were not. Any income from the games went to the Company, but in amount it was hardly sufficient to keep up with the team expenses. The control of the team was in the hands of the public relations officer of the Company. Rela Wardle was injured at night while she was riding in an automobile going to Provo to play a game. The car was being driven by a Miss Green, who was not an employee of Auerbach's, but the Company was furnishing the gasoline for the trip.

After a hearing, the Industrial Commission held that Miss Wardle was in the course of her employment and awarded compensation. By a unanimous decision, the Supreme Court of Utah annulled the award. In the Court's main opinion and in the two concurring opinions, it was held that one of the most important elements of the employer-employee relationship was missing, namely "the right to control." Justice Pratt said,

"Right to control in this case does not mean merely coaching control, the purpose of which is to produce team work when the alleged employee plays; but means the right to require performance of a duty to play, if such a duty exists."

In his concurring opinion, Justice Wade said,

"The company encouraged the girls to play basketball, it furnished certain expenses including transportation, its department of public relations

arranged some of the games and some of the details connected therewith, it collected the gate receipts and obtained certain advertisement advantages from the games. In my opinion this is not sufficient from which a contract of employment vesting in the company the right of control over the members of this team can reasonably be inferred."

In his concurring opinion, Justice Wolfe said,

"The test of the employer-employee relationship is not whether or not the purported employer is benefited by the actions of the purported employee. A person or business organization may be materially benefited by an independent contractor, or by a volunteer. It is obvious that regardless of whether or not the prime motive in sponsoring a team is to reap the benefits of the advertising thereby attained, all sponsors will receive, either as a direct or incidental benefit, advertising benefits to the extent that games played by their teams are patronized by the 'fans,' and to the extent that results and reports of such games are publicized in the newspapers and on the radio. But whether the chief purpose of the sponsor is advertising, or some more philanthropic motive, I regard as immaterial here. As noted in the prevailing opinion, the fundamental test of employer-employee relationship is right of control. And where the player plays voluntarily, of his own choice, during his off-duty hours, and is free to play or not to play as he determines of his own choice, it cannot be said that the sponsor has the right of control which makes it an employer and the player an employee, within the meaning of the Workmen's Compensation Act."

There have been two cases decided by the Supreme Court of Utah involving the question of whether racing car

drivers were in the status of employees, namely *Intermountain Speedways, Inc. vs. Industrial Commission*, 101 Utah 573, 126 Pac. (2nd) 22, and another case having the same title, at 102 Utah 126, 127 Pac. (2nd) 1045. The majority opinion of the Court held that the racing car drivers were not employees of the company which operated the races. This, of course, was a different question than is involved in the case at bar. Most of the Court's discussion of the points involved, is contained in the opinion of the first of the two cases at 101 Utah 573. The Court discussed certain tests which must be applied to any situation to determine whether the relationship of "employer-employee" exists, such as:

- (1) The method of payment.
- (2) Nature of the work.
- (3) Whether for a definite piece of work.

But the Court's opinion held that the one test which is more important than the others is the "right to control as to means and method of performance." The Court's opinion further stated (p. 578-579) that

"Speedways had no right to control Winters as to the means or method of performance in the race.

\* \* \* The deceased in this case did not bear the relation of employee to Intermountain Speedways. He was a contestant with other contestants."

## POINT II.

THE INDUSTRIAL COMMISSION DID MAKE  
WRITTEN FINDINGS OF FACT AND CON-  
CLUSIONS OF LAW.

Plaintiff's attorneys have charged that the Industrial Commission failed to make findings of fact and conclusions of law in writing, as is required by Section 35-1-85, U. C. A. 1953. The Industrial Commission did make its findings of fact and its conclusions of law in writing. In its Decision dated August 1, 1958, the Commission first specified the formal and preliminary matters in the title and in the first three paragraphs. Then, the findings of fact and conclusions of law are set out in the next four paragraphs as follows:

“Applicant was employed as a mechanic by Sports Cars Incorporated. He had not been separated from the payroll at the time the accident occurred. However, it does not follow that the activity in which applicant was engaged at the time of the accident was in his capacity of employee.

