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Notice and Grounds of Appeal.

10

(Filed June 22, 1921.)

New Jersey Supreme Court

UNION COUNTY.

NATHAN FREEDMAN, Petitioner-Respondent, against SPICER MANUFACTURING CORPO- RATION, Defendant-Appellant.	} On Petition for Compens- ation. Notice of Appeal and Grounds.	20
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To William Newcorn, Attorney for Petitioner-Respondent: 30

TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment rendered in this cause on the following grounds:

1. That the Supreme Court erred in giving judgment for the petitioner-respondent for the reasons advanced by the defendant-appellant in certiorari. 40

Notice and Grounds of Appeal.

10 2. That the trial court erroneously and improperly found that the said Harry Freedman was induced by the respondent to accept inoculation, whereas the trial court should have found as a fact from the testimony that it was optional and entirely
voluntary with this decedent and all employees, whether they wished to be inoculated or not, without any compulsion or inducement on the part of the employer.

20 3. That the trial court erroneously and improperly found that there was evidence showing that as a result of the inoculation he fainted and fell to the floor, whereas there was no evidence offered to show that the inoculation was the cause or in any way
contributed toward the said accident and his death.

4. That the trial court erroneously and improperly found that the death of decedent ensued as a result of said accident.

30 5. That the trial court erroneously and improperly found that the injury was caused by accident, arising out of and in the course of the employment of deceased.

6. That the trial court erroneously and improperly found that Nathan Freedman, the father; Jennie Freedman, the mother, and Oscar Freedman, a brother, are actual dependents entitled to compensation provided by the statute for a period of three hundred weeks.

40 7. That the trial court erroneously and improperly found that the petitioners are entitled to costs in this proceeding, together with their attorney's fee.

Notice and Grounds of Appeal.

8. That the trial court erroneously and improperly permitted the judgment to be found in favor of the petitioner and against the employer.

9. That the trial court erroneously and improperly refused to enter judgment in favor of the employer herein. 10

10. That the trial court's findings of fact and determinations are inconsistent, and there is no evidence to warrant or sustain its conclusions, and its judgment in divers other respects is illegal, erroneous, improper and oppressive to the prosecutor.

CLARENCE B. TIPPETT,
Attorney for Defendant-Appellant, 20
Dover, N. J.

Claim Petition.

(Filed June 18, 1920, Union County Clerk's Office.)

NEW JERSEY DEPARTMENT OF LABOR

10 WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

DEPENDENTS' CLAIM PETITION FOR COMPENSATION

20

NATHAN FREEDMAN,
Petitioner,
vs.
SPICER MANUFACTURING Co.,
Respondent.

Claim
Petition
No. 178.
December
17, 1918.

Attorney for Petitioner:

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What was the full name of the decedent?
Harry Freedman.
2. Where did decedent live? 111 Washington
Street, Plainfield, N. J.
3. Sex of decedent: Male.
4. Date of birth of decedent: 21.
5. Give below, in reference to each person
claimed to be dependent upon the deceased at the
time of accident or death:

40

Claim Petition.

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent
Nathan Freedman	45	Dec. 1, 1873	Father
Jennie Freedman	43	Dec. 1, 1871	Mother
Oscar Freedman	16	Nov. 1, 1902	Brother

10

6. By whom was decedent employed at the time of accident (give name and business address)? Spicer Manufacturing Co., South Plainfield, N. J.

7. What was the business of the employer? Manufacturer of Universal Joints.

8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did he receive such notice from the employer? No.

20

10. Did the employer have knowledge of this accident? Yes.

11. Did you notify the employer of this accident? No. Employer had knowledge at the time of the accident.

12. If so, on what date?

13. Have you made claim to the employer for compensation? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Supervisor of the Production Force.

30

15. When did the accident happen? October 23, 1918, at 10.00 or 10.30.

16. Where did the accident happen? Production Dept., Spicer Mfg. Co.

17. What was the nature of the accident, and how did it happen? Was sent to the shop hospital

40

Claim Petition.

to be inoculated with the serum to prevent pneumonia and upon returning to his department became dizzy, fainted and as the result thereof he fell on the floor, striking the floor and fracturing his skull; he was removed from the shop to his home and from thence to Muhlenberg Hospital, and died the same day.

10

18. Did deceased work any after the accident?
No.

19. If so, give date he was compelled to stop work:

20. Give date of death: October 23, 1918.

21. Were his wages fixed by piece work? No.

22. If so, what was his average weekly wage?
.....

20 23. If wages were fixed by the hour, state rate per hour:

24. Give number of hours in an ordinary working day: 8.

25. Give number of days in an ordinary working week: 6.

26. State the amount of weekly wages: \$30.00.

27. How much money have you received from the employer as compensation (not medical aid) since the accident? None.

30 28. Has the employer promised to pay you any compensation? Yes.

29. If so, how much? \$4.50 per week.

30. Was medical aid required? Yes.

31. If so, was this service furnished by the employer? No.

32. What other sum did you expend for medical, surgical or hospital service? About \$15.00.

40 33. Give name and address of physician and hospital: Dr. A. H. Dundon, 55 Somerset St., Plainfield, N. J.; Dr. Albert Pittis, 178 E. Front St., Plainfield, N. J.; Muhlenberg Hospital, Park Ave., Plainfield, N. J.

Claim Petition.

34. What other facts are there which you believe important? The dependents herein named were dependent upon the deceased for maintenance and support, the father having suffered from tuberculosis for a number of years, and by reason of his illness has been unable to support his wife, child and himself, and for that reason if the compensation for the benefit of the said dependents was commuted into a lump sum, he would have sufficient capital to establish a little business which could be operated by the dependents for their mutual benefit. 10

35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes. 20

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper. 30

And your petitioner will ever pray, etc.

(Signed) N. FREEDMAN,
111 Washington St., Plainfield, N. J. 40

Claim Petition.

STATE OF NEW JERSEY, }
 COUNTY OF UNION, } ss. :

10 NATHAN FREEDMAN, of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

(Signed) N. FREEDMAN.

20 Subscribed and sworn to before me this Seventeenth day of December, 1919, at Plainfield, N. J.

(Signed) FLORENCE V. GRAY,
 Notary Public of N. J.

30 (This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

TO THE RESPONDENT.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

40 We hereby notify you that unless an answer shall, within seven days from the date of this notice,

Claim Petition.

be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU,

10

.....,

Secretary.

I, W. E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, do hereby certify the foregoing to be a true and correct copy of the Dependents' Claim Petition in the above case.

20

W. E. STUBBS.

30

40

Form No. 25.

Answer to Claim Petition.

(Filed June 18, 1920, Union County Clerk's Office.)

NEW JERSEY
DEPARTMENT OF LABOR

10

WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.RESPONDENT'S ANSWER TO DEPENDENTS' CLAIM
PETITION

20

NATHAN FREEDMAN,
Petitioner,

vs.

SPICER MANUFACTURING Co.,
Respondent.Claim
Petition
No. 178.
December
17, 1918.

Attorney for Respondent:

In answer to Claim Petition filed in this cause:

30

1. What was decedent's name? Harry Freed-
man.2. Where did decedent reside? 111 Washington
Street, Plainfield, N. J.5. Do you question the dependency, age or rela-
tion of any of the persons named in question No.
5 of the Claim Petition? If so, specify: Claim of
dependency is questioned.6. Was the decedent in your employ at the time
of the accident? Yes.

40

7. State your business: Manufacturer.

8. Did you receive written notice from the de-
cedent at the time of hiring, or later, that the Com-
pensation Law was not to apply to him? No.

Answer to Claim Petition.

9. Did you give such notice to him? No.
10. When did you first have knowledge of this accident? At the time.
11. Did you receive notice of this accident from the Petitioner? No. Employer knew of occurrence at the time. 10
12. If so, on what date?
13. Has any claim for compensation been made? Yes.
14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Clerk and die-setter; standing and suddenly fainted.
15. When did the accident happen? Oct. 23, 1918, about 11.00 A. M.
16. Where did the accident happen? At the plant. 20
17. What was the nature of the accident, and how did it happen? Deceased had voluntarily submitted to influenza serum inoculation, which was optional with him to accept or reject; after inoculation he walked back to his desk; suddenly fainted and fell, striking his head on concrete floor.
18. Did the decedent work any after the accident? No.
19. If so, give date he stopped work: Oct. 23, 1918. 30
20. Give date of death: Oct. 23, 1918.
21. Were his wages fixed by piece-work? No.
22. If so, what was his average weekly wage?
23. If wages were fixed by the hour, state rate per hour: 45c.
24. Give number of hours in an ordinary working day: 8.
25. Give number of days in an ordinary working week: 5½. 40

Answer to Claim Petition.

26. State the amount of weekly wages: \$19.00, excepting one week.

27. How much have you paid as compensation (not medical aid) since the accident? None.

28. Have you promised to pay compensation?
10 No.

29. If so, how much?

30. Was medical aid required? Yes.

31. If so, did you furnish all the medical, surgical, or hospital services, or other expense of last sickness? Dr. Anthony at plant, and sent Muhlenberg Hospital, Plainfield, N. J.

32. Between what dates was service rendered?
Died Oct. 23, 1918.

33. Give name and address of physician and hospital rendering service at your direction:
20

34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion: The injury sustained did not arise out of and in the course of the employment.

SPICER MFG. CORPORATION,
South Plainfield, N. J.

30

40

Answer to Claim Petition.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss. :

CLARENCE B. TIPPETT, of full age, being duly sworn according to law, on his oath deposes and says: That he is agent of the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief. 10

(Signed) CLARENCE B. TIPPETT,
Agent of Respondent.

20

Subscribed and sworn to before me this 23rd day of April, 1919, at New York City, N. Y.

(Signed) W. F. CONEYS,
Notary Public.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.) 30

I, W. E. STUBBS, Deputy Commissioner and Secretary of the Workmen's Compensation Bureau, do hereby certify the foregoing to be a true and correct copy of the Respondent's Answer in the above case.

40

W. E. STUBBS.

**Determination of Facts and Rule for
Judgment.**

(Filed June 18, 1920, Union County Clerk's Office.)

WORKMEN'S COMPENSATION BUREAU,

DEPARTMENT OF LABOR OF NEW JERSEY.

10

NATHAN FREEDMAN,
Petitioner,

vs.

SPICER MFG. COMPANY,
Respondent.

Claim
Petition
#178.
On Petition
for Compen-
sation.

20

This is a proceeding brought by Nathan Freedman, father of Harry Freedman, deceased, age twenty-one years, in behalf of himself and Jennie Freedman, mother of decedent, and Oscar Freedman, age sixteen years, a brother of decedent, as dependents of the said Harry Freedman, deceased, under and by virtue of the terms and provisions of an Act of the Legislature of the State of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, together with the several supplements thereto and acts amendatory thereof, and a time and place for the hearing of the said petition having been fixed and it appearing that said petition and the order fixing the time and place of said hearing have been duly served upon the said Respondent, and an answer having been filed

30

40

Determination of Facts and Rule.

by the said Respondent, and the Petitioner and Respondent having duly appeared on the 24th day of May, A. D. 1919, the date set for the final hearing, the Petitioner being represented by Hon. William Newcorn, and the Respondent by Clarence B. Tippet, Esq., and the Deputy Commissioner having heard the testimony offered in behalf of the parties hereto, and briefs having been submitted, I do hereby determine from said testimony as follows: 10

FIRST: That the said Harry Freedman, who was 21 years of age, was on the 23rd day of October, 1918, employed by the Spicer Manufacturing Company, at South Plainfield, Union County, New Jersey, as a supervisor of the production force. 20

SECOND: That on or about said last-mentioned date the said Spicer Manufacturing Company offered to its employees, and the members of the families of its employees, an inoculation by the company physician as a preventative against the disease of influenza, which was raging at that time. That the said company did not order its employees to accept said inoculation, but offered the same from a humanitarian standpoint, the said company believing that it was thereby performing a public benefit in relieving the distress occasioned by said epidemic. That its employees were notified that the serum and injection would be supplied without charge to them and the members of their immediate families; that it was optional and voluntary with the individual employees to accept said offer, and that some nine hundred out of twelve hundred employees of said Respondent did accept said inoculation. 30 40

THIRD: That the said Harry Freedman, deceased, elected to accept said offer to subject himself to

Determination of Facts and Rule.

16 said inoculation at the hands of the company doctor. That after he was inoculated, in his turn, by the doctor, he walked back to his desk in the department where he was employed, and he was noticed by fellow employees, as he stood at his desk, to suddenly sway above the desk, and then fell backwards, striking the back of his head upon the concrete floor, sustaining a fractured skull, from which he afterwards died at the Muhlenberg Hospital.

FOURTH: That there was no evidence offered to show that the inoculation was the cause, or in any way contributed toward the said accident and his death, no autopsy having been performed.

20 FIFTH: That while the said accident arose in the course of the employment, it cannot be said that the said accident arose out of the employment, inasmuch as the acceptance of the inoculation was in no way compulsory or ordered by the company, it being entirely voluntary on the part of the decedent to have accepted same.

30 SIXTH: That the petitioner has, in my opinion, failed to establish the burden of proof required of him that the death of the said Harry Freedman was caused by an accident arising out of and in the course of said employment of said Harry Freedman, deceased.

It is, therefore, on this 12th day of May, 1920, ordered that the said petition be dismissed, and judgment entered in behalf of the said Respondent, but without costs to either party.

Notice of Appeal.

(Filed June 18, 1920, Union County Clerk's Office.)

WORKMEN'S COMPENSATION BUREAU,

DEPARTMENT OF LABOR OF NEW JERSEY.

10

NATHAN FREEDMAN,
Petitioner,

vs.

SPICER MANUFACTURING Co.,
Respondent.

On Petition
for Compensa-
tion.

TAKE NOTICE that the petitioner appeals from the judgment of George J. Jaeger, Deputy Commissioner, ordering the petition filed in the cause to be dismissed and judgment entered in behalf of the respondent without costs, and appealing therefrom to the Court of Common Pleas on the ground that the finding of the Commissioner is not substantiated by the evidence in the case.

20

Dated, June 12, 1920.

30

NATHAN FREEDMAN,
Petitioner.

WILLIAM NEWCORN,
His Attorney.

40

Order.

(Filed June 24, 1920, Union County Clerk's Office.)

COURT OF COMMON PLEAS
OF UNION COUNTY.

10

NATHAN FREEDMAN,
Petitioner,

vs.

SPICER MANUFACTURING Co.,
Respondent.

On Appeal.

20 An appeal having been taken to the judgment rendered in the above cause, and application being made to the Court to fix the time and place of hearing of said appeal.

It is thereupon ordered on this Twenty-third day of June, A. D. 1920, ORDERED that the trial of the said appeal be set down for Friday, the 9th day of July, 1920, at one o'clock in the afternoon (Day-light saving time), at the Court House, in the City of Elizabeth.

30

C. B. PIERCE,
Judge.

Notice of Trial.

(Filed July 7, 1920, Union County Clerk's Office.)

UNION COUNTY

COURT OF COMMON PLEAS.

NATHAN FREEDMAN,
Petitioner-Appellant,

vs.

SPICER MANUFACTURING Co.,
Respondent-Appellee.

10

On Appeal.

TAKE NOTICE that the appeal of the above cause will be heard before His Honor, Carlton B. Pierce, Judge of the Court of Common Pleas of Union County, on Friday, the Ninth day of July, 1920, at one o'clock in the afternoon (Daylight Saving Time), at the Court House in the City of Elizabeth.

20

Yours, etc.,

WILLIAM NEWCORN,
Attorney of Petitioner-Appellant.

30

To:

CLARENCE B. TIPPETT, Esq.,
Attorney of Respondent-Appellee,
18 E. 41st St.,
New York.

40

Minutes of Hearing.

DEPARTMENT OF LABOR,

WORKMEN'S COMPENSATION BUREAU,

PLAINFIELD, UNION COUNTY, DISTRICT.

10

 NATHAN FREEDMAN,
 Petitioner,

vs.

 SPICER MANUFACTURING
 COMPANY,
 Respondent.

} Claim #178.

20

Transcript of stenographer's notes of evidence, taken in the above-entitled matter, before Hon. GEORGE J. JAEGER, Deputy Commissioner of Compensation, in the Plainfield District Court Chambers, City Hall, Plainfield, N. J., on the 24th day of May, A. D. 1919, at 10 A. M.

APPEARANCES:

30

WILLIAM N. NEWCORN, Esq., for the Petitioner.
 CLARENCE B. TIPPETT, Esq., for the Respondent.

The Commissioner: In this matter is there anything which can be agreed upon so as to save time?

Mr. Tippet: Mr. Referee, I think we can agree on the fact that Mr. Freedman was an employee of the plant.

40

The Commissioner: Let us get right down to the main points at issue.

Minutes of Hearing.

Mr. Tippet: And the date of this accident was October 23rd.

Mr. Newcorn: October 23rd.

Mr. Tippet: About 11 o'clock.

Mr. Newcorn: Or thereabouts.

Mr. Tippet: And as to his weekly wages, is that a question at issue? 45 cents an hour. 10

The Commissioner: I notice——

Mr. Newcorn: There is.

Mr. Tippet: Working days, eight working hours an ordinary working day; five and a half days in a week.

The Commissioner: There seems to be a variance there. The petition sets forth weekly wages \$30, six days a week, eight hours a day; and the answer, 45 cents an hour, eight hours a day, and five and a half days a week, or total \$19 a week. 20

Mr. Tippet: We could submit to the referee a schedule of the wages paid.

The Commissioner: Paid an hourly rate? Your answer so admits.

Mr. Tippet: Rate per hour, yes, 45 cents an hour.