“Mr. Schettler, president of defendant corporation, on request of applicant and Funk, consented that a company car could be conditioned for races at LaJunta, Colorado, if applicant and Funk, perhaps others, did all the work free of charge. Sports Car Incorporated would supply the necessary parts free of charge. Neither applicant nor Funk received wages from the time they left Salt Lake City until their return. Each paid his own living expenses and the gas and oil. There is no evidence to support a finding that Sports Car Incorporated had the right to control applicant after he left Salt Lake City and until his return. No doubt Schettler could have re-

fused to let applicant and Funk use the car but that is not the kind of control with which we are concerned.

“We are persuaded to hold that both applicant and Funk were on a mission of their own choosing as contestants to obtain experience in racing and for their own enjoyment. Such relationship as may have existed between applicant, Funk and Sports Cars Incorporated, could be called a joint enterprise, but not an employer-employee relationship. Defendant corporation supplied the car and the necessary parts free of charge. Applicant and Funk supplied the labor free of charge. Defendant corporation possibly received some advertising value. Applicant and Funk obtained race driving experience and enjoyment.

“In any event, whether applicant and Funk were on a mission of their own or engaged in a joint enterprise with defendant corporation, we must find that the accident did not arise out of or in the course of applicant’s employment by defendant corporation.”

It is true that the Industrial Commission did not label the FINDINGS OF FACT by putting those three words in the middle of the page immediately preceding the fourth paragraph of the Decision, as is usually done in the papers filed in the District Court in a civil case prior to entering a Judgment. But there is no requirement in Section 35-1-85 that the findings of fact or the conclusions of law must be in any particular form or be specifically designated with those titles prior to the issuance of the Decision or in the Decision itself. We are also aware that the Commission included a few surplus words in its findings and conclusions, particularly in giving its reasons for so finding or so con-

cluding. But the provision in Section 35-1-85 does not prohibit the Commission from giving its reasons for arriving at certain conclusions.

Stripped of surplus words, the Commission's findings of fact were that

- (1) Jared Looser regularly was in the employ of Defendant, Sports Cars, Inc., as a mechanic;
- (2) the corporation's president Schettler allowed a company car to be conditioned for races at LaJunta, under arrangements whereby the company supplied the necessary parts and the men supplied the labor;
- (3) Looser and Funk did not receive wages from the time of leaving Salt Lake City until their return;
- (4) each of them paid his own expenses;
- (5) the corporation did not have the right to control Looser after he left Salt Lake City;
- (6) at the time of his accident Looser did not have the relationship of employee;
- (7) Looser and Funk supplied their labor and they received driving experience and enjoyment;
- (8) the corporation possibly received some advertising value.

The Commission's conclusion of law was that the accident did not arise out of or in the course of Looser's employment. Those findings and conclusions are quite clear and are complete.

There have been very few cases in which the Supreme Court of Utah has discussed the requirement of Section 35-1-85, U. C. A. 1953, that the Industrial Commission shall

make written findings of fact and conclusions of law, since that provision was enacted by the 1949 Legislature. But this Court has on previous occasions ruled on the requirement that the District Courts make findings of fact and conclusions of law.

*In re Clift's Estate*, 70 Utah 409, 290 Pac. 859, this Court held that even though the District Court's findings are not in artistic form according to approved models, but they clearly indicate the mind of the trial court, the Supreme Court will hold without merit the assignments of error as to such findings.

In the case of *Consolidated Wagon & Machine Co. vs. Kay*, 81 Utah 595, 21 Pac. (2nd) 836, the following syllabi are instructive:

- (5) In making findings Court must find on all material issues.
- (6) Findings are required only as to ultimate facts, not necessarily as to all specifically alleged facts involved in findings of ultimate facts.
- (8) Statutory requirement that facts found and conclusions of law be separately stated is merely directory.
- (10) Finding, though stated among conclusions of law, may be regarded as finding of ultimate fact.

In the 1933 case of *Thompson vs. Ind. Comm.*, 82 Utah 247, 23 Pac. (2nd) 930, the Supreme Court held that an Industrial Commission finding that "the applicant failed to sustain his burden of proof by competent evidence that injury was the result of accident in course of his employ-

ment," was equivalent to a finding that applicant did not sustain an injury by accident arising out of or in course of his employment.