Mr. Newcorn: As I understand, he was receiving \$19 a week until two weeks prior to the accident, when the wages were changed to 45 cents per hour, after which the first week he drew \$27.50 and the second week a little over \$30. 30

Mr. Tippet: We have a schedule here of his wages from 1916 right on up (shows paper to Judge Newcorn). It would not make a particle of difference.

Mr. Newcorn: I do not think it is very essential.

Mr. Tippet: I can submit the fact that up until two weeks of this accident he was earning \$19 a week. 40

Mr. Newcorn: \$19 a week.

Minutes of Hearing.

Mr. Tippet: And that for the two weeks prior to the accident he was earning over \$20 a week.

10 The Commissioner: It might make a difference if you are going to stipulate that the wages were \$19 a week; 45 per cent. of the weekly wage not to exceed \$10, and 45 per cent. of \$19 would be less than \$10.

Mr. Newcorn: And the further stipulation for the last two weeks it was over \$20 covers that.

The Commissioner: No, 45 per cent. Three dependents you allege: 45 per cent. of \$20 would be only \$9 a week; you have not reached the maximum ten.

Mr. Newcorn: That is right.

20 The Commissioner: I fail to see how you make it \$19 a week. If 45 cents an hour is to be the rate, eight hours a day, and five and a half days a week, that itself would amount to \$19.80.

Mr. Newcorn: But he was working overtime all the time.

Mr. Tippet: Weekly rate is \$19.

The Commissioner: Your answer says 45 cents an hour, eight hours a day, five and a half days a week.

Mr. Tippet: Up to the last two weeks.

30 The Commissioner: Take it at the time of the accident. That is the time we go by.

Mr. Newcorn: And the payroll the first week under the new arrangement was \$27.50, and under the second week, which is the week in which he died, was \$32 and some odd cents.

The Commissioner: Is that agreed to, Mr. Tippet?

Mr. Tippet: I do not positively agree to it, but we can verify that with a submission to you.

40 The Commissioner: Let us get it straight now.

Mr. Tippet: I cannot agree to it because it may not be so, and it may be absolutely so.

Minutes of Hearing.

The Commissioner: Was he working at an hourly rate at the time of the accident?

A Man Seated With Mr. Tippet: Yes, sir.

The Commissioner: How much per hour?

A Man Seated With Mr. Tippet: 45 cents an hour.

The Commissioner: How many hours a day? 10

A Man Seated With Mr. Tippet: Forty-eight a week.

The Commissioner: That would be \$21.60 a week.

A Man Seated With Mr. Tippet: Overtime.

The Commissioner: What about overtime?

A Man Seated With Mr. Tippet: Time and a half.

The Commissioner: We have to eliminate the overtime in computing the weekly rate. We eliminate the overtime; \$9.72 at 45 per cent. of the weekly wage. 20

Mr. Tippet: We are arriving at the actual wages, aren't we, now?

The Commissioner: I am trying to get the actual wage so that the question can be settled without coming back again and waiting for examination of the payrolls.

Mr. Tippet: You base it on \$21.60 a week? 30

The Commissioner: Unless Judge Newcorn has something else to show.

Mr. Newcorn: All we can say is what the payroll was. That is our only knowledge; money received by the mother.

The Commissioner: All right; now, anything further stipulated?

Mr. Tippet: What was the date of the death?

Mr. Newcorn: October 23rd.

Mr. Tippet: 1918. 40

The Commissioner: That was the same day the alleged accident happened?

*Minutes of Hearing.**Dr. Benjamin Hedges—Direct.*

Mr. Tippet: I don't know of anything else.

The Court: First witness.

10 DR. BENJAMIN HEDGES, produced as a witness on behalf of the petitioner, being duly sworn on his oath according to law, saith:

Direct examination by Mr. Newcorn.

Q. Doctor, in October, 1918, were you attached or have charge at the Muehlenberg Hospital? The stenographer can't get your nod. And do you recollect a patient in this institution by the name of
20 Harry Freedman? A. I do.

Q. When was he brought there? A. In the afternoon.

Q. By day? A. Yes, sir.

Q. Did you examine him? A. Yes.

Q. And did you find out what was the matter with him? A. We found that the patient was unconscious, was having convulsions, had some temperature and rapid pulse, and was bleeding at the ear. His symptoms grew progressively worse, and
30 he died that night at the hospital.

Q. Did you examine his head? A. Yes.

Q. And what did you find? A. We found bleeding from his ear and some contusion about his head.

Q. And what does that indicate? A. It indicated that he had some injury to his head.

Q. Yes, sir, were you there at the time when he died? A. No—yes, I think I was. I didn't see him at the time of his death. I was in just a few
40 moments before he died and I was in another part of the hospital when he passed away.

Dr. Benjamin Hedges—Direct—Cross.

Dr. William Anthony—Direct.

Q. You did not issue the death certificate, did you? A. I am not sure, Judge, whether I did or not. It is sometimes issued by the house surgeon, and sometimes by the attending surgeon, and I am not sure whether I issued the death certificate or not. It is sometimes signed by the house surgeon. I don't remember. 10

Q. In this case the county physician? A. Yes, I think the county physician in this case, because it was an accident case.

Q. What was the cause of the death, do you know, doctor? A. To the best of my judgment, the cause of death was a fracture at the base of the skull.

Mr. Newcorn: That is all.

20

Cross-examination by Mr. Tippet.

Q. Were any X-rays taken to your knowledge? A. No, he was only in the hospital a short time.

Q. I see. Then your examination indicated, without doubt, a fracture at the base of the skull? A. Yes.

Mr. Tippet: That is all.

30

DR. WILLIAM ANTHONY, produced as a witness on behalf of the petitioner, being duly sworn on his oath according to law, saith:

Direct examination by Mr. Newcorn.

Q. Dr. Anthony, you are a physician in the City of Plainfield? A. I am.

Q. And on the 23rd day of October, 1918, you were at the plant of the Spicer Manufacturing Company, South Plainfield? A. I was. 40

Dr. William Anthony—Direct.

Q. What was your object being there? A. Administer vaccine.

Q. At whose request? A. Prophylactic against influenza.

10 Q. Oh, I thought you had finished. At whose request were you there? A. Spicer Manufacturing Company.

Q. What agent of the Spicer Manufacturing Company invited you down there? A. Mr. Berry, I think.

Q. Mr. Berry, the treasurer of the company? A. Yes.

Q. Did you inoculate the men there that day? I say, did you inoculate the men there that day? A. Yes.

20 Q. Where did the inoculation take place? A. In the plant hospital.

Q. Do you recollect Harry Freedman? A. I do.

Q. Was he one of the men you inoculated? A. He was.

Q. When the men came into the hospital, how did they come there, if you know? I mean, did they come individually or in groups? A. There was a regular line-up.

30 Q. There was a regular line-up of the men? A. One following the other.

Q. Did you inoculate all the men in the plant? A. Not all, only those who wished it.

Q. Only those who wished it. After you had inoculated Freedman, who was amongst the groups that came there, did you see Mr. Freedman again? A. I did.

40 Q. State the circumstances under which you saw him? A. One of the men mentioned that Freedman had fainted, and he had fainted. That was it. And then a couple—a few minutes after another one came over and said Freedman had fainted, and

Dr. William Anthony—Direct.

he was awful pale and sick. So I went over personally to make sure he was all right, and he was sitting up on a box, I think it was, then. And I asked him how he felt and he said he had fainted and that his head hurt; that he would be all right. And I examined his head and he had a bruise, you could see, where he had struck his head on the floor. I put him through the regular examination; pupils reacted all right; looked at his ears, there was no sign of hemorrhage there. I even looked at his tongue and questioned him, and told him he better lie down or sit quiet. And he said, oh, he would be all right. And I insisted on him keeping quiet for a while, explaining that after a faint like that, and especially bumping his head, it would be better for him to keep quiet. Seen the man—couple of them got a chair, I think, or something for him to sit down on to recline. I know they gave him all that attention that any one could give. And I asked him—I said, “Now, Freedman, I will be here a while yet; you sit here and I will come over and see you before I leave.” That really was not part of my duties, but I’d do it for anyone that had been there. And I went over a second time to see Freedman, but in the meanwhile they were taking him home. I stopped them putting him in the automobile, I think it was, and I asked him how he felt, and he said his head hurt him, and he felt pretty badly and that he was going home. That’s all.

Q. How long a time after you had inoculated him that you were called? A. Oh, it wasn’t very long. Maybe a case of five, ten or fifteen minutes, I should judge. I am not sure about that time.

Q. A short while after you saw him? A. Very recent—it wasn’t a long time, anyhow.

Dr. William Anthony—Direct—Cross.

Q. And the second time when you saw him, when they had put him in the automobile, what time of day was that? A. It must have been around noon time.

10 Q. Couple of hours after, you say, around noon time? A. Yes.

Q. When did you begin the inoculation of the men, doctor? A. You mean that morning?

Q. That morning. A. I can't recall; somewhere around 9 o'clock, I think it was; 9 or 10 o'clock is when I got there.

Mr. Newcorn: About 10 o'clock. That is all.

Cross-examination by Mr. Tippet.

20

Q. Doctor, was this day in question on the 23rd of October last when Freedman sustained this fainting spell? A. That was the date.

Q. Was that the—when the first day that you started given inoculations, doctor, at the plant? A. I don't know.

Q. What was the first day? A. Mr. Berry, I suppose, has the dates.

30 Q. Do you recall whether that was the day you began the inoculation? A. No, it wasn't the day we began. I feel sure it wasn't the first day. Am I right about that, Mr. Berry?

Mr. Berry: Record shows it was the first day.

A. What?

Mr. Berry: Record shows it was the first day.

40

A. It was the first day?

Dr. William Anthony—Cross.

Mr. Berry: According to the record.

A. Well, then, it was.

Q. On that particular morning you stated you began the inoculation about 10 o'clock? Around 10 o'clock? A. Around 10 o'clock.

Q. I see. Now, will you explain again just what you understand as to the occasion of these men coming up for inoculation? A. I don't quite—

Q. Do you know the occasion for those men coming up to be inoculated? A. Yes.

Q. What was the occasion of it? A. As a preventative against the influenza that was raging.

Q. Doctor, you are regularly at the plant, are you not, taking care of injured cases? A. No, I was acting in an emergency at that time.

Q. In an emergency at that time? A. Yes, sir, I was looking after some of the accident work in connection with one or two other men.

Q. So that this particular time you were called there particularly to give the inoculations? A. Yes, sir.

Q. And you say that the inoculations were only rendered to those who wished to be inoculated? A. Yes.

Q. And this man was among those, I assume? A. He was.

Q. And you say that they came in in a regular line-up of them? Those men were in the same category as Mr. Freedman? A. Yes, and any fellow who doubted, or was nervous, or didn't just know what it was, and especially among the foreigners, we just asked him to stand aside and watch a couple of other fellows get inoculation. So it was up to them decidedly; if they wanted it they could have it, and if they didn't they didn't have to.

Q. In other words, was it voluntary with them? A. It was absolutely voluntary.

Dr. William Anthony—Cross.

Q. There was nothing compulsory about it? A. Nothing at all.

Q. Did any man decline to accept it? A. Some did, and would come back maybe the same day or a day or two afterwards.

10 Q. On this particular day Mr. Freedman came along with the others? A. Yes.

Q. And went in and was inoculated in the customary way; do you remember particularly anything about him at the time he came up? Is there anything you especially recall in your mind that impresses—in your mind anything about him when he came up? Any of his actions? A. Yes, Freedman, I remember, he hesitated. I remember this distinctly. I said, "It doesn't amount to anything; 20 watch me shoot this fellow," and it happened to be a big stout fellow. This was all talked over afterwards, and that is why I can recall it. So Freedman saw me give this other fellow inoculation, and I personally gave Freedman his inoculation. All he did, he just smiled after it as though it didn't amount to anything, and that was all there was to it.

Q. Did he act nervous? A. No, not afterwards. He went out. As I said, he smiled.

30 Q. He went out and he smiled? A. Yes.

Q. And then after he was inoculated he went away? A. Yes.

Q. Do you recall anyone who, at the time, was with him when he came up to be inoculated? A. I don't.

Q. You don't. And the next you heard of it was when you were called in, doctor, as you stated, someone said he had fainted? A. Yes, sir, and I went over to see him.

40 Q. You went over and made examination of him then? A. Yes, sir.

Dr. William Anthony—Cross.

Q. As you said, shortly after he had left. It was, doctor, can you remember, or do you recall, about how long after he had been inoculated and then left you that word actually came to you that he had fainted? A. I judge it must have been around fifteen minutes. I put that as a mean time. 10

Q. Doctor, you examined a good many men, I presume, at the plant there. Do you recall how many you had examined; I mean how many you had inoculated? A. No, I don't.

Q. The records would indicate that, wouldn't they? A. The records would.

Q. And did any man faint, according to your knowledge, after inoculation except this man? A. No, he was the only one.

Mr. Newcorn: Of course, this is not cross-examination, but we will not be so technical. Doctor is under subpoena by the other side likewise. I presume it is to save time. 20

Mr. Tippet: I would suggest we go along.

The Commissioner: Yes, I will allow him to go along because we, as a rule, are not bound by rules of evidence.

Mr. Tippet: I meant to speak to you about that to save a little time.

Mr. Newcorn: I accord with your views. 30

Q. So you say, doctor, you do not know of anyone besides this man who fainted as a result of inoculation? A. I don't recall of anyone.

Q. Were there 100 men or 200 men or 400 men in the plant, roughly, that you can estimate had been inoculated? A. I guess nearer 500.

Q. At least 500, or nearer 500? A. Of course, I haven't the families of the men; women folks and little children. 40

Q. Oh, yes? A. They all came in. Not only at the plant, but also here at Plainfield.

Dr. William Anthony—Cross—Redirect.

Q. I see. A. And we all took it ourselves.

Q. So the inoculation was given to others besides the employees, was that right? A. Anyone who wished it. There were little babies, children came in and had the inoculation.

10 Q. And did the members of the families come in and were they inoculated? A. Yes.

Q. As well as the children also? A. H'm, h'm.

Mr. Tippet: That is all.

Redirect examination by Mr. Newcorn.

Q. You say that Mr. Freedman volunteered to be inoculated; do you know that of your own knowledge? A. He was in the line-up, and that's all I know.

20 Q. And because he was in the line-up you say that he did that voluntarily? A. Yes.

Q. He did hesitate before he permitted you to inoculate him? A. No, I wouldn't call it a hesitation. It wasn't a rebellion, anyway, I know. He just looked a little bit like a lot of us, scared, he didn't know what to expect. And when anyone seemed to be timid we just let him stand there and see a couple of more get the inoculation.

30 Q. Well, his actions and conduct were such as to cause you to ask him to step aside to watch these other inoculations, is that correct? A. Actions? Well, you can tell fellows that don't care—

Q. No. Answer the question, doctor. I want to find out what actually did transpire at that time. Read the question. (Question repeated by the stenographer.) A. I didn't ask him to step aside, but they were in a group, a bunch, and some fellows looked nervous. You would pick out a brave fellow and do him first just as an object lesson to the others. And, evidently, he must have come under

40

Dr. William Anthony—Redirect.

that head of one who wasn't quite as brave as the others.

Q. Your recollection of the incident is not as good as it might be, is it, considering the number of people you inoculated that day? A. That would mix one up some.

10

Q. And a good deal of the testimony to which you have testified to is the result of the conversation, talking the matter over after the accident occurred? A. What I have said was personal observation and especially recalled by talking afterwards.

Q. Which refreshed your memory? A. So I remember.

Q. Now, in answer to a question, you say that none of the men fainted, or the people who were inoculated that day by you fainted. Do you mean to say that you know the outcome of every case in which you administered the serum? A. No, not of every case.

20

Q. And there may have been other persons who have been inoculated who may have fainted as a result of the experience of inoculation? A. If they were I didn't hear them.

Q. There is nothing unusual, is it, upon the injection of serum to produce a fainting fit in a patient? A. No, among the soldiers they actually drop. (Answer repeated by the stenographer.) One after another. Not that it hurt, but they didn't know what they were getting. They imagined it was worse than it was. And that was the object in anyone who seemed timid to let him see others get it first.

30

Mr. Newcorn: That is all.

40

Dr. William Anthony—Redirect—Recross.

By the Commissioner.

10 Q. How was this invitation to be inoculated extended to the employees, do you know? A. Why, I recall, and I remember reading the bulletin. There was a bulletin posted on the board which mentioned what was to be done, and the men could avail themselves of that opportunity.

Q. Was that kind of a notice given, just that bulletin posted? A. Bulletin posted and then the men would see that and question one another and question the foremen.

Q. Of course, you don't know that? A. And I know I was questioned.

20 Q. That was the manner of extending the invitation to the employees to become inoculated? A. Yes.

The Commissioner: That is all.

Recross-examination by Mr. Tippet.

30 Q. You spoke of the soldiers dropping. Of course, that was probably from what you had ascertained and understood the result of the inoculations made to soldiers? You don't know of any cases that occurred at the plant during your observation? No personal knowledge, excepting this particular case, of anyone fainting even after the inoculation? A. No, that is the only one.

Q. There was none, doctor, in the line-up before you who fainted before or after inoculation, were there? A. There was none.

John F. Kimsey—Direct.

JOHN F. KIMSEY, produced as a witness on behalf of the petitioner, being duly sworn on his oath according to law, saith:

Direct examination by Mr. Newcorn.

Q. Mr. Kimsey, you are an employee of the Spicer Manufacturing Company? A. Yes, sir. 10

Q. And on October 23rd, 1918, you were in their employ? A. Yes, sir.

Q. You knew Harry Freedman? A. Yes, sir.

Q. And what position did he occupy there? A. Why, he at that particular time, he was supposed to be a die setter, department 22, that is a stamping department.

Q. Did you have charge of that department? A. Yes, sir. 20

Q. Can you recollect the date on which the inoculation took place? A. I don't recall just the date, whether—but it was along about that time.

Q. Did you accompany him to the plant hospital for the purpose of becoming inoculated? A. I did, with the employees of Department 22 that went to take the inoculation.

Q. And was it upon your invitation that employees went there? A. It was on invitation of the Spicer Manufacturing Company, they would supply the vaccine to any of the employees wished to take it. I notified the men in our department that particular time of day was set aside for them to be inoculated. 30

Q. For your department? A. For our department.

Q. Did you give any orders for the men to cease and accompany you to the hospital? A. Did I do what? 40

John F. Kimsey—Direct.

Q. Did you give any orders that the men could quit work at that time and go with you to the hospital? A. I did.

Q. And was Harry Freedman one of the men who accompanied you there? A. He was.

10 Q. Amongst the other men in your department?
A. Amongst the other employees.

Q. Prior to the plant taking—providing for the inoculation, you had been having considerable trouble in the plant by reason of the illness of the men from the influenza? A. Yes, sir.

Q. Which made you shorthanded? A. Several deaths, three in our department.

Q. And the same condition prevailed throughout the entire plant? A. It did.

20 Q. As far as you know, and with a view to lessening the number of absentees and deaths, that the corporation decided to afford the men a chance to avail themselves of this opportunity as a preventative, is that so or not? A. I don't know anything about that, what Mr. C. A. Dana's idea was in regard to that. Whether it was to lessen the absentees of the department or whether it was his idea of being in a position to help humanity to such an extent he was willing to donate that; I couldn't answer that question.

30 Q. You don't know. But the fact actually was that there had been quite a number of deaths and quite a number of men kept away from the plant by reason of the influenza epidemic? A. Yes, sir.

Q. Which made the shop shorthanded? A. Yes, sir.

40 Q. How far were you away from Harry at the time when he was inoculated? A. Well, that I couldn't tell you. It would be impossible for me to answer that because he was over there with the men. I don't know just exactly what position he

John F. Kimsey—Direct—Cross.

was in the line, but I believe that I received the inoculation ahead of Mr. Freedman.

Q. And after you were inoculated did you leave right away? A. I did.

Q. Did you have any talk with him about the inoculation? A. No, I didn't.

10

Q. You didn't. When did you see him again? A. Why, when I went to my department and found that he had fainted, or had taken—picked him up off the floor and taken him outside.

Q. Where was he at the time where he had fainted? A. In front of his desk.

Q. What was his work, you say? A. He was a die setter, he was rated as a die setter, but at that particular time he had been a clerk up to two weeks before that, and had changed his rating and put him in as die setter, and he was still taking care of clerical work on account of the clerk who was to take his position was home sick on account of the influenza. That is, Mr. Nelson.

20

Q. Then, at the place where he fainted and fell there was his usual place of employment under the old employment? A. Yes, sir.

Q. And the same work which he was still finishing for the two weeks of his new rates? A. Yes.

30

Mr. Newcorn: That is all.

Cross-examination by Mr. Tippet.

Q. Mr. Kimsey, was this—would you please repeat as near as you can recall the testimony on that question of your direction or notification to the employees that they could go in and be inoculated; did you say that that was a request or a direction, or what was that? A. Well, it was nothing more than that the company had set aside that particular time for any of the employees to take the inocu-

40

John F. Kimsey—Cross.

lation, and I notified them it was such. All the employees didn't take the inoculation.

10 Q. That is, for the employees in your particular department it happened that this particular time of the day was the time under the schedule they could come in and be inoculated if they so desired, is that right? A. That's right. That was so that the whole shop would not be there at any particular time.

Q. Did you order those men in or did you invite them in there, which? A. I told them any of those would care to take the inoculation would have to be at the hospital between that time of the day, whatever time was set.

20 Q. That was no direction they should imperatively go? A. No, they didn't have to go. There was some of them didn't go and they are still in the employ of the company.

Q. It was a designation made them merely that those who wished to accept it they could go any time and be inoculated? A. That's right.

Q. Mr. Kimsey, I assume that this manner of inoculation had been previously presented to the employees, had it not? A. There was a bulletin up to that effect.

30 Q. Had there been any other means of presentation of the situation to the employees? A. I don't recall that, whether there was or not.

Q. Had there been any meetings called at which the employees were present when the subject was presented to them, anything about inoculation? A. I don't recall that there was.

Q. You, of course, didn't see him fall? A. I didn't.

40 Q. I see. He is employed, though, in your particular department? A. Yes, sir.

John F. Kimsey—Cross.

Q. And after you were inoculated, did you leave and go back to your department? A. Well, I don't know as I went directly back to it, because I believe he was inoculated after I was, and he had fainted and was outside of the building when I went over there.

10

Q. About how many men were there in your department? A. Thirty-four.

Q. Thirty-four? A. I believe there was at that time.

Q. Do you know the number of those men in your department who elected to be inoculated? A. Well, I believe out of the department there was six or seven; I won't say six, I'll say five. Place it as a conservation basis, that weren't inoculated.

Q. Who were not? A. Who were not.

20

Q. I see. After his employment, at the time that he was—went in to be inoculated, he had been engaged in some clerical work? A. In clerical work.

Q. And at the time of this alleged accident he was not engaged in the die setting operation? A. No, sir.

Q. Previous to his going in? A. No, he hadn't taken up that work yet on account of the man who was to relieve him in the clerical work was taken sick with the influenza.

30

Mr. Tippet: I see. That is all.

Mr. Newcorn: That is all, Mr. Kimsey.

John Suydam—Direct.

JOHN SUYDAM, produced as a witness on behalf of the petitioner, being duly sworn on his oath according to law, saith :

Direct examination by Mr. Newcorn.

10

Q. Mr. Suydam, you were employed by the Spicer Manufacturing Company on October 23rd? A. Yes.

Q. Talk out so the— A. Yes.

Q. And you knew Harry Freedman? A. Yes.

Q. Did you work in the same department with him? A. Yes.

Q. What work were you doing? A. Die setter.

Q. And were you present when Mr. Kimsey, a little before 10 o'clock, stopped the department and requested the employees— A. I was.

20

Q. (Continuing) —to go to the hospital? Let me complete the question. Can you state just exactly what was said by Mr. Kimsey at that time? A. No, I don't.

Q. Did you go into the hospital? A. Yes.

Q. You are still employed by the Spicer Manufacturing Company, are you? A. Yes, sir.

Q. Was Harry Freedman with you at the time? A. Yes.

30

Q. Was anything said by Mr. Freedman about the inoculation to you? A. No.

Q. What was that? A. No.

Q. How far away was Harry when you went into the hospital? A. He came in right behind me.

Q. Directly behind you. And you say you had no conversation at all about it? A. No, didn't seem to worry or feel scared much.

Q. You were inoculated ahead of him? A. Yes.

Q. And then you went back to the shop? A. Yes.

40

John Suydam—Direct.

Q. Did you see Freedman come back to the shop?

A. Yes.

Q. Where did he go to when he came in? A. To the desk.

Q. Start working? A. I didn't see him do no work. He just stood in front of the desk.

Q. He was standing in front of the desk. The clerical work he was doing required him to sit down or stand up? A. Sit down.

Q. What kind of a desk did he have there? A. Just common frame wooden desk.

Q. As low as this or was it one of these standing—these desks up against the wall with long legs in it, attached to it? A. It has no legs in the back, stand up.

Q. In the back. Did he have a high stool or low stool if he sat down? A. About the height of a chair.

Q. A stool the height of a chair. It was not the regular ordinary desk like that you are referring to (indicating the desk of the court clerk, a flat top affair)? A. No.

Q. And were his books on this desk that he had been working on? A. Some.

Q. Some. And how long after he came to the desk was it that you noticed him on the ground?

A. Well, about two minutes.

Q. About two minutes. Did you see what he did when he came in? A. No.

Q. What was it attracted your attention to him?

A. Why, seen him waving back and forth over the desk.

Q. About how far away from him were you at that time? A. About twenty feet.

Q. And what was it attracted your attention to him? A. Why, the funny motions he was going through.

John Suydam—Direct.

Q. Were you facing in his direction? A. Yes.

Q. And you saw him wavering or staggering?

A. Yes.

Q. In front of the desk. And then what happened? A. He fell.

10 Q. Where to? A. The floor.

Q. And what did you do? A. Went over and picked him up, with the assistance of Frank Kerber.

Q. Frank who? A. Kerber.

Q. What did you do with him? A. Took him outside of the door.

Q. Have any conversation with him? A. Not just then. A few moments after he came to he was talking.

20 Q. He was unconscious at the time you took him out? A. Yes, sir.

Q. Now, tell us just what you did do after he recovered consciousness? A. Why, I didn't do anything after that. I left him, as there was many more around there taking care of him and looking after him.

Q. Who was taking care of him at the time you left him? A. Why, different employees. I just don't recall their names.

30 Q. Can't you mention one of them? Was Mr. Houston there? A. Mr. Houston came, then Frank Kerber was there.

Q. Mr. Horowitz there? A. I don't remember.

Q. Did you see him again after you left; did you go back to him? A. When they took him out on the stretcher was the next time I saw him.

Q. Did you assist in that? A. No.

Mr. Newcorn: That is all.

40 Q. You have been subpoenaed by the Spicer Manufacturing Company for this morning, haven't you? A. Yes, sir.

*John Suydam—Cross.**Cross-examination by Mr. Tippet.*

Q. Have you explained substantially what you know about the occurrence of this accident? Mr. Suydam, is this about all you actually know? A. That's everything. 10

Q. About the occurrence of this accident? A. Yes, sir.

Q. It happens he was employed with you in the same department as you stated? A. Yes, sir.

Q. And you accompanied him to the hospital? A. Yes.

Q. And you went in and were inoculated ahead of him and then he followed you? A. Yes.

Q. Did you two go out together after inoculation? A. No, I left first. 20

Q. You left first. How far away is it from where you were working to the plant hospital? A. I should judge about 250 feet.

Q. 250 feet. And after you were inoculated did you come back to your regular place of employment? A. Yes.

Q. Regular place of work after you were inoculated. And how long after you had gotten back did Mr. Freedman come back? A. In a very few minutes. Maybe five minutes or three minutes. 30

Q. And how far were you working from his desk? A. Why, I am working all over the department.

Q. I see. What is your particular job there? A. Die setter.

Q. Die setter, and you stated he went up to his desk. Just what kind of a desk is that? Flat topped desk or roll top, or what? A. One that has been built by the carpenters out there out of wood.

Q. Is it about the height of this (indicating the counsel table, about three feet high), or that (indicating the court clerk's desk, a flat top desk)? 40

John Suydam—Cross.

A. Something about the height of that table (indicating the counsel's table).

Q. Were you facing where he was standing at the time or not? A. Yes.

10 Q. And you said you happened to observe him and saw him wavering, Mr. Suydam? A. Yes.

Q. Was that what you stated? And what did you do then? A. Why, I ran toward him.

Q. And in the meantime what did he do? A. Fell to the floor.

Q. And hit the floor. And then you picked him up, I suppose, and a lot of the men ran to you to help him. And he was unconscious, you said, at the time? A. Yes.

20 Q. Where was he taken, outside? A. Outside, it is about twenty feet. There is a door there and we took him out in the air.

Q. Was the doctor called? A. Yes, sir.

Q. Do you know who sent for the doctor? A. No.

Q. Did the doctor come while you were there? A. No.

Q. What did you do afterwards? A. Back into the department and went to work.

Q. And you said he was taken out on a stretcher? A. Yes, sir.

30 Q. So that was all you actually know about it?

The Commissioner: That is all.

Harry Horowitz—Direct.

HARRY HOROWITZ, produced as a witness on behalf of the petitioner, being duly sworn on his oath according to law, saith:

Direct examination by Mr. Newcorn.

10

Q. Mr. Horowitz, were you working for the Spicer Manufacturing Company October 23rd? A. Yes, sir.

Q. And are still working for them? A. Yes, sir.

Q. You knew Harry Freedman? A. Yes, sir.

Q. And were you working in the same department with him? A. Yes, sir.

Q. Will you tell us what happened in the morning of the 23rd of October before you went into the hospital to be inoculated? Do you understand the question? (Question repeated by the stenographer.) A. I know nothing at all. (Answer repeated by the stenographer.) 20

Q. Did you see Mr. Kimsey come into the department before 10 o'clock? A. Yes, sir.

Q. And what did Mr. Kimsey say to you and the rest of the employees? A. Mr. Kimsey said who wants to be inoculated have to go, and who don't want they can stay there.

Q. That is what he said? A. Yes, sir. (Answer repeated by the stenographer.) 30

Q. How many men stayed there, if you know, Mr. Horowitz? A. I don't know how many.

Q. What is the answer? A. (Answer repeated by the stenographer.)

Q. Did you go? A. Yes, sir.

Q. Was Freedman with you? A. Freedman went in before me.

Q. What is it? A. (Answer repeated by the stenographer.) 40

Harry Horowitz—Direct.

Q. Before you. Did you see him inoculated? A. No.

Q. When did you see him after you left? A. I seen him when he came back. (Answer repeated by the stenographer.)

10 Q. Walking all right when he came back? A. Yes.

Q. Where did he go to? A. He went no place. Went back.

Q. You say you saw him when he came back, where did he go to? A. I went after the doctor inoculated myself, when he came back, I go in inoculated himself.

Q. Oh, when he came back? A. Yes, sir.

20 Q. You first, yourself, went to the doctor to be inoculated? A. Yes, sir.

Q. Were you in the place then when he fainted? A. No.

Q. You weren't. And then you don't know anything at all about how the fall happened or where he was? A. I didn't see him fall. I seen the fellows pick him up from the floor, that's all.

Q. You did see the fellows pick him up from the floor; where did they take him? A. They took him outside.

30 Q. And he fell where? Where had he fallen when you saw them pick him up? A. He fell on the floor. I don't know how he fall.

Q. What part of the floor? A. On the floor by the desk.

Q. Just by— A. His desk.

Q. (Continuing) —the place where he was always working? A. Yes.

Q. And they picked him up? A. Yes, sir.

Q. And took him outside? A. Yes, sir.

40 Q. Did you see him after they took him outside? I say, did you see him after— A. No, I didn't see him after.

Harry Horowitz—Direct.

G. W. Houseman—Direct.

Q. You were not there when they sent him home?

A. No.

Mr. Newcorn: That is all.

The Commissioner: What kind of material was the floor made of, wood? 10

A. No, it was stone.

The Commissioner: Stone.

Mr. Tippet: No cross-examination.

G. W. HOUSEMAN, produced as a witness on behalf of the petitioner, being duly sworn on his oath according to law, saith: 20

Direct examination by Mr. Newcorn.

Q. Mr. Houseman, you are an employee of the Spicer Manufacturing Company? A. Yes, sir.

Q. And were on the 23rd day of October, 1918? A. Yes, sir.

Q. In what department? A. Thirteen.

Q. Is that the same department that Harry Freedman was employed in? A. No, sir. 30

Q. You know Harry Freedman? A. Yes, sir.

Q. Did you see him that day? A. Yes, sir.

Q. When was the first time you saw him? A. First time I saw him?

Q. Yes. A. That day?

Q. That day, yes, sir. A. I seen him in the morning.

Q. At what time? A. When he comes in to work.

Q. When did you see him again that day? A. What is it? 40

G. W. Houseman—Direct.

Q. (Question repeated by the stenographer.) A. I see him about every five minutes.

Q. Did you see him inoculated? A. No, sir.

Q. Where were you at the time that the men from that department were in the room being inoculated?

10 A. Where was I?

Q. Yes. A. In line getting inoculated.

Q. And was he inoculated before you? A. That's something I couldn't say.

Q. You don't know? A. No.

Q. When did you see him after you were inoculated? A. Well, I came back to my respective place and putting on my gloves, and I happened to look towards his desk and saw him, as I thought anybody else was, leaning over his books, standing up.

20 Not sitting down, standing up. And the next time I saw they were carrying him out. Not carrying him out, but taking him out. I don't think they carried him.

Q. You say you saw him leaning over his books?

A. He was looking at something. I don't know books; in front.

Q. He was leaning over the desk at the time you saw him? A. Yes.

30 Q. Did you see him fall? A. Well, I seen him fall, really I can say I seen him fall, but I didn't see him land.

Q. You didn't see him land? A. I seen him stagger. Kind of stagger.

Q. And how long was that after you saw him leaning over the desk that you saw him stagger?

A. Just one look. As far as looking at you and you leaning over the desk and you happen to turn around and fall.

40 Q. Then you saw him leaning over this way (indicating) and then stagger back and fall over? A. He was standing up when he fell.

G. W. Houseman—Direct—Cross.

Q. He was standing up? A. Yes, sir.

Q. Leaning over the desk? A. Yes, sir.

Q. And then staggered back and fell. When he was led out did you see him outside? A. I followed him out, yes, sir.

Q. I believe you were one of the men helped to put him in the automobile and send him home? A. Yes, sir. 10

Mr. Newcorn: That is all.

Cross-examination by Mr. Tippet.

Q. Mr. Houseman—

Mr. Tippet: This may be part of a direct examination.

Mr. Newcorn: All right. Go ahead. 20

Q. Will you explain, please, under what circumstances you happened to go in to be inoculated?

A. What circumstances?

Q. Yes. A. Why, at the time I happened to go in that morning or at that time?

Q. If you were inoculated? A. I went in to prevent me getting influenza. I thought if there was a preventative I ought to take it. And that is what made me go into it. 30

Q. Was it optional or compulsory you were to take it?

Mr. Newcorn: I object.

A. I had my mind made up when it was first introduced to get it if it was going to be a preventative. So I could have taken it or not taken it; just my own choice.