In the more recent case of *Smith vs. Industrial Commission*, 5 Utah (2nd) 50, 296 Pac. (2nd) 511, Roland B. Smith was killed in the crash of a private airplane on April 19, 1954. He was a general partner in a partnership business known as Smith Sales Company, which sold the products of four corporations which packed or canned foods. Mr. Smith was an officer of each of those corporations. The partnership had no workmen's compensation insurance coverage. The corporations had coverage. A claim was made by Mr. Smith's dependents against the corporations and their insurance carrier. After a hearing, the Industrial Commission denied the claim. One of the Commission's findings was that at the time of his death Smith was engaged in his capacity of a general partner in the Smith Sales Company. The Commission further stated "It necessarily must follow that the trip was for and on behalf of the partnership \* \* \*."

The Supreme Court of Utah sustained the Industrial Commission's order. The Court held that there was ample evidence to support the Commission's finding that Smith "was engaged in his capacity of general partner." Plaintiffs' attorneys contended that the findings were incomplete in that the Commission failed to make a finding that Smith was not at the time in question representing one or more of the corporations. The Court's opinion said,

"It was not his duty as representative of any corporation to promote sales; that was his duty as



a general partner. \* \* \* It would seem that a positive finding that Smith was representing the partnership would under the facts in this case necessarily preclude a finding that he was also engaged in corporate work. It would be clearer had the Commission spelled out the negative—that Smith was not representing any of the corporations on this trip. The affirmative finding that he was engaged in his capacity of a general partner of Smith Sales Company carries with it the conclusion that he was not engaged in his capacity of an employee or officer of one or more of the corporations. \* \* \* The order of the Commission could only follow their conclusion that the finding that Smith was engaged in his capacity of general partner in the Smith Sales Company was a finding that he was not engaged in his capacity of corporate employee or officer.”

Section 35-1-88 of the Workmen's Compensation Law reads:

“The commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided; but may make its investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title.”

In the case of *Spencer vs. Ind. Comm.*, 81 Utah 511, 20 Pac. (2nd) 618, there was considerable discussion about the Industrial Commission's procedure. The Supreme Court's opinion contains the following:

“A broad discretion is vested in the Industrial Commission by statute (Comp. Laws Utah 1917, Sec. 3149) with respect to the manner in which its investigations shall be conducted. Unless it is shown that some substantial right of a party has been de-

nied him, or that he has been deprived of an opportunity to fairly and fully develop his case, this court will not interfere to direct the method of conducting such hearings or investigations. (*Ocean Acc. & Guar. Co. vs. Ind. Comm.*, 66 Utah 600, 245 Pac. 343.)”

In our present case, Jared Looser had been hired by Sports Cars, Inc., as a mechanic and worked as a mechanic. He was not hired to engage in races. He had never entered or driven in a race before. He voluntarily put in 50 hours of work on his own time preparing the car for the race because he expected to get some fun or enjoyment out of going to and participating in the races as a driver. His employer did not instruct or direct him with respect to his trip or his driving.

Vaughn Funk also was in the same status at LaJunta as was Mr. Looser. He told Looser on one occasion that he should slow down so as not to give their competitors any secret about their speed capabilities. Mr. Funk was merely giving his fellow contestant some advice. He was more experienced than Looser. Mr. Funk might even be considered as being in the category of “coach” of the team consisting of Funk & Looser. His suggestion to Looser to slow down was more in the nature of advice than it was supervision.

### POINT III.

#### THE INDUSTRIAL COMMISSION WAS NOT REQUIRED TO GRANT APPLICANT'S RE- QUEST FOR A REHEARING.

The only necessary words which were contained in the Industrial Commission's Order dated September 30, 1958

were the last sentence in which it was "ORDERED that the Application for Rehearing is hereby denied."