Q. There were signs posted up, I presume, in the plant? A. Yes, for the benefit of the employees. 40

G. W. Houseman—Cross—Redirect

Mr. Newcorn: Have you one of those signs with you?

The Commissioner: What part of the body was the inoculation made, of the arm?

10 A. Yes, I was inoculated four times; twice in one arm and twice in the other.

Redirect examination by Mr. Newcorn.

Q. Same morning? A. Not same morning, consecutive mornings.

Q. How long before you were invited to go to the hospital did you know that inoculation would take place? A. Just state that, I don't quite get that.

20 Q. (Question repeated by the stenographer.) A. How long? That day, previous day, or what are you trying to get at? Is that day you have reference to, how long?

Q. Before they started to inoculate at the Spicer plant. A. How long? Only thing I knew about it was when Mr. Kimsey came in and he said that anyone wants to be inoculated will go down to the hospital.

30 Q. And that was that very morning, was it? A. That was that very morning.

Q. At 10 o'clock? A. Yes, sir.

Q. You mean to say that was the first time you knew they were going to do it? A. Oh, no, no. I said I had my mind made up.

40 Q. No. I am speaking about the factory. Was that the first time you knew that the factory was going to provide a physician to inoculate its employees? A. No, it was announced in—it was announced they were going to get this vaccine and inoculate the employees. I don't know how many days before that or not. I could not say that. It was announced in the lunch room.

G. W. Houseman—Redirect—Recross.

Q. Announced by whom? A. By Mr. Dana, I think it was.

Q. Mr. Dana. What position does Mr. Dana occupy? A. I couldn't say.

Q. Don't you know he is the president of the Spicer Manufacturing Company? A. I didn't know what position he was holding at that time. Of course, I know his name is there as president. 10

Q. You knew he was one of the bosses, though? A. Sure, no doubt of it.

Mr. Newcorn: That is all.

Recross-examination by Mr. Tippet.

Q. And that notice which you referred to, Mr. Houseman, in which you said it was announced that they were going to get the serum and inoculate, can you enlarge upon that in any way? What do you mean by that? Will you explain a little more fully just what you mean by that? A. If I am not mistaken, I was in the lunch room when Mr. Dana got up and he announced that anybody—that they were going to have this vaccine there from—have this vaccine. Get this vaccine from some place outside, and anybody that wanted to be inoculated, the employees or their families, would have it free of charge. Of course, that's all I know about it. 20 30

Mr. Tippet: That is all.

Jennie Freedman—Direct.

JENNIE FREEDMAN, produced as a witness on behalf of the petitioner, being duly sworn on her oath according to law, saith:

Direct examination by Mr. Newcorn.

10

Q. Mrs. Freedman, you are the mother of Harry Freedman? A. Yes, sir.

Q. And how old was your son? A. Was twenty-two, over twenty-two.

Q. He was employed by the Spicer Manufacturing Company? A. Yes, sir.

Q. How much wages did he earn prior to the accident? A. Over thirty. (Answer repeated by the stenographer.)

20

Q. When you say over thirty what are you referring to? A. That what he—that is what I got the wages for.

Q. You got the wages from him; when did you get over \$30? A. That was Mr. Kimsey brought me home wages because it was after. He was supposed to get his wages Saturday and he died Wednesday.

30

Q. Mr. Kimsey, after his death, brought you home the last pay envelope, which was over \$30? A. Yes.

Q. But he wasn't earning that straight along, was he? A. No, there was only two weeks. One week he got twenty-seven and some change and that was the last week was over thirty. And the last wage he didn't bring himself, but Mr. Kimsey brought it.

Q. But prior to that time his earnings were how much? A. \$19.

40

Q. There is no dispute on that. What did he do with his wages? A. He used to turn them over to me.

Jennie Freedman—Direct.

Q. What for? A. What for? Because my husband is sick, and he was my support.

Q. For how long a time had Harry been the support of you and your husband? A. Since my husband was sick, over two years.

Q. How long a time? A. Over two years. 10

Q. Was there anybody else dependent upon these earnings besides your husband and yourself? A. My boy, my little boy.

Q. How old is your boy now? A. He is sixteen.

Q. He will be sixteen? A. Yes, sir.

Q. Where was he going at the time? A. He was going to high school.

Q. He was going to high school at the time? A. He is going now, too. (Answer repeated by the stenographer.) 20

Q. Now, what is the matter, with your husband, Mrs. Freedman? A. Pardon me?

Q. (Question repeated by the stenographer.) A. He is sick with tuberculosis.

Q. And prior to Harry's death was he able to do any work? A. No, sir.

Q. Was he home? A. No, sir, he was away for seven months.

Q. What for? A. On account of his illness.

Q. Where was he? A. In Liberty, New York State. 30

Q. Is he able to do anything now? A. No, sir.

Q. Why not? A. Because he is sick. He ought to go to the hospital now, but on account of the case, he is waiting until the case is over.

Q. Why should he go to the hospital? Anybody order him to go there? A. Because the doctor says so they couldn't cure him any other way.

Q. You were home the day Harry was brought home? A. Yes, sir. 40

Jennie Freedman—Direct—Cross.

Q. About how long was he home? A. Only a couple of hours.

Q. Doctors treat him while he was there? A. Dr. Peters came first, and then Dr. Denham came. And when Dr. Denham came he had convulsions, and
10 he said we should take him to the hospital.

Q. And he was taken to the hospital? A. And he died same day.

Q. And he died the same day. You do not know anything at all about this inoculation, do you? A. I didn't have a chance to speak to him.

Q. And all his earnings were turned over to you for the support of your husband, boy and yourself? A. Yes, sir.

Mr. Newcorn: Take the witness.

20

Cross-examination by Mr. Tippet.

Q. Mrs. Freedman, do you or your husband own any property? A. Pardon me?

Q. Do you own any property, you or your husband? A. I had, but I sold it.

Q. What was that you owned and when did you sell it? A. I sold it after my boy's dead.

Q. When? A. After my boy's dead.

30 Q. What was it, a house? A. A house, yes.

Q. How much did you get for it? A. \$500. That is what I had in it.

Q. How much is that house worth? House and land worth? A. House was sold at 3100, but I had 500.

Q. Now, let me see, did you or your husband own that? A. That is the same thing.

Mr. Newcorn: No, it is not the same thing.
Answer the question.

40

A. I owned it.

Jennie Freedman—Cross.

Q. You owned it? A. Yes, sir.

Mr. Newcorn: She did own a piece of property which was sold for \$3100.

The Commissioner: There were encumbrances?

Mr. Newcorn: She received \$500 cash, I happened to hold a mortgage 1500, and second mortgage \$800. 10

Mr. Tippet: Would Mr. Freedman be able to give that direct, I wonder?

Mr. Newcorn: I happen to be familiar with the property and transaction.

Mr. Tippet: \$3100 was the selling price of it?

Mr. Newcorn: Selling price.

Mr. Tippet: And there was a mortgage on it? 20

Mr. Newcorn: Fifteen.

Mr. Tippet: 1500.

Mr. Newcorn: Second mortgage of \$800, and there is—she received 500 cash at the time of closing, and so forth.

Mr. Tippet: Then there is a balance of purchase price. How was the balance of the purchase price to be taken care of? The property was worth 3100, 1500 mortgage 30

The Commissioner: First mortgage?

Mr. Tippet: First mortgage is this 1500, and was there a second mortgage on there?

The Commissioner: \$800.

Mr. Tippet: 800. Total mortgages \$2300. Who held the second mortgage, do you know, Mrs. Freedman?

A. I had it.

Q. You had it. So that you received \$500 cash? 40

A. Yes, sir.

Jennie Freedman—Cross.

Q. You took back a second mortgage of \$800; this makes \$1300 and then there was first mortgage of \$1500, that makes \$2800. How was the \$300 to be taken care of? A. Because I owned it before I received it.

10 Mr. Newcorn: I understand the second mortgage is \$1100. Her daughter posed me, with all my familiarity.

Q. There is a second mortgage of 1100 and first mortgage of \$1500. Do you know who holds the first mortgage?

Mr. Newcorn: My brother.

20 Q. And the second mortgage is in your name?
A. Yes, sir.

Q. Who bought the property?

Mr. Newcorn: Mrs. Lombardi. She will not be able to recollect; a midwife.

Q. Is there any other property you own? A. No, sir.

Q. Do you own any stock? A. No, sir.

Q. Or bonds of any sort? A. No, sir.

30 Q. Have you any insurance interests at all? A. No, sir.

Q. Your husband? A. No.

Q. Do you receive any income of any nature at all now? A. No, sir, nothing.

Q. Was there any insurance paid you by the Spicer Manufacturing Company? A. Yes, sir.

Q. What was that? A. That was the group insurance, \$600.

Q. Group insurance? A. Yes, sir.

40 Q. You say \$600? A. Yes, sir.

Q. That was paid by the company? A. Spicer Manufacturing Company.

Jennie Freedman—Cross.

Q. And the various employees in the event they died while in their employ? A. After his death.

Q. That is separate and distinct from any compensation insurance or anything like that? A. Yes, sir.

Q. Have you any other income of any sort? A. No, sir. 10

Q. Anybody in your family working? A. No, sir; that is the girl I got.

Q. How many children did you say you have? A. Two.

Q. You have a daughter? A. Yes.

Q. Is she employed? A. Yes, sir.

Q. Well, then, she is working, isn't she? A. That is what I said.

Q. Where does she work? A. She works now in New York. 20

Q. Do you know how much she gets? A. She is getting \$16 a week.

Q. She is getting \$16 a week. Does she turn in any to you? A. No, sir.

Q. Why? A. Because she needs it herself. She only pays her board.

Q. She needs that for herself?

The Commissioner: He pays who? She pays board? 30

Mr. Tippet: She pays board.

Q. Your other boy, is he in school? A. Yes, sir.

Q. He is not working? A. No, sir.

Q. Then your husband is not working? A. No, sir.

Q. Does your husband own any interest in any business at all? A. He is sick now, but I would try to get in business myself—I should be able to earn a living. 40

Jennie Freedman—Cross.

Q. Has he any business in which he is interested?
A. No, sir, he hasn't got any business.

Q. What did he do before he was ill? A. He was a tailor.

10 Q. He was a tailor. Where was his shop and where was he working? A. In Plainfield, Wachung Avenue.

Q. When did he discontinue his tailor shop? A. It is over two years.

Q. What? A. It is over two years since he has been working.

Q. How long has he been sick? A. He is sick over two years.

Q. At the time of your son's death, where was your husband? A. He just returned from Liberty.

20 Q. Was he up at Liberty at that time? A. Yes, sir. He just came back two weeks before he died.

Q. One week? A. Two weeks.

Q. So he was home at the time your son died? A. Yes.

Q. Do you know who paid his expenses at Liberty? A. My husband's expenses?

Q. Yes. A. There wasn't any expenses because it was free.

Q. It was what?

30

Mr. Newcorn: Free patient.

Q. Free patient? A. Yes, sir; I couldn't afford to pay.

Q. And what kind of an institution or hospital was it up there? A. It is from the working circle.

Q. What is that, a lodge? A. Just workmen.

40 Q. A Hebrew workmen's association, is that just what it is? A. It isn't exactly Hebrew, but is the working circle, and workmen works and try to keep up anybody that isn't able to pay.

Q. They treat tuberculosis cases up there? A. Yes.

Jennie Freedman—Cross.

Q. And don't pay anything for service? A. Yes.

Q. Do you have to show you haven't any money before they take you up there? A. Yes, sir; they look over things before they take him in to see if he could or not.

Q. So that all the property you have and all the interest you have now are simply this: you received 600 as a benefit from the group insurance, which the employer paid over? A. Yes, sir. 10

Q. At the son's death, \$600. You say you received \$500 from the sale of this property? A. Yes, sir.

Q. And when was the property sold? A. It was sold in, I think, January 10th.

Q. This past January? A. Yes, sir.

Mr. Newcorn: Agreement made in December and title closed. 20

Q. Besides, you hold \$1100 second mortgage, upon which you receive how much interest? A. I don't receive any yet. I don't receive any yet.

Q. You haven't received any yet. Was the interest at 6 per cent.?

Mr. Newcorn: I think 5 per cent., but I would not be sure. 30

Q. \$55 a year interest. Is there any provision when you will have paid back to you, a limit of time in the second mortgage? A. She didn't give me enough time, because I was anxious to sell, being I didn't have no other money.

Q. Isn't it a fact that that second mortgage is to be paid off by certain installment payments over six months? A. She told me after two years she would pay me. And I didn't have anybody else to sell, being it was war time, and I sold it that way. 40

Jennie Freedman—Cross.

Q. Isn't it a fact you are supposed to get \$100 every six months? A. Yes, sir.

Q. On that principal, in reducing it? A. Yes, sir. That is what she promised me.

10 Q. But that is the understanding on which the premises were sold, when the second mortgage was taken back. You say your daughter retained for her own use the \$16 she receives from her work? A. Yes, sir.

The Commissioner: No. She said she paid board.

Mr. Tippet: I beg pardon.

The Commissioner: She said she paid board.

20 Q. To whom? A. She pays board.

Q. Where did she pay that board? A. Where she pays?

Q. Where does she stay? A. She stays with me now. Because the money what I got I spent it all the time since my boy's dead; I didn't have any other.

Q. You say she pays \$16 board to you? A. She doesn't pay \$16 to me. She earns \$16. That is what the girl needs for herself.

30 Q. How much does she pay you? A. She pays me \$4 a week.

Q. She pays you \$4 a week for her board, you say? A. Yes, sir.

Q. Was she working and paying you that at the time of your son's death? A. No, sir; she was sick with the influenza.

Q. Where was she? A. She was sick.

Q. Sick at the time? A. Yes, sir.

40 Q. Before she was taken sick with the influenza where did she work? A. She worked in Plainfield.

Jennie Freedman—Cross—Redirect.

Q. And she earned the same amount of money?

A. No, sir; she worked in Clark's.

Q. How much do you say that she paid you, \$4 a week board? A. She paid me now \$4. At that time she didn't make so much, and she paid me less.

Q. Did you say the rest of the money she uses for her own support? A. Yes, sir.

Q. Clothing and various things.

Mr. Tippet: That is all.

Redirect examination by Mr. Newcorn.

Q. Mrs. Freedman, what became of the \$500 you received from the sale of the property? A. I paid the expenses of selling it, and I had to live from that time until now, since my son was dead, and it is just the same now, I haven't got enough to help my husband along; three doctors, doctor bills, and living and rent. I pay my rent now, and that is how the money went.

Q. And does the same thing apply to the \$600 which you received from the insurance? A. Yes, sir.

Q. Have you any of this money, of this \$1100, which you received, at the present time? A. No, sir; not a cent.

Mr. Newcorn: That is all.

Mr. Tippet. That is all.

By the Commissioner.

Q. In other words, you and your younger son, there is a younger son, and the father? A. Yes, sir.

Q. Were absolutely dependent upon this boy's income for your support? A. Yes, sir.

Jennie Freedman—Redirect.

Nathan Freedman—Direct.

Q. And maintenance for the necessities of life?

A. Yes, sir.

Q. Is that so? A. Yes, sir; that is what we expected.

10

NATHAN FREEDMAN, the petitioner, being duly sworn, on his oath, according to law, saith:

Direct examination by Mr. Newcorn.

Q. Mr. Freedman, you are the father of Harry?

A. Yes, sir.

20 Q. And your wife just left the stand? It was your wife just left the stand? A. Yes.

Q. During the month of October and prior thereto, before the death of Harry, do you know who maintained the household? A. Pardon me?

(Question repeated by the stenographer.)

A. My son.

Q. Were you working? A. No, sir.

30 Q. How long have you not been working? A. Over two years; over two years.

Q. Over two years? A. Yes, sir.

Q. Why weren't you working? A. Because I couldn't. If I start working, I get sick again and I couldn't.

Q. What was the matter with you? A. First thing---first was tuberculosis, but now I got some other thing, but I don't know what; doctor sent me to the hospital to find out.

40 Q. The doctor has sent you to the hospital? A. Yes, sir.

Nathan Freedman—Direct—Cross.

Q. Had you been earning anything before Harry died? Within the year and a half prior to that time? A. Beg pardon?

(Question repeated by the stenographer.)

Q. Well, before Harry died? A. Yes. 10

Q. Had you been earning or paying any money into the house for the— A. No, sir.

Q. (Continued)—expenses of your wife, your son and yourself? A. I didn't pay anything because I haven't got it.

Q. And for how long a time is that before his death that you stopped contributing or giving to your wife? A. About a year and half.

Mr. Newcorn: About a year and a half before that time. Take the witness. 20

Cross-examination by Mr. Tippet.

Q. And you were in the tailoring business, weren't you? A. Yes, sir.

Q. Before you went away? A. Yes, sir.

Q. Did you sell your business? Did you sell your business? A. Yes, sir.

Q. How much did you get for it? A. \$300.

Q. \$300. It was in Plainfield here? A. Yes, sir. 30

Q. Who bought it? A. A man by the name Feldt.

Q. I see. And you personally—have you personally any income at the present time? A. No.

Mr. Tippet: That is all.

Mr. Newcorn: That is all. I would just like to ask Mrs. Freedman one question.

The Commissioner: Mrs. Freedman, come forward.

Jennie Freedman—Direct—Recalled.

JENNIE FREEDMAN recalled.

Direct examination by Mr. Newcorn.

10 Q. In case you were to—in case the Referee should find in favor of your contention in this matter, would there be any means by which you could help yourself? A. If I got the money now.

Q. If the money was paid in a lump sum instead of weekly payments? A. I would be more satisfied to get the lump sum. I would make a little business; I should be able to make my living, because my boy goes to school; he couldn't earn anything yet.

20 The Commissioner: Why not await a decision in this matter?

Mr. Newcorn: I haven't made application.

30 The Commissioner: For this reason: if an award is made and lump sum is desired, we have a method whereby that is submitted to us, and our investigator goes out and looks into it. If he reports favorably, we consider the proposition to commute accordingly. And if he reports unfavorably, we will turn it down. So there is hardly any necessity of going into it now.

Mr. Newcorn: I profess my ignorance of the procedure.

The Commissioner: Of course, under the old method the procedure was to make the application now.

Mr. Newcorn: We will rest.

40 Mr. Tippet: Unless you want me to make the motion now to dismiss the petition on the ground that there is not sufficient proof here to put in the whole case.

Jennie Freedman—Direct—Recalled.

John S. Berry—Direct.

The Commissioner: I think that that is a matter on which you better submit briefs. it is a rather peculiar case. It is the first one of its kind. I did think the Judge would introduce some evidence as to the effect of this particular vaccine upon the system, if possible. I do not know whether that would have any direct bearing in the matter in order to establish a claim under our New Jersey law. We have a condition in Bryant vs. Purcell that there was an accident, and that it arose out of and in the course of the employment. There was an accident. There is no doubt about that. It arose in the course of the employment, but did it arise out of the employment? That is the crucial question.

JOHN S. BERRY, produced as a witness on behalf of the respondent, being duly sworn, on his oath, according to law, saith:

Direct examination by Mr. Tippet.

Q. Mr. Berry, in what position are you employed? 30

A. Treasurer.

Q. By the Spicer Manufacturing Company. Mr. Berry, are you familiar with the conditions which exist in your plant at the present time and which have existed for the past six months or more? A. Yes, sir.

Q. And will you please tell us just under what circumstances your company acted, the details of it, pertaining to this influenza situation, in your own words? A. Yes. As soon as we saw that our addressees were increasing, we started an investigation 40

John S. Berry—Direct.

10 as to causes, as to how many people were sick, and so forth. We employed special nurses and hired automobiles to investigate the cases. We had a report that quite a number of them were sick with this influenza, and quite a number of cases were very needy. We called a meeting of our foremen and asked if they would not go out and investigate the cases in their own particular departments. Our president, Mr. Dana, who called this meeting, handed to each foreman an order on any store to deliver to the foreman any materials, food or supplies of any nature, and that this order was simply given, explaining it was given in the place of a formal office order. And that the company would honor any bill charged against us.

20 Q. May I interrupt you on that point, Mr. Berry?

A. Yes, sir.

Q. And ask you one question: if that was, of which you are speaking, with reference to your welfare department service, and so forth? A. Well, yes. Mr. Dana, without any regard to welfare department, Mr. Dana called the foremen together and handed to each foreman an order to go out and purchase anything at the company's expense, to alleviate the suffering of our employees.

30 Q. I show you a paper, and ask you what that is? A. This is one of the orders.

Q. This is one of the orders? A. That I refer to.

40 Q. Will you please read it so we can have it? A. "Spicer Manufacturing Corporation, South Plainfield, N. J., October 15th, 1918. We hereby authorize the bearer, Mr. Bunn, representing this company, to make any reasonable purchases at your store to assist any cases of influenza that he may be investigating that will alleviate the patient. We are giving him this blanket authorization so that the remedies may be secured immediately and the pa-

John S. Berry—Direct.

tients may secure the benefit thereof, and not be delayed in waiting for a formal order to come from this office. You will please furnish us with a detailed memorandum of such articles and cost thereof that the bearer may purchase from you, and same will be promptly paid by us. Spicer Manufacturing Corporation, C. A. Dana, President." 10

Mr. Tippet: I would like to have that marked for identification and introduced in evidence.

The Commissioner: That is simply introduced in evidence to show the reason which led up to the inoculation?

A. Yes, I am trying to explain the circumstances as they came before us. 20

(Order entered in evidence and marked Exhibit D-1.)

A. After this first investigation was made by our foremen, the situation appeared to be such that it seemed to be getting beyond the control of our own immediate organization, and we went to the Y. M. C. A. and to the preachers in Plainfield requesting volunteer workers, on account of the fact that nurses could not be secured. We hired all of the nurses we could, but nurses couldn't be had at any price. The women from the first families of Plainfield volunteered, and we used some sixty women to go out and nurse the sick, and report to us every day; we furnished them supplies for our people, and sending the children to the home over on Front Street, the Children's Home; sending the patients to the hospital and alleviating the suffering wherever we could. It came to a point along in the latter part of October, I will say October, 20th, when our welfare worker, I mean the head of our employ- 30 40

John S. Berry—Direct.

ment department, Monday morning, after him being out all day Sunday, like the rest of us——

10 Q. Who was that? A. Mr. Farrar, had a fever of 103. I tried it myself; sent him over to the hospital, one of our nurses being ill that morning, and she didn't show up. I went to Mr. Spicer and said the situation around is simply coming to a point where something heroic must be done. We wired to several cities, New York City, and others, trying to find the location of suitable vaccine that could be used. We finally located vaccine in Philadelphia, and after consulting with the Health Department of Plainfield, also Dr. Lindeman, blood specialist, New York City, Rockefeller Institute, and our own physician, Dr. Anthony, this particular serum was recommended. And Mr. Spicer went to Philadelphia in his car and brought home with him—let me see—Tuesday, I think, of that week, the necessary vaccine for 1,000—for 1,000 people. On the following day a meeting of our employees was called, and Mr. Dana, and also Mr. Spicer, explained to them that we had secured the vaccine, and invited all employees to take it, and we recommended or they—they recommended the use of it to stop the influenza epidemic as far as we could.

30 We started in either that day or the following day, I think the same day; our president, Mr. Dana, was the first one inoculated, and Mr. Spicer and all the others went down there and the employees followed. A couple of days after that we put out a notice to all employees stating that we extended this invitation to the families of all employees.

Q. May I interrupt you there? A. Yes, sir.

Q. I show you paper, and ask you if that is a copy of that notice of which you are speaking? A. Yes,

40 sir.

John S. Berry—Direct.

Mr. Tippet: And also ask to have that marked for identification and entered in evidence.

(Typewritten invitation entered in evidence and marked Exhibit D-2.)

10

A. "Spicer Manufacturing Corporation, South Plainfield, N. J., October 25th, 1918. We invite all of our employees to bring their families if they live near the factory to our hospital on Saturday, the 26th, at 11 A. M., or if they live in Plainfield, to the office of the Suburban Transit Company, Madison Avenue and Fourth Street, at 2 P. M., to be inoculated with the anti-influenza vaccine. The second dose will be given at the same hours at the same places on Sunday. We are arranging this in both South Plainfield and Plainfield so as to create as little inconvenience as possible to your families. We advise everyone to take advantage of this opportunity. Spicer Manufacturing Corporation."

20

The Commissioner: That was after the date of this alleged accident, isn't that so?

A. That is 25th; yes, sir. Going back to October 23rd, the first day of the inoculation, the foremen were instructed—they were instructed to follow a schedule as to hours when one department could follow the other in the administration of the vaccine. That continued for a week or ten days, until we were through inoculating those who wished to be inoculated. Now, anything further than that particular period, I suppose, would be irrelevant, further than to say that our company have maintained a visiting nurse, and the object in our using the vaccine and all of these other remedies was to alleviate the suffering of our employees primarily.

30

40

John S. Berry—Direct.

It sprang necessarily from the heart of a man who is president of the company; he is interested in humanity, and it shows in all of his acts. Our welfare department is continuing the work, and it has been going on for some years.

10 The Commissioner: Is that all, Mr. Tippet?

Q. Mr. Berry— A. Yes.

Q. (Continuing)—your description of the conditions is with respect to the circumstances under which your company— A. Yes.

Q. (Continuing)—started in to inoculate or present the serum to them for the purpose of their being inoculated it was optional, do I understand?

20 A. Absolutely.

Q. Was there any compulsion in any manner? A. None whatsoever. And any there stated they didn't want to be inoculated we told them to consult their own physician, and act upon their advice in the matter. And it was absolutely up to them as to whether they would be inoculated or not. I might say that we have a statement signed by a large number of the employees stating that that is their understanding; it was voluntary.

30 Q. That statement to which you refer—

The Commissioner: Do you object, Judge?

Mr. Newcorn: I certainly do.

Mr. Tippet: We do not need it.

Q. The fact is that your employees at the plant had it optional with them? A. Yes, sir.

Q. To accept or reject it? A. Yes, sir.

Q. And some did reject it? A. Quite a number did reject it.

40 Q. How many employees had you at your plant?
A. We had then approximately 1200. And I think

John S. Berry—Direct—Cross.

some 871, it is a matter of record, 871 were inoculated, and the rest were not. Some of them took the first inoculation and not the second and third; some took the second and not the third and fourth, and so on.

Q. And there were various inoculations given, one, two, three and four? A. Yes, sir. Four. 10

Mr. Tippet: That is all.

Cross-examination by Mr. Newcorn.

Q. Mr. Berry, the labor question was quite a vital or was of vital importance during the influenza epidemic, caused by illness? A. Not as much so as a matter of humanity.

Q. Please answer the question. 20

(Question repeated by the stenographer.)

A. Certainly.

Q. And as a result of the conditions at the shop, you being engaged in war activities at the time, your corporation was looking around for some means to lessen the absence of your employees by mitigating the circumstances which were causing the number of men out, and retarding the work which you were carrying on, is that correct? A. I don't know that that entered into it. 30

Q. The fact—was it not a fact that during the epidemic that a large number of your employees were absent from the plant? A. Certainly.

Q. Yes, and wasn't it true that by reason of these men not working that you were being handicapped in fulfilling your war orders? A. No, sir. We didn't hold up one manufacturer throughout all of our contracts one day because of waiting for our material. 40

John S. Berry—Cross.

Q. Prior to October 23rd and how many days before was it that Mr. Dana called the meeting of your employees and addressed them on the serum question? A. I think it was just the previous day to the first inoculation.

10 Q. That was on October 22nd? A. I think so; yes, sir.

Q. And for how long had your corporation been making inquiries, investigation, and so forth, for the purpose of stopping or lessening the influenza epidemic, as applied to your own plant? A. I would say that it was a week or possibly ten days; we had visiting nurses out looking up the absentees and cause of the absentees. At least, I would say approximately from the 15th anyhow.

20 Q. Isn't it a fact that almost 33-1/3 per cent. of your men were out, caused either by themselves having the influenza or by their families being laid up with it, between the 1st day of October and October 23rd? A. I think our records show that approximately 250 people were absent on Mondays for several weeks during that——

Q. And you investigated, and as the result of such investigation you decided to submit the inoculation to your employees, is that correct? A. As the
30 facts brought out by that investigation, not by the investigation itself.

Q. It said the result. Now, Mr. Berry, you are a man of intelligence, and it is no use sparring over any words in the matter. A. I wanted to get the meaning.

Q. And a meeting was called of your employees, which was addressed by Mr. Dana, who was the president? A. Yes, sir.

Q. You were present at that meeting? A. Yes.

40 Q. And in that—at that meeting didn't Mr. Dana say that conditions were appalling, not only the

John S. Berry—Cross.

shop, but in the community, and for that reason the company had been expending a large sum of money for the purpose of trying to do what they could to prevent the further spread of the disease, and that therefore they requested and recommended each of the employees of the plant to submit to inoculation in an endeavor to stop the effect to the dread disease that was carrying people away rapidly? A. No, sir. 10

Q. You say he didn't say that? A. Yes, sir.

Q. What did he say? A. Practically what you said, with the exception of requesting the employees; he didn't request them to, he recommended them.

Q. He recommended them? A. And that with the exception of that one word, "requesting," leave that out, I think it would be perfectly as you have stated it. 20

Q. And this meeting was called by Mr. Dana for the purpose of their listening to him and for him to submit the proposition to them? A. You mean making the invitation, extending the invitation?

Q. I don't care what you call it. A. There wasn't any proposition about it.

Q. We won't quibble over the words. There was a gathering which was called by Mr. Dana, and what he said was to that effect; what he said was exactly what I have just read to you, with the exception of the word "request" you take exception to, is that right? A. I don't know of anyone that we had there taking down those speeches. We don't do it as a rule. 30

Q. Is that the only thing guiding your testimony to-day, as to whether there was anyone there taking down those speeches? A. If you want to know what is guiding my testimony, I couldn't possibly answer that. 40

John S. Berry—Cross.

Q. That does not answer my question. I am asking you whether it was taken down on that day?

A. You are saying exactly what was said. I can't say exactly what was said. I will say I don't know. That will answer the question.

10 Q. But the sense of what I have just propounded to you as to what took place is correct? A. With the exception of the word "request," yes.

Q. "Request"? A. That is right.

Q. He did say recommended? A. He invited them to.

Q. Invited?

The Commissioner: The witness wants to be exact, Judge.

20 Q. Well, I do not know the distinction between invite and request.

The Commissioner: You might be invited to attend a dinner, but you might be requested to leave the room.

A. He is trying to put up that we invited the employees. We didn't request them; we invited them to. We extended the invitation to them. Everything shows that.

30 Q. You went a step beyond inviting, did you not? You recommended that they submit themselves to the inoculation? A. Yes. We recommended. I don't see that that was a step further; it might be.

Q. But that is what actually happened; you recommended they submit themselves to the inoculation? A. Yes, we did. We recommended it, and the wives and families, and children as well, and on the advice of Dr. Liniman, the Rockefeller Institute, and so forth.

40 Q. It was an afterthought. An invitation was not extended until two days after you had started

John S. Berry—Cross.

the inoculation, that is correct, isn't it? A. You are speaking about the families? You do not say what you are talking about.

Q. Families now? A. Yes.

Q. On the 25th. You don't know anything at all about the—you did not see Harry Freedman? A. 10
No, I didn't.

Q. Not in this particular case? A. No.

By the Commissioner.

Q. As a matter of fact, this matter of inoculation was thought of as a preventative to further absence by employees, if possible? A. Oh, that is only one small part of it.

Q. That was part of it, though? A. Very small part of it, and one that I would not consider, and 20
our company would not consider.

Mr. Tippet: Well, that is all. That is our case, our defense; we rest on that.

Memorandum.

At the trial of the appeal before Judge Carleton B. Pierce, July 9, 1920, the transcript of evidence 30
taken before Hon. George J. Jaeger, Deputy Compensation Commissioner, on May 24, 1919, was by consent of both attorneys appearing in the cause stipulated to be taken and used upon this appeal before Judge Pierce as the testimony in the case.

Exhibit P-1.

Transcription taken from pay-roll sheets from
Sept. 16th to Nov. 1st, 1918.

	Week End Sept. 21st	On Roll	Absentee
	Factory	1,057	393
	Office	175	
10	F. & C.	60	
		T. 1,292	T. 393
	Week End Sept. 28th		Absentee
	Factory	1,060	337
	Office	176	
	F. & C.	60	
		T. 1,296	T. 337
	Week End Oct. 5th		Absentee
	Factory	1,087	424
20	Office	171	
	F. & C.	59	
		T. 1,317	
	Week End Oct. 11th		Absentee
	Factory	1,070	619
	Office	173	
	F. & C.	68	
		T. 1,311	
30	Week End Oct. 18th		Absentee
	Factory	1,169	592
	Office	172	
	F. & C.	68	
		T. 1,408	
	Week End Oct. 25th		Absentee
	Factory	1,059	1,037
	Office	173	
	F. & C.	74	
40		T. 1,306	
	Week End Nov. 1st		Absentee
	Factory	1,089	869
	F. & C.	74	
	Office	171	
		T. 1,334	

Exhibit P-2.

Transcription taken from factory pay-roll sheets
from Sept. 16th to Nov. 1st, 1918.

	On roll	Absentee	
September			
Sept. 16th	1057	153	
" 17th	1057	60	
" 18th	1057	51	10
" 19th	1057	44	
" 20th	1057	41	
" 21st	1057	44	
" 23rd	1060	102	
" 24th	1060	63	
" 25th	1060	47	
" 26th	1060	45	
" 27th	1060	38	
" 28th	1060	42	
" 30th	1087	149	
Oct. 1st	1087	75	
" 2nd	1087	58	20
" 3rd	1087	52	
" 4th	1087	42	
" 5th	1087	48	
" 7th	1070	204	
" 8th	1070	96	
" 9th	1070	90	
" 10th	1070	85	
" 11th	1070	73	
" 12th	1070	71	
" 14th	1169	205	
" 15th	1169	148	
" 16th	1169	128	30
" 17th	1169	111	
" 18th	1169	No record of Absentee	
" 19th	1169	No record of Absentee	
" 21st	1059	215	
" 22nd	1059	168	
" 23rd	1059	170	
" 24th	1059	140	
" 25th	1059	132	
" 26th	1059	212	40
" 28th	1089	170	
" 29th	1089	146	
" 30th	1089	151	
" 31st	1089	131	
Nov. 1st	1089	124	
" 2	1089	147	

Exhibit Filed with Judge Pierce.

Report of Absentees from Shops.

1918 Week ending	8-10	8-17	8-24	8-31	9-7	9-14	9-21	9-28	10-5	10-12	10-19	10-26	11-2	11-9	11-16	11-23	11-30	12-7	12-14
Monday	57	148	131	116	*4	125	153	102	149	204	205	215	170	121	*3	107	84	84	71
Tuesday	49	99	74	71	*3	62	60	63	74	96	148	168	146	113	215	70	75	63	64
Wednesday	*1 145	99	65	80	70	60	51	47	58	90	128	170	151	114	128	70	74	61	57
Thursday	*2 225	110	71	77	48	53	44	45	52	85	111	140	131	84	109	54	*4	57	47
Friday	112	78	54	57	52	51	44	38	42	73	*3	132	124	90	85	47	*4	43	44
Saturday	97	*3	77	81	51	46	41	42	48	71	*3	212	147	125	124	87	*4	57	88
Total	685	534	472	482	221	397	393	337	423	619	592	1037	869	647	661	435	233	365	366
Average daily	114	107	79	80	55	66	66	56	70	103	148	173	145	108	132	73	78	61	61
New men hired	45	42	59	52	57	66	58	38	45	25	36	30	20	21	16	4	3	2	*3

*1 Very hot day.