Section 35-1-82, U. C. A. 1953, provides that any party may apply to the Industrial Commission for a rehearing within 30 days after the Commission's decision. But neither this section nor Section 35-1-83 specify the wording or form of the order whereby the Commission denies the application for rehearing. Neither these sections of the statute nor any ruling by the Utah Supreme Court of which we are cognizant, say anything more than that the Commission denies the application for rehearing. In the present case the Industrial Commission gave its reasons for denying the application for rehearing, mainly that the Commission had not been persuaded by the contents of the first Application for Rehearing nor of the First or Second Supplements which were filed by applicant's attorneys, that the applicant was entitled to a rehearing.

There is no provision in the Workmen's Compensation Act, nor in any other statutory or judicial rules, which required the Industrial Commission to grant a rehearing under circumstances such as those existing in this case at the time the Industrial Commission made its Order of September 30, 1958. In the preliminary material in that Order, the Industrial Commission mentioned that there is no provision in law for the filing of any Supplements to the application for rehearing. But in denying said application, the Commission's Order of September 30, 1958 showed that the Commission had given consideration to the material contained in the Supplements, as well as the material in the Petition for Rehearing.

There have been several Utah Supreme Court cases which mentioned that the Industrial Commission has the discretionary power to grant or deny a rehearing. In the case of *Callahan vs. Industrial Commission*, 104 Utah 256, 139 Pac. (2nd) 214, Marlow Callahan was given a hearing by the Industrial Commission, which then denied compensation on the basis that he had not sustained "an accident, resulting in a hernia, arising out of or in the course of his employment." On July 13, 1942 applicant filed an application for rehearing on the basis of alleged "newly discovered evidence." On July 16, 1942 the Commission denied this application for rehearing. On August 13, 1942 applicant filed with the Industrial Commission a "Supplemental Application for Rehearing," with three affidavits attached, one by himself, one by his attending physician and one by a fellow employee. The Industrial Commission took no action regarding the "Supplemental Application." The applicant took the case to the Utah Supreme Court for review.

The Supreme Court refused to interfere with the Industrial Commission's decision. The Court's opinion said, "This Supplemental Application was simply a second application for rehearing, for which there is no authority in law. The statute above quoted is jurisdictional, and the Commission was warranted in disregarding this untimely 'Supplemental Application.'" With respect to the Industrial Commission's discretion relating to the application for rehearing, the Court's opinion said

"Regardless of whether we might feel that, under the unfortunate circumstances of plaintiff appearing at the hearing without counsel or other

representation, and being unprepared to properly present his case at that time, the showing made through counsel by his application for a rehearing for a more thorough examination of available evidence, the Commission found as a fact on the conflicting testimony in the record that plaintiff 'did not sustain an accident, resulting in a hernia, arising out of or in the course of his employment.' The Commission having so acted, on substantial, competent evidence, we cannot say as a matter of law that the decision should have been otherwise. This principle has been repeatedly announced in Industrial Commission cases."

---

With respect to the allegation of plaintiff's attorneys that the Industrial Commission refused to grant their Motion to be allowed time to file a Memorandum countering the Memorandum which Defendants' attorney had filed with the Industrial Commission on September 29, 1958:

The Commission's Order denying the application for rehearing, was dated September 30, 1958. That was before the Commission received the Motion of plaintiff's attorneys on October 1, 1958.

As with several other matters of the procedure involved in this case, there is no statutory provision relating to any memorandum or briefs which may be filed with the Industrial Commission by either party to a proceeding pending before the Commission. Of course, the purpose any party has in filing such a memorandum is to persuade the Commission to make a decision or ruling in favor of such party. There is no requirement that the Industrial Commission shall grant or specify a period for any party to file an argu-

ment relating to a case the Commission may be considering. We do know that as a customary practice the Industrial Commission always has received written arguments from parties who have filed them in a reasonable time, and has given due consideration to them. After the Industrial Commission rendered its Decision in this case on August 1, 1958, the Applicant's attorneys filed first, an Application for Rehearing, then a Supplement to Pending Application for Rehearing. Both of those documents contained several allegations and points of argument. They were as much in the nature of a brief or memorandum as if they had been so labeled. We felt that it was only fitting and proper to file a memorandum with the Industrial Commission in the nature of argument against the arguments which the applicant's attorneys had already filed, lest we give the impression (by remaining silent) that we agreed with applicant's attorneys' arguments.