*2 Knights of Columbus Outing.

*3 No record.

*4 Holiday.

Note—The absentees were not paid for time off and new men were hired as far as possible to do their work.

After the Armistice was signed we practically stopped employing new help account of cancellation of War Orders.

**Determination of Facts and Rule for
Judgment Final.**

(Filed Dec. 30, 1920, Union County Clerk's Office.)

COURT OF COMMON PLEAS

OF UNION COUNTY.

10

NATHAN FREEDMAN, Petitioner, vs. SPICER MANUFACTURING CORPORA- TION, Defendant.	}	On Appeal on Petition for Compensation. Determination of Facts and Rule for Judgment Final.
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This is an appeal from a judgment of dismissal entered by a Deputy Commissioner of the Workmen's Compensation Bureau in a proceeding brought by Nathan Freedman, father of Harry Freedman, deceased, age twenty-one, in behalf of himself and Jennie Freedman, mother of decedent, as dependents of said Harry Freedman, deceased, under and by virtue of the terms and provisions of an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 14, 1911, together with the several supplements thereto, and acts amendatory thereof, and the court having by an order made on the 23rd day of June, A. D. 1920, set down the said appeal to be heard at the Court House, in the City of Elizabeth, on the 9th day of July, 1920, at one o'clock in the

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Determination of Facts, etc.

10 afternoon of that day, and the petitioner and respondent having duly appeared on the 9th day of July, A. D. 1920, the date set for the final hearing herein, the petitioner being represented by William Newcorn, and the respondent by Clarence B. Tippet, and the Court having heard the testimony offered in behalf of the parties hereto and the stipulations of fact made at the hearing by the respective counsel, and briefs having been submitted, I do hereby determine from said testimony as follows:

20 1. That the said Harry Freedman, who was 21 years of age, was on the 23rd day of October, 1918, employed by the Spicer Manufacturing Corporation, at South Plainfield, N. J., as a clerk in the production department.

2. That during the influenza epidemic in the fall of 1918, in an effort to check the spread of such disease, respondent obtained and administered through its company physician, a vaccine to such of its employees as were willing to take the treatment and also to the members of their families.

30 3. That on October 23, 1918, said Harry Freedman was invited, recommended and induced by the respondent to accept such inoculation, and was inoculated at the plant along with the other men in his department; upon his returning to his desk after such inoculation, and as a result of the inoculation, he fainted and fell to the floor.

4. That as a result of the fall, the deceased fractured his skull and his death ensued on the following day as a result of said accident.

40 5. That the injury was caused by an accident on the 23rd day of October, 1918, arising out of and in the course of the employment.

6. That the respondent herein had knowledge of said accident.

Determination of Facts, etc.

7. That the wages of the deceased at the time of his death was Twenty-one and 60/100 Dollars (\$21.60) per week.

8. That Nathan Freedman, the father, Jennie Freedman, the mother, and Oscar Freedman, a brother, are actual dependents entitled to compensation, provided by the statute, at the rate of Nine and 72/100 Dollars (\$9.72) per week for a period of three hundred (300) weeks. 10

9. That no compensation has been paid the dependents of the respondent; that the petitioners are entitled to costs in this proceeding, together with their attorney's fee.

It is therefore, on this 29th day of December, A. D. 1920, ORDERED that judgment final be entered in favor of the petitioners and that the respondent make payments to the petitioners as follows: 20

For the injury resulting in death, immediate payment One Thousand Eighty-eight and 64/100 Dollars (\$1,088.64), covering compensation at the rate of Nine and 72/100 Dollars (\$9.72) per week from Nov. 6, 1918, two weeks after the accident, to the date of this order, and thereafter weekly payment of \$9.72 for one hundred eighty-eight (188) weeks, amounting to One Thousand Eight Hundred Twenty-seven and 36/100 Dollars (\$1,827.36). 30

It is also further ordered that the respondent pay the costs of this proceeding, including the fees of witnesses for the petitioners and the fee of Two Hundred Fifty Dollars (\$250) to the attorney for the petitioners.

C. B. PIERCE,
Judge.

Writ of Certiorari.

(Filed.)

NEW JERSEY, SS.

THE STATE OF NEW JERSEY, to the Court
of Common Pleas in and for the County
10 (L. S.) of Union, and William B. Martin, Clerk
of said Court, and Nathan Freedman,
GREETING :

We, being willing, for certain reasons, to be
certified of a certain determination of facts and
memorandum rendered by the Honorable Carleton
B. Pierce, one of the judges of the said Court of
Common Pleas, in and for the said County of Union,
in certain proceedings brought on behalf of Nathan
20 Freedman, against Spicer Manufacturing Corpora-
tion, for the determination and recovery of com-
pensation under an Act of the Legislature of the
State of New Jersey, entitled "An Act prescribing
the liability of an employer to make compensation
for injuries received by an employee in the course
of employment, establishing an elective schedule of
compensation and regulating procedure for the de-
termination of liability and compensation there-
under," approved April Fourth, Nineteen Hundred
30 and Eleven, and the acts amendatory thereof and
supplemental thereto; we command you that the
said determination and judgment, the conclusions
of the Common Pleas Judge and all papers and
records in the said cause, together with all things
touching and concerning the same, as fully and
entirely as before you they remain or are in cus-
tody and control, you do certify and send together
with this writ to our Justices of our Supreme
Court of Judicature at Trenton, on the 15th day
40 of , 1921, that therein may be caused to
be done what of right and according to the Laws
of this State should be done.

Writ of Certiorari.

WITNESS, the Honorable William S. Gummere,
Chief Justice of our Supreme Court, this fifth day
of February, Nineteen Hundred and Twenty-one.

ENOCH L. JOHNSON,
Clerk. 10

CLARENCE B. TIPPETT,
Attorney.
Allowed: Let this writ be sealed.
Feb. 5, 1921.

J. J. BERGEN,
Jus. Sup. Ct.

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Return.

IN OBEDIENCE to the command of this Writ to me,
I, Wm. B. Martin, Clerk of the Court of Common
Pleas, in and for the County of Union, directed,
I DO HEREBY CERTIFY and send to our Justices of
our Supreme Court of Judicature at Trenton, with-
10 in mentioned, the—

Claim Petition—Filed June 18th, 1920;
Answer—Filed June 18th, 1920;
Determination of Facts and Rule for Judgment
—Filed June 18th, 1920;
Notice of Appeal—Filed June 18th, 1920;
Order (setting date)—Filed June 24th, 1920;
Notice of Trial (On Appeal)—Filed July 7th,
1920;
20 Opinion (Filed by Judge Pierce)—Filed Nov.
29th, 1920;
Determination of Facts and Rule for Judgment
Final (On Appeal)—Filed December 30th,
1920;

whereof mention is within made, with all things
touching and concerning the same, as fully and
entirely as they remain in our said Court of Com-
mon Pleas.

30 IN TESTIMONY WHEREOF, I have hereto set
my hand, and affixed the seal of said
(Seal) Court this Fourteenth day of February,
A. D. 1921.

W. B. MARTIN,
Clerk of the Court of Common Pleas
of Union County.

Reasons.

(Filed.)

NEW JERSEY SUPREME COURT.

SPICER MANUFACTURING CORPORATION,
 Prosecutor,

vs.

COURT OF COMMON PLEAS in and
 for the County of Union, and
 WILLIAM B. MARTIN, Clerk of
 the said Court of Common
 Pleas, and NATHAN FREEDMAN,
 Petitioner-Respondent.

On Certiorari.
 Reasons.

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The prosecutor presents the following reasons for setting aside the proceedings, determination and statement of facts and judgment brought before this Honorable Court by the Writ of Certiorari in the above entitled cause:

1. Because the trial court erroneously and improperly found that the said Harry Freedman was induced by the respondent to accept inoculation, whereas the trial court should have found as a fact from the testimony that it was optional and entirely voluntary with this decedent and all employees, whether they wished to be inoculated or not, without any compulsion or inducement on the part of the employer.

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2. Because the trial court erroneously and improperly found that there was evidence showing that as a result of the inoculation he fainted and fell to the floor, whereas there was no evidence

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Reasons.

offered to show that the inoculation was the cause, or in any way contributed toward the said accident and his death.

10 3. Because the trial court erroneously and improperly found that the death of decedent ensued as a result of said accident.

4. Because the trial court erroneously and improperly found that the injury was caused by accident, arising out of and in the course of the employment of deceased.

20 5. Because the trial court erroneously and improperly found that Nathan Freedman, the father, Jennie Freedman, the mother, and Oscar Freedman, a brother, are actual dependents entitled to compensation provided by the statute for a period of three hundred weeks.

6. Because the trial court erroneously and improperly found that the petitioners are entitled to costs in this proceeding, together with their attorney's fee.

30 7. Because the trial court erroneously and improperly permitted the judgment to be found in favor of the petitioner and against the employer.

8. Because the trial court erroneously and improperly refused to enter judgment in favor of the employer herein.

9. Because the trial court's findings of fact and determinations are inconsistent, and there is no evidence to warrant or sustain its conclusions, and its judgment in divers other respects is illegal, erroneous, improper and oppressive to the prosecutor.

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CLARENCE B. TIPPETT,
Attorney for Prosecutor.

Notice of Argument.

(Filed.)

NEW JERSEY SUPREME COURT.

SPICER MANUFACTURING CORPORA-
TION,

Prosecutor,

vs.

NATHAN FREEDMAN,
Petitioner-Respondent.

10

Sir:

TAKE NOTICE of the Argument of the issue in
this cause before the Supreme Court of New Jer-
sey, to be held at the State House, in the City of
Trenton, State of New Jersey, on the third Tuesday
of February, next, at 11.00 o'clock in the forenoon
or as soon thereafter as the said court can hear the
same.

20

Yours respectfully,

CLARENCE B. TIPPETT,
Attorney for Prosecutor.

30

Dated, February 14, 1921.

To:

WILLIAM NEWCORN, Esq.,
Attorney for Petitioner-Respondent.

40

**Memorandum Opinion of Supreme
Court.**

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1921, #237.

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NATHAN FREEDMAN

vs.

SPICER MFG. CORPORATION.

} Certiorari to
Union Com-
mon Pleas.

Before Justices PARKER, SWAYZE and BLACK.

WILLIAM NEWCORN, for Petitioner-Respondent.
CLARENCE B. TIPPETT, for Plaintiff-Prosecutor.

20

The Common Pleas found the following facts:

1. That the said Harry Freedman, who was 21 years of age, was on the 23rd day of October, 1918, employed by Spicer Manufacturing Corporation, at South Plainfield, N. J., as a clerk in the production department.

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2. That during the influenza epidemic in the fall of 1918, in an effort to check the spread of such disease, respondent obtained and administered through its company physician, a vaccine to such of its employees as were willing to take the treatment, and also to the members of their families.

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3. That on October 23, 1918, said Harry Freedman was invited, recommended and induced by the respondent to accept such inoculation, and was inoculated at the plant along with the other men in his department; upon his returning to his desk after such inoculation, and as a result of the inoculation, he fainted and fell to the floor.

Opinion.

4. That as a result of the fall, the deceased fractured his skull and his death ensued on the following day as a result of said accident.

5. That the injury was caused by an accident on the 23rd day of October, 1918, arising out of and in the course of the employment. 10

We think this finding justified the judgment entered in favor of the petitioner. Let judgment be affirmed, with costs.

20

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CHAPTER

The first of the two parts of the book is devoted to a general survey of the history of the subject, and the second part is devoted to a more detailed examination of the various theories and methods which have been proposed for its solution.

The first part of the book is devoted to a general survey of the history of the subject, and the second part is devoted to a more detailed examination of the various theories and methods which have been proposed for its solution.

The first part of the book is devoted to a general survey of the history of the subject, and the second part is devoted to a more detailed examination of the various theories and methods which have been proposed for its solution.

NEW JERSEY Court of Errors and Appeals.

NATHAN FREEDMAN, <i>Petitioner-Respondent,</i>	} On Appeal.
<i>vs.</i>	
SPICER MANUFACTURING CORPORATION,	
<i>Prosecutor,</i>	

Brief of Petitioner-Respondent.

FACTS.

This cause was removed into the Supreme Court upon a Writ of Certiorari from the Union County Court of Common Pleas upon the determination of Facts and Judgment of the Court of Common Pleas, wherein the Court entered judgment upon the following finding of facts:

1. That the said Harry Freedman, who was 21 years of age, was on the 23d day of October, 1918, employed by Spicer Manufacturing Corporation, at South Plainfield, N. J., as a clerk in the production department.
2. That during the influenza epidemic in the fall of 1918, in an effort to check the spread of

such disease, respondent obtained and administered through its company physician, a vaccine to such of its employees as were willing to take the treatment and also to the members of their families.

3. That on October 23d, 1918, said Harry Freedman was invited, recommended and induced by the respondent to accept such inoculation, and was inoculated at the plant along with the other men in his department; upon his returning to his desk after such inoculation, and as a result of the inoculation, he fainted and fell to the floor.

4. That as a result of the fall, the deceased fractured his skull and his death ensued on the following day as a result of said accident.

5. That the injury was caused by an accident on the 23d day of October, 1918, arising out of and in the course of the employment.

The Supreme Court in its opinion affirmed the Judgment of the Court of Common Pleas, after setting forth the above findings, in the following language: "We think this finding justified the judgment entered in favor of the petitioner. Let judgment be affirmed with costs."

The facts of this case briefly stated are as follows:

A petition was filed to secure compensation to Nathan Freedman, father; Jennie Freedman, mother, and Oscar Freedman, a brother of Harry Freedman, who died on the 23d day of October, 1918, and whose death was caused by a fracture of the skull due to a fall sustained by the deceased on the floor of the Production Department of the prosecutor, while the deceased was at his desk, and after he had been treated by the company's physician, at their hospital located at the plant, with serum to prevent influenza, said treatment being furnished by his employer, and the said deceased having submitted himself thereto upon the request of

the officers of the prosecutor, and under the direct orders of the foreman of this particular department, and the inducement of the company's physician, who, noticing the nervous condition of the deceased, caused him to step aside and have him wait for a while, and then assuring the deceased that the inoculation amounted to nothing, when the employee finally hesitated to submit to the inoculation, and as a result of these inducements and persuasions, the deceased permitted himself to be inoculated with the serum.

By agreement, the testimony used before the Commissioner and the exhibits, together with the additional exhibits, were placed in evidence and were considered by the court as the evidence in the case, and upon which the court decided the question.

The evidence discloses that prior to the date in question, and while the epidemic of influenza was raging, quite a number of employees were absent from their work, and as a result of the absenteeism, the plant was crippled and unable to fulfill its orders, particularly the war orders which they had on hand, this being before the declaration of the Armistice.

Supplemental evidence taken from the pay-roll sheets for the week ending September 21st, shows that there were employed in the plant altogether 1,992 employees in the factory, office, etc., total number of absentees for the week, 393; for the week ending September 28th, 1,296 employees, number of absentees for the week, 337; for the week ending October 5th, 1,317 employees, total number of absentees for the week, 424; for the week ending October 11th, 1,311 employees, total number of absentees, 619; for the week ending October 18th, 1,408 employees, total number of absentees for the week, 592; for the week ending October 25th, 1,306 employees, total number of absentees, 1,037; for the week ending November 1st, 1,334 employees, total number of absentees for the week, 869; showing a large percentage of employees

out for each week from the 16th day of September to November 1st, and up to the time of the inoculation the number increasing with each successive week, the daily averages ranging for the first week, 65; second week 56; third week, 71; fourth week, 103; fifth week, 99; sixth week, 173, and the seventh week, 145. An inspection of the transcription taken from the factory pay-roll sheets from September 16th to November 1st, that too shows a larger daily average absenteeism than when the averages taken from the total number of the employees engaged in the plant—this sheet shows the daily number of absentees.

As the result of the crippling of the plant, the evidence shows that the officers of the corporation had been making investigations through the medium of the laboratories of the Rockefeller Foundation, the Board of Health of the City of New York, City of Philadelphia, and the City of Plainfield for some means whereby the spread of the epidemic might be checked, and as the result of this research they were able to secure a serum which was represented would prevent contracting the disease by a person who was inoculated by this serum.

After a sufficient supply of the serum had been obtained, according to the testimony, Mr. Dana, President of the corporation, called all of the employees of the establishment together, and after explaining the efforts made by the corporation to find some remedy to prevent the spread of the influenza, advised the employees that arrangements had been made with Dr. Anthony, a physician of the City of Plainfield, to inoculate all the employees of the shop at the shop hospital attached to and forming part of the plant of the corporation, and that the employees of each department would be inoculated in a body, a specific time being set apart for each of the respective departments, and urging and insisting upon the men to submit to the inoculation in order to prevent the spread of the disease.

In this connection it might be well, at this point, to call some of the testimony of Mr. Berry, the Treasurer of the corporation, found on pages 78 to 86 inclusive, and the cross-examination of Mr. Berry, from pages 86 to 93 inclusive. An inspection of the direct testimony of Mr. Berry shows that as a result of the epidemic the condition in the plant was alarming; requests were made of the foreman to investigate cases and to furnish such relief as they could give—then to quote Mr. Berry's language, "I went to Mr. Spicer and said the situation around is simply coming to a point where something heroic must be done. We wired to several cities, New York City, and others, trying to find the location of suitable vaccine that could be used; we finally located vaccine in Philadelphia, and after consulting with the Health Department of Plainfield; also Dr. Lindeman, blood specialist, New York City, Rockefeller Institute, and our own physician, Dr. Anthony, this particular serum was recommended, and Mr. Spicer went to Philadelphia in his car and brought it home with him—let me see—Tuesday, I think, of that week, the necessary vaccine for one thousand. On the following day a meeting of our employees was called and Mr. Dana and also Mr. Spicer explained to them that we had secured the vaccine and invited all employees to take it, and we recommended or they—they recommended the use of it to stop the influenza epidemic as far as we could. We started in either that day or the following day" (p. 87-82).

On page 84 will be found the testimony of Mr. Berry, in which he states the following took place: "Going back to October twenty-third, the first day of the inoculations, the foremen were instructed—they were instructed to follow a schedule as to hours when one department could follow the other in the administration of the vaccine. That continued for a week or ten days until we were through inoculating those who wished to

be inoculated." Under cross examination Mr. Berry testified as follows:

Q. Mr. Berry, the labor question was quite vital, or was of importance during the influenza epidemic, caused by illness?

A. Not as much so as a matter of humanity.

Q. Please answer the question.

(Question repeated by the stenographer.)

A. Certainly.

Q. And as a result of the condition at the shop, you being engaged in war activities at the time, your corporation was looking around for some means to lessen the absence of your employees by mitigating the circumstances which were causing the number of men out, and retarding the work which you were carrying on, is that correct?

A. I don't know that that entered into it.

Q. The fact—was it not a fact that during the epidemic that a large number of your employees were absent from the plant?

A. Certainly.

Q. Yes, and wasn't it true that by reasons of these men not working, that you were being handicapped in fulfilling your war orders?

A. No, sir. We didn't hold up one manufacturer throughout all of our contracts one day because of waiting for our material.

Q. Prior to October twenty-third, and how many days before was it that Mr. Dana called the meeting of your employees and addressed them on the serum question?

A. I think it was just the previous day to the first inoculation.

Q. That was on October twenty-second?

A. I think so; yes, sir.

Q. And how long had your corporation been making inquiries, investigations, and so forth, for the purpose of stopping or lessening the influenza, epidemic, as applied to your own plant?

A. I would say that it was a week or possibly ten days, we had visiting nurses out looking up the absentees and the cause of the absentees. At least, I would say approximately from the fifteenth anyhow.

Q. Isn't it a fact that almost thirty-three and a third per cent. of your men were out, caused either by themselves having the influenza or by their families being laid up with it, between the first day of October and October twenty-third?

A. I think our records show that approximately two hundred and fifty people were absent on Mondays for several weeks during that—

Q. And you investigated, and as the result of such investigation you decided to submit the inoculation to your employees, is that correct?

A. As the facts brought out by that investigation, not by the investigation itself.

Q. It said the result. Now, Mr. Berry, you are a man of intelligence, and it is no use sparring over any words in the matter.

A. I wanted to get the meaning.

Q. And a meeting was called of your employees which was addressed by Mr. Dana, who was the president?

A. Yes, sir.

Q. You were present at that meeting?

A. Yes.

Q. And in that—at that meeting didn't Mr. Dana say that conditions were appalling, not only in the shop, but in the community, and for that reason the company had been expending a large sum of money for the purpose of trying to do what they could to prevent the further spread of the disease, and that therefore they requested and recommended each of the employees of the plant to submit to inoculation in an endeavor to stop the effect of the dread disease that was carrying people away rapidly?

A. No, sir.

Q. You say he didn't say that?

A. Yes, sir.

Q. What did he say?

A. Practically what you said with the exception of requesting the employees; he didn't request them to, he recommended them.

Q. He recommended them?

A. And that with the excepting of that one word, requesting leave that out; I think it would be perfectly as you have stated it.

Q. And this meeting was called by Mr. Dana for the purpose of their listening to him and for him to submit the proposition to them?

A. You mean making the invitation; extending the invitation?

Q. I don't call what you call it.

A. There wasn't any proposition about it.

Q. We won't quibble over the words. There was a gathering which was called by Mr. Dana, and what he said was to that effect; what he said was exactly what I have just read to you, with the exception of the word "request", you take exception to, is that right?

A. I don't know of anyone that he had there taking down those speeches. We don't do it as a rule.

Q. Is that the only thing guiding your testimony today, as to whether there was anyone there taking down those speeches?

A. If you want to know what is guiding my testimony I couldn't possibly answer that?

Q. That does not answer my question. I am asking you whether it was taken down on that day?

A. You are saying exactly what was said. I can't say exactly what was said. I will say I don't know. That will answer your question.

Q. But the sense of which I have just propounded to you as to what took place, is correct?

A. With the exception of the word "request", yes.

Q. Request?

A. That is right.

Q. He did say recommended?

A. He invited them to.

Q. Invited?

The Commissioner—The witness wants to be exact, Judge.

Q. Well, I do not know the distinction between invite and request.

The Commissioner—You might be invited to attend a dinner, but you might be requested to leave the room.

A. He is trying to put up that we invited the employees. We didn't request them; we invited them to. We extended the invitation to them. Everything shows that.

Q. You went a step beyond inviting, did you not, you recommended that they submit themselves to the inoculation?

A. Yes, we recommended. I don't see that that was a step further; it might be.

Q. But that is what actually happened; you recommended they submit themselves to the inoculation.

A. Yes, we did. We recommended it, and the wives and families, and children as well, and on the advice of Dr. Lindeman, the Rockefeller Institute and so forth.

Q. It was an afterthought. An invitation was not extended until two days after you had started the inoculation, that is correct, isn't it?

A. You are speaking about the families? You do not say what you are talking about.

Q. Families now.

A. Yes.

Q. On the twenty-fifth. You don't know anything about the—you did not see Harry Freedman?

A. No, I didn't

Q. Not in this particular case?

A. No.

By the Commissioner.

Q. As a matter of fact, this matter of inoculation was thought of as a preventative to further absence by employees, if possible?

A. Oh, that is only one small part of it.

Q. That was part of it though?

A. Very small part of it, and one that I would not consider and our company would not consider.

The testimony of Mr. Kinsey, the foreman, found on pages 26 to 30, inclusive, is interesting upon throwing light upon a method by which the deceased was lead into the hospital at the specified time to be inoculated, showing that at the specified time all the employees of that department, under the directions and orders of their foreman, ceased work and marched with their foreman to the hospital for the purpose of inoculation and amongst them was the deceased.

Doctor Anthony's testimony shows that the deceased came in the line-up with the rest of the men—he noticed that he hesitated somewhat and had him step on the side in order to observe several others being inoculated—he then assumed him that there was nothing to it—he then was inoculated, after which he left. Dr. Anthony furthermore testified that he had known that soldiers frequently dropped when being inoculated. The testimony further discloses that after the inoculation of Freedman, he went back to his desk in his department, and Mr. Suydam, who worked in the same department, and who was inoculated ahead of him, testified that he was standing in front of the desk and saw him waving back and forth over the desk, his attention being attracted by the funny motions he was going through, and then he saw him fall to the floor (p. 27). He then went over and picked him up and found he was unconscious at the time. His testimony is corroborated by the testimony of Mr. Houseman and Mr. Horwitz. Doctor Anthony in his testimony explains the condi-

tion in which he found Freedman when his attention had been called to the fact that he had fainted, and examined him and saw him again just before he was being taken home (pages 13 and 14).

The testimony further shows that upon his arrival at home, he was taken with convulsions and removed from there to the Muhlenberg Hospital. Dr. B. Van Hedges treated him there and diagnosed his case as a fractured skull due to the fall. He died at the hospital the same night, and a death certificate was issued by Dr. Westcott, the County Physician, giving the cause of death "fracture of skull—while being treated for influenza fell to the floor in (fainted) accident."

The evidence further discloses that he was earning about \$17.00 a week about up to two weeks prior to the injury, after which time he was raised and for the last two weeks received for the first week \$28.50, and about \$32.000 for the second week. The proof upon the dependency shows that the deceased turned over his wages for the support of his mother, father and younger brother, who was under sixteen years of age; that for several years the father had been unable to work or earn anything by reason of suffering from tuberculosis and that there were three dependents entirely dependent upon the deceased for their maintenance and support.

An examination of the testimony and the circumstances surrounding the death of the deceased, justifies the conclusion of the Judge of the Union County Court of Common Pleas in his Findings, Conclusion and Determination of the Facts and law raised in this case, the court having found jurisdictional facts from the evidence to entitle the petitioner-respondent to compensation, and which summarized are:

(a) That the deceased was twenty-one years of age, and on the 23d day of October, 1918, was employed by the prosecutor as a clerk in the Production Department.

(b) That during the influenza epidemic in the Fall of 1918, the prosecutor administered through its company's physician vaccine in an effort to check the spread of the disease.

(c) That the deceased elected to accept the inoculation, and upon returning, fainted and fell to the floor.

(d) That as a result of the said fall the deceased fractured his skull, causing his death.

(e) That the accident occurred arising out of and in the course of the employment.

(f) That the prosecutor had knowledge of said accident.

(g) That the wages were \$21.60 per week.

(h) That the father, mother and brother were actual dependents entitled to compensation.

The prosecutor has assigned each and every one of these findings as the ground for reversal.

LAW.

The accident arose out of and in the course of employment. The court below found as a question of fact that while the inoculation of the employee was voluntary by election of the deceased, nevertheless that it was upon the invitation and inducement of the prosecutor and its employees that the deceased submitted himself to the inoculation.

It is immaterial whether in submitting himself to the inoculation, the act of the deceased was voluntary or not, from the circumstances surrounding the case; the proof is conclusive that the plant was crippled; that the officers of the corporation urged upon its employees the necessity of the inoculation to prevent the spread of the disease; that the plant was engaged in war work at the time, and by reason of the large number of employees that were absent, were unable to fulfill its con-

tracts; that a designated time was set aside for each of the respective departments, and that at the time set the foreman of the department conducted his men under the instructions of his superiors to the hospital located at the plant for the purpose of securing the inoculation. The proof further shows that after the inoculation, within five minutes of the time that the deceased returned to his place of employment he was seen to stagger and faint, falling on the ground and fracturing his skull.

The prevailing rule in compensation cases is that the employee comes under the protection of the act when he enters the premises of the employers and steps out from under such protection when he leaves the premises. For that reason, as stated above, it is immaterial whether the inoculation was the result of the voluntary act of the deceased or whether the inoculation was the cause of the deceased fainting, resulting in his fall and fractured skull and death, and is clearly a case in which the accident arose out of and in the course of employment.

The case of *Nevich v. Delaware, Lackawanna & Western Railway Co.*, 100 *Atl. Rep.*, p. 234 would seem to be in point—in this case the Court of Errors and Appeals affirmed the judgment of the Supreme Court wherein the Supreme Court affirmed the judgment of the Common Pleas Court adjudging that the accident arose in the course and out of the employment of the petitioner. Nevich was employed by the respondent to fill a barrel with water and to carry the water in pails to other servants of the defendant to be used in mixing cement, and while temporarily away from it two strangers up with the barrel, carried it for a short distance, and at this point the boss of Nevich directed him to get the barrel and bring it back. This he undertook to do and when he approached the men they threw down the barrel and assaulted him, inflicting the injuries for which he asked for compensation.

Mr. Justice Bergen who wrote the opinion for the Court of Errors and Appeals said that "as there was testimony tending to show that the servant of the petitioner directed him to get the barrel while it was in the hands of the person carrying it away, there can be no doubt that the accident happened in the course of his employment, and also that it arose out of his employment, for he was reclaiming his employer's property by his direction, from persons who were attempting to remove without color of right, a part of the tools used by him in the performance of his services, and being directed by the defendant to reclaim the barrel, with knowledge of the existing conditions of it being a possibility that the recovery of the property might be risked, we are of the opinion that the accident arose out of the employment as well as in the course of it."

In the case at bar we have the case where Harry Freedman entered upon his clerical duties upon the day of his death in the morning, and during his work was sent, requested or directed going to the hospital and being inoculated and then returning back to his work and about to function the same and suddenly fainting, which resulted in the fractured skull that caused his death. Therefore there can be no question but that the accident arose out of and within the scope of his employment.

A sound statement of the principal involved appears in 1 *Honnold on Workmen's Compensation*, paragraph 3, as follows: "It cannot be said that the employment is broken by mere intervals of leisure such as those taken for a meal. If an accident happened at such a time, there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises or about his property, unless the workman is doing something that is wholly foreign to his employment. Acts of ministration by a servant to himself, such as quenching his

thirst, relieving his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work, are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the workmen's compensation acts, though they are only indirectly conducive to the purpose of his employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food or fresh air, or to rest in the shade."

The work of the deceased was clerical at a desk, and even if we were to conceive for the sake of argument that no inoculation had taken place, and he had fainted in the position which he was at the time when the event occurred and struck his head upon the stone floor, fracturing the same, resulting in death, there would be no question that the accident occurred.

In the case of *MacNichols*, 215 Mass., p. 497, Chief Justice Rugg defines the term arising out of and within the scope of employment as follows: "It arises out of the employment when there is, apparent to the rational mind, upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. It must be incidental to the character of the business and not independent of the relations of master and servant."

In the case of *Hally v. Moosebrugger*, 88 N. J. L. 164, Chancellor Walker adopts the definition of the Massachusetts Supreme Court in construing the same language of the New Jersey statute.

In the case of *Bryant et al. v. Fissell*, 84 N. J. L., p. 72, the Supreme Court was called upon to construe the phraseology of the Employers' Liability Act, the Court laid down the following principals:

"7. Within the purview of the Employers' Liability Act of April 4, 1911, an accident arises 'in the course of employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

"8. Within the purview of the Employers' Liability Act of 1911 an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it."

"9. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service."

"10. A risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment."

In that case the deceased was employed by the respondent as a journeyman carpenter, and while engaged in his duties as carpenter he received injuries by reason of a heavy bar of metal falling upon his head from one of the upper stories of the building being erected at the corner of Market and Beaver Streets in the city of Newark, which injuries caused the death of the said carpenter. The falling of this metal was not caused by any of the employees of the respondent, but by an employee of some other independent contractor who had work to do on the said building. The court there affirmed the judgment of the Court of Common Pleas, laying down the principles above enumerated.

Chancellor Bulkley, in the case of *Fitzgerald v. Clarke & Sons*, 2 K. B. 796, defines the words "out of and in the course of his employment" as follows: "The words 'out of' point, I think, to the original and cause of the accident, the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident, the latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment—it must be an accident resulting from a risk reasonably incident to the employment." He concludes, therefore, "that an accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." One of the risks incident to all employment of an employee is that he may be injured by a fall or otherwise while performing the work of the master, and irrespective of the question whether the inoculation had anything to do with causing the deceased to faint, the evidence conclusively proves that he fell and fractured his skull, which caused his death during the course of his employment, and in the absence of any proof that the physical condition of the deceased was such as brought about the accident resulting in his death, there can only be one finding of fact, to wit, that the accident arose out of and in the course of his employment.

In the case of *Emorick et al. v. Slavonian Roman Greek Catholic Union*, 108 At. Rep. 223, the Supreme Court held that where the decedent, while at work for his employer as a bartender selling intoxicating liquors in his employer's saloon, was shot and killed by a patron because of and during a dispute regarding the

price of drinks which decedent sold to such patron, the trial judge was justified in concluding that decedent's death arose out of his employment. Mr. Justice Trenchard, who wrote the opinion for the court, in construing this case followed the decisions in the cases of *Bryant v. Fissell*, 84 N. J. L., p. 72; *Hally v. Moosebrugger*, 88 N. J. L. 162; *Scott v. Payne*, 85 N. J. L. 446, and *Foley v. Home Rubber Co.*, 89 N. J. L. 474, affirmed 91 N. J. L., p. 323.

DEPENDENCY.

It is respectfully submitted that the undisputed evidence shows that there were three dependents, the father, the mother and the brother, and they come within the rule laid down by the Court in the case of *John J. O'Connor v. Public Service*, 89 N. J. L., p. 999, where the Court says: "Where an adult son gave all his money, which was more than the value of his board and lodging, to his mother for the common fund of the family, none of whom were themselves working, it was held that the family was deprived of the benefits of the wages of the deceased by his death, and all were actual dependents within the meaning of the act.

The court in the case of *Hammiell v. Pennsylvania Railroad Company*, 87 N. J. L. 338, affirmed by the Court of Errors and Appeals in 88 N. J. L. 717, said, "We understand the phases 'actual dependents' as used in paragraph 13 of the act as amended, to mean relatives in some degree, mentioning in that paragraph who were being wholly or to a substantial degree supported by the deceased at the time of his death."