---

We do not understand why plaintiff's attorneys (at page 25 of their brief), cited the case of *Kent vs. Ind. Comm.*, 89 Utah 381, 57 Pac. (2nd) 724. It does not support their arguments. In that case Charles Kent applied to the Industrial Commission, which after a hearing, denied his claim. Mr. Kent then took the case to the Supreme Court. The Court sustained the Industrial Commission's decision. At pages 384 and 385 of the Court's opinion is found the following language:

“When the Industrial Commission denies compensation and the case is brought to this court for review, a different type of search of the record is demanded than when the Industrial Commission

makes an award of compensation and the record is likewise brought here for review.

“In the case of denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence. See *Kavalinakis vs. Industrial Commission*, 67 Utah 174, 246 P. 698, and *Gagos vs. Industrial Commission*, 87 Utah 101, 48 P. (2d) 449, 450.

“In case of an award of compensation, all the record is required to disclose is that there is sufficient, competent, material evidence in the record to support the award. That there is a conflict in the evidence, or that this court might or would have found differently had the evidence been submitted to it as a trier of the facts, is of no consequence. The Industrial Commission is a fact-finding body, and in case there is any substantial evidence to support its findings, its findings are conclusive upon this court and may not be distributed. *Utah-Idaho Central R. Co. vs. Industrial Commission*, 71 Utah 490, 267 P. 785.”

We also do not understand why plaintiff's attorneys cited the case of *Miner vs. Ind. Comm.*, 202 Pac. (2nd) 557, 115 Utah 88, at page 13 of their brief. Practically all of the Supreme Court's opinion in the *Miner* case is contrary to the position of plaintiff's attorneys. At page 91 of the Utah citation the Court said

“Once a decision has been rendered against an applicant on an issue of fact, his right to a rehearing for the production of further evidence is within the

discretion of the Commission. Ordinarily the Commission does not abuse its discretion when it refuses to open up a case for the taking of further evidence, particularly when the tendered evidence would not compel a contrary finding."

Plaintiff's attorneys' brief (page 12) refers to the case of *Jensen vs. Logan City*, 89 Utah 347, 57 Pac. (2nd) 708, and quotes a sentence from the Supreme Court's opinion, relating to a trial court's refusal to grant a new trial.

We doubt that this Court is now ready to hold that all rules relating to motion for new trial in District Court cases shall apply to the Industrial Commission's action relating to applications for rehearings. Regardless of that point, we call the Court's attention to a sentence preceding the sentence quoted by plaintiff's attorneys at 89 Utah 380, to wit

"Where disinterested testimony on the vital point in a case is very scant, newly discovered testimony on that point appearing from affidavits in support of the motion for a new trial to be apparently reliable, when it appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness for the trial, and there is no element of holding such witness in reserve for purposes of obtaining a new trial—generally picturesquely denominated in slang phraseology as "an ace in the hole"—and it appears likely that such evidence would change the result, a new trial should be granted."

*Morgan vs. United States*, 304 U. S. 1, 82 L. Ed. 1129, was cited by plaintiff's attorneys at page 15 of their brief. An examination of the questions decided by the United



States Supreme Court in that case, shows very little similarity to the points involved in the case at bar. Syllabus number 2 of the *Morgan* case discloses the type of question therein involved:

“2. The ‘full hearing’ upon which the Packers and Stockyards Act conditions the power of the Secretary of Agriculture to fix maximum rates to be charged by market agencies at stockyards requires that the agencies under investigation be fairly advised of what the government proposes and be heard upon its proposals before it issues its final command, even where the proceeding is not of an adversary character but is initiated as a general inquiry.”

## CONCLUSION

Neither we nor the members of the Industrial Commission receive any personal pleasure in being required to refuse or oppose the request of a seriously injured man for financial assistance. The Legislature enacted the Workmen’s Compensation Act, providing for financial benefits to covered employees under specified circumstances. Regardless of how generous the Industrial Commissioners or any others may feel, they cannot legally go beyond the limitations set by the Legislature.

For the foregoing reasons the Decision and Order of the Industrial Commission should be sustained.

Respectfully submitted,

E. R. CALLISTER,  
Attorney General,

F. A. TROTTIER,  
*Attorneys for Defendants.*