The undisputed facts in this case show that all of the money earned by the son was turned over to the mother, who, with the wages thus derived, ran the

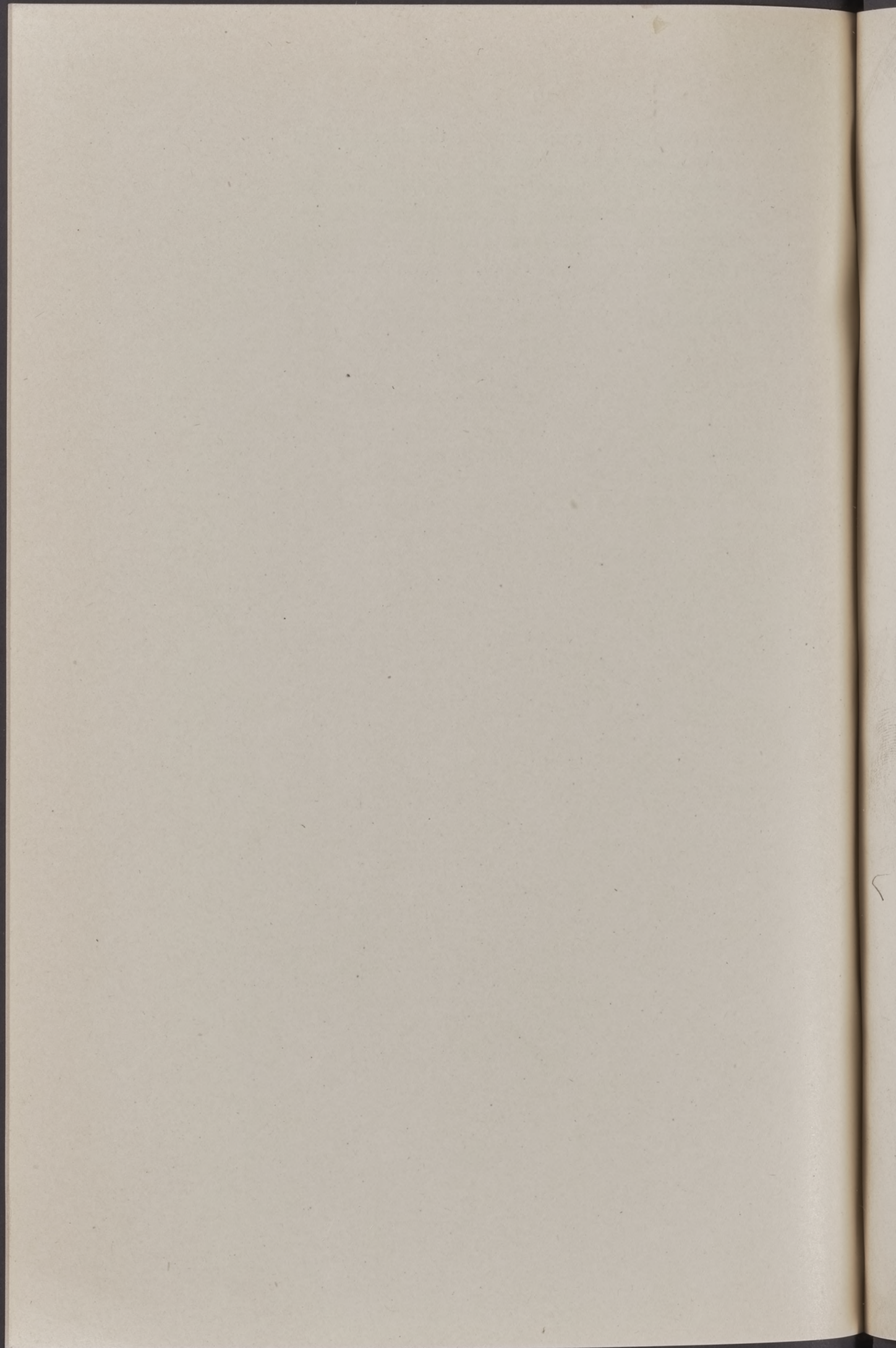
household and took care, not only of the deceased, but also of the husband and other son.

It is respectfully submitted that the judgment of the Supreme Court in sustaining the findings of fact and law by the Judge of the Court of Common Pleas was proper, and that the appeal should be dismissed, with costs.

Respectfully submitted,

WILLIAM NEWCORN,

*Attorney and of Counsel for
Petitioner-Respondent.*



NEW JERSEY

Court of Errors and Appeals

NATHAN FREEDMAN,
Petitioner-Respondent,

against

SPICER MANUFACTURING CORPO-
RATION,
Defendant-Appellant.

On Petition
for Compensa-
tion.
On Appeal
from Supreme
Court.

**BRIEF OF
DEFENDANT-APPELLANT.**

Facts.

This cause is upon appeal from the Supreme Court. A petition was originally filed by Nathan Freedman herein, father of Harry Freedman, deceased, to secure the payment of compensation, on behalf of petitioner and alleged dependents, by reason of the death of Harry Freedman, under the Workmen's Compensation Statute. After hearing all the evidence the Workmen's Compensation Bureau rendered its determination of facts and rule for judgment in favor of the defendant-appellant, dismissing the petition in accord with the findings of facts by the Deputy Commissioner (Case, pp. 14-16).

Upon appeal presented by petitioner to Common Pleas Court of Union County, it was stipulated by attorneys for the respective parties that the transcript of the evidence taken before the Deputy Compensation Commissioner on May 24, 1919, be taken and used upon this appeal before Judge Carleton B. Pierce as the testimony in the case. Therefore, upon substantially the same facts as were heard by the Deputy Commissioner, who initially had an opportunity to observe the witnesses produced, and their testimony, and who thereupon rendered his determination after careful consideration, the Appellate Court under the statute considered the transcript of evidence merely, and reversed the Deputy Commissioner, sustaining the appeal of the petitioner.

The cause was then removed into the Supreme Court upon a writ of certiorari and the Supreme Court affirmed the judgment of the Common Pleas Court (see Opinion, Case, pp. 88-89). This appeal accordingly follows.

The pertinent facts in the case were: That following the death of Harry N. Freedman, son of Nathan Freedman herein, on October 23, 1918, a petition for compensation was filed by Nathan Freedman, father of said deceased, on behalf of himself and the mother and brother, Oscar, under the Workmen's Compensation Statute. It appears that Harry N. Freedman, on October 23, 1918, and prior thereto, was employed by Spicer Manufacturing Corporation of Plainfield, N. J., as die-setter and clerk. During the influenza epidemic, which was prevalent at the time, and which affected people of all classes, the laborer as well as those of high degree, the employer sought a means to allay the ravage of the disease which had become so general. After consultations with various medi-

cal institutes, physicians, and after making inquiries as to the proper kind of serum to use, they secured a serum for the purpose of inoculation. The employer thereupon presented to its employees that it had secured a serum, and that such of its employees who *desired* or *wished* to be inoculated with serum against influenza could be inoculated free by the company physician, who was stationed at the plant. It was voluntary with the employees to elect or reject the inoculation, as the testimony clearly discloses. Also, the families of the employees could be inoculated free of charge if they wished (Case, pp. 68-69). The testimony clearly shows that the company *did not order* its employees to accept the inoculation, but *offered* it from a humanitarian standpoint, believing it was thereby performing a public benefit in relieving the distress occasioned by the epidemic in so far as possible (Case, pp. 69-70).

The company, in line with its welfare department work, and even in addition thereto, had the foremen in the various departments investigate the cases in their respective departments which were ill or needy, and credit was given by the various stores to the employees who needed materials, food or other supplies, and they were charged to the company (see Case, p. 66).

And so, on the 23rd day of October, 1918, the employees in the department in which Harry N. Freedman worked were advised that those who desired to be inoculated could go that morning to the company physician at the plant hospital. Among the large number who went was Freedman. After being inoculated in his turn by the doctor, he walked back to where his desk was in his department. Before resuming his work he was seen by two employees to suddenly sway above his flat top desk and then fall backwards, apparently in a

faint, striking the back of his head upon the concrete floor. He was taken to the hospital and died eleven hours afterwards from a fractured skull.

Counsel for Nathan Freedman, petitioner-respondent herein, upon his arguments and in his briefs filed in the prior proceedings in this cause, laid stress upon his conclusions that the deceased had submitted himself to inoculation upon the *request* of the officers of the employer corporation, and under the *direct orders* of the foreman of this particular department wherein deceased worked, and upon the inducement of the company's physician that the inoculation did not amount to anything. The evidence *conclusively* shows that *recommendation* and *invitation* were the words that applied. There was nothing compulsory or obligatory upon the employees in any manner. It was optional and voluntary with them to accept or reject this offer given by the employer to supply inoculation, as shown by the fact that 900 out of 1200 or more of the employees accepted the inoculation. We refute *any* inducement evidenced by Dr. Anthony upon the occasion. His testimony will clearly show. Note testimony (Case, p. 26, lines 30-33) :

"Q. Did you inoculate all the men in the plant? A. Not all, only those who wished it."

Again (Case, pp. 29-30) :

"Q. And you say that the inoculations were only rendered to those who wished to be inoculated? A. Yes.

Q. And this man was among those, I assume? A. He was.

Q. And you say that they came in in a regular line-up of them? Those men were

in the same category as Mr. Freedman? A. Yes, and any fellow who doubted, or was nervous, or didn't just know what it was, and especially among the foreigners, we just asked him to stand aside and watch a couple of other fellows get inoculation. So it was up to them decidedly; if they wanted it they could have it, and if they didn't they didn't have to.

Q. In other words, was it voluntary with them? A. It was absolutely voluntary.

Q. There was nothing compulsory about it? A. Nothing at all.

Q. Did any man decline to accept it? A. Some did, and would come back maybe the same day or a day or two afterwards.

Q. On this particular day Mr. Freedman came along with the others? A. Yes.

Q. And went in and was inoculated in the customary way; do you remember particularly anything about him at the time he came up? Is there anything you especially recall in your mind that impresses—in your mind anything about him when he came up? Any of his actions? A. Yes, Freedman, I remember, he hesitated. I remember this distinctly. I said, 'It doesn't amount to anything; watch me shoot this fellow,' and it happened to be a big stout fellow. This was all talked over afterwards, and that is why I can recall it. So Freedman saw me give this other fellow inoculation, and I personally gave Freedman his inoculation. All he did, he just smiled after it as though it didn't amount to anything, and that was all there was to it.

Q. Did he act nervous? A. No, not afterwards. He went out. As I said, he smiled."

Dr. Anthony was there as a physician and it is unfounded to view his professional mannerism as reading into it an inducement. He expressly said he did not ask Freedman to step aside, but they were in a group, a bunch, and some fellows looked nervous (Case, p. 32).

Counsel for petitioner-respondent endeavors to assert that the plant was unable to fulfill its orders, particularly war orders, at that time. This is not shown by the evidence to have been so. In fact, it is expressly denied by John S. Berry, treasurer (Case, p. 71) :

"Cross-examination by Mr. Newcorn.

Q. Yes, and wasn't it true that by reason of these men not working that you were being handicapped in fulfilling your war orders? A. No, sir. *We didn't hold up one manufacturer throughout all of our contracts one day because of waiting for our material."* (Italics ours.)

As a matter of fact and common knowledge, the Court will recognize that with the ravage of such a disease a goodly number of men would be ill in a plant as large as that of this corporation, or absent from one cause or another. Even in normal times there is a considerable list of absentees, which necessitates replacements with new men. Reference to the exhibit (Case, p. 78, Note) shows daily average of absentees and new men hired. In all factories there is a "floating population" of employees, which is not unusual.

However, we maintain it makes no difference in the instant case as to the number of absentees, because we recognize, and the testimony showed, that there was a period of *most unusual* severity of ill-

ness during the particular time in question, and a restoration to normal occurred shortly thereafter. The employee record shows that the plant kept right on in its work without handicap to any one contract.

Respondent reiterates that the evidence does not show that the plant was crippled, and we must be guided by testimony rather than unfounded conjecture.

It was urged by petitioner-respondent that the inoculation was not voluntary, but that it was under a degree of *inducement or compulsion*, and we desire to call the Court's attention to Mr. Kimsey's testimony on cross-examination (Case, pp. 37-39), wherein he shows clearly that those who wished the inoculation could go at the time set apart for that department and be inoculated. Further, the testimony of *every* employee presented as witnesses by petitioner supports or warrants no other interpretation, namely, that it all was voluntary, optional and without any degree of compulsion or insistence. We are confined to the evidence in this regard.

The testimony of John S. Berry, treasurer, is a clear refutation of any inducement, compulsion or insistence that *any* employee submit to this inoculation (Case, pp. 65-75). His story of events and his explicit answers indicate only the humanitarian attitude of the employer at the time of general severity of this disease, the securing of the serum, the spontaneous offer of the employer to supply the serum, the absolute denial of any compulsion in any manner (see particularly, Case, p. 70); and that the invitation was extended to *all* employees who *wished* to be inoculated, and their acceptance of such inoculation was voluntary.

Evidence was also presented in attempt to prove that the father, mother and brother of deceased

were dependent upon him at the time of his death.

The appellant herein asserts that the determination of facts and rule for judgment, as found by the Deputy Commissioner of Compensation, presents the true and correct legal finding upon the facts and the law raised in this case; that the *second* finding of facts, evidenced by the determination of the Common Pleas Court, is incorrect and erroneous upon the facts and law; that the Supreme Court erred in its holding that the Common Pleas finding justified the judgment entered in favor of petitioner; and, therefore, this appellant presents the additional and following reasons for setting aside the proceedings, determinations and judgments and brings this issue to this Court for reversal upon the following grounds:

1. That the Supreme Court erred in giving judgment for the petitioner-respondent for the reasons advanced by the defendant-appellant in certiorari.

2. That the Court erroneously and improperly found that the said Harry Freedman was induced by the respondent to accept inoculation, whereas the Court should have found as a fact from the testimony that it was optional and entirely voluntary with this decedent and all employees, whether they wished to be inoculated or not, without any compulsion or inducement on the part of the employer.

3. That the Court erroneously and improperly found that there was evidence showing that as a result of the inoculation he fainted and fell to the floor, whereas there was no evidence offered to show that the inoculation was the cause or in any way contributed toward the said accident and his death.

4. That the Court erroneously and improperly found that the death of decedent ensued as a result of said accident.

5. That the Court erroneously and improperly found that the injury was caused by accident arising out of and in the course of the employment of deceased.

6. That the Court erroneously and improperly found that Nathan Freedman, the father; Jennie Freedman, the mother, and Oscar Freedman, a brother, are actual dependents entitled to compensation provided by the statute for a period of 300 weeks

7. That the Court erroneously and improperly found that the petitioners are entitled to costs in this proceeding, together with their attorney's fee.

8. That the Trial Court erroneously and improperly permitted the judgment to be found in favor of the petitioner and against the employer.

9. That the Court erroneously and improperly refused to enter judgment in favor of the employer herein.

10. That the Court's findings of fact and determination are inconsistent, and there is no evidence to warrant or sustain its conclusions, and its judgment in divers other respects is illegal, erroneous, improper and oppressive to the prosecutor.

LAW.

POINT I.

The alleged injury sustained by the said Harry N. Freedman and his ensuing death was not by accident arising out of and in the course of his employment under the statute.

Prosecutor will include for presentation under this point all reasons excepting 6 and 10.

To warrant a recovery under Section 2 of the New Jersey Workmen's Compensation Act of 1911 (Pamphlet L, p. 134, Chap. 95) from an employer for the death of an employee it must appear that the employee's death was caused by (a) an accident, (b) arising out of, and (c) in the course of his employment. Even though the injury arose out of and in the course of the employment, if it be not an "accident" within the purview of the Act, there can be no recovery. Even if there be an accident which occurred "in the course of" the employment, if it did not arise "out of the employment," there can be no recovery; and even though there be an accident which arose "out of the employment," if it did not arise "in the course of the employment" there can be no recovery.

Bryant v. Fissell, 84 N. J. L., 72, etc.

Fitzgerald v. Clarke & Son, 2 K. B., 796.

Craske v. Wigan, 2 K. B., 635.

Hulley v. Moosebrugger, 86 N. J. L., 161.

Moore v. Lehigh Valley R. R., 169 A. D., 177.

In re Heitz, 218 N. Y., 148.

It is not enough to say that the accident would not have happened if the servant had not been engaged in the work at the time, or had not been in that place. It must appear that it resulted from something he was doing in the course of his work or from some peculiar danger to which the work exposed him.

Archibald v. Ott (W. Va.), 87 S. E., 791.

In *In re McNicol* (102 N. E., 697; 215 Mass., 497) the following test is laid down and has general applicability with respect to an injury:

"It arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a *causal connection* between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person, familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of the employment.'

But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment."

The words "out of" are descriptive of the character or quality of the accident. The words "in the course of" relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident, as

conveyed by the words "out of," involves the idea that the accident is in some sense due to the employment.

Rayner v. Sligh Furniture Co., 180 Mich., 168.

It is agreed that the words "arising out of and in the course of his employment" do not make the employer an insurer against all the risks of the business, but include only those injuries arising from the risks of the business which are suffered while an employee is acting within the scope of his employment.

Mann v. Glastonbury Knitting Co., 90 Conn., 116.

It therefore follows that all the essential elements above noted must be involved by definite proof on the part of the petitioner to entitle a claimant to an award for a compensable claim. Not every injury by any means occurring while a man is employed contemplates a liability upon the employer for compensation.

Woodruff v. Howes Const. Co., 226 N. Y., 276.

In the case at bar, without repeating in detail the elements of occurrence and circumstances of the accident, this man, Harry N. Freedman, had been engaged at the time in clerical duties; among and along with the other employees he elected to accept inoculation by the company physician as a preventive against the disease of influenza. It was optional and voluntary with him to accept or to reject the offer of the employer to supply serum injections and all the testimony positively, clearly and undeniably was that there was nothing com-

pulsory; it was entirely up to the man himself if he desired it or not. The testimony showed on the part of the employer that this serum was secured and ultimately supplied after serious and careful investigations into the question of kind of serum, method of inoculation and, further, such efforts were made because of the fact that the entire country was in the throes of a most serious epidemic; all classes of people were subject to the ravage of this disease, and through humanitarian reasons this large employer, having 1200 or more employees with families dependent upon their work and earnings for sustenance, sought to do its part in this way to try to alleviate, in so far as possible, *among its employees, and likewise among the families*, the attack of this disease.

It must be borne in mind that no testimony was introduced disproving the above facts.

The Trial Court must be guided by the testimony produced and is bound by the testimony rather than by any suppositions as to any other motive on the part of the parties.

After inoculation with the men in his regular turn, this man walked back to a point where his desk was, and before he had started to work, standing above it, was suddenly seen to sway and then fall backwards upon the floor.

He had undoubtedly a "fainting spell"; no doubt a cardiac syncope; it is to be recalled that he was not doing anything at the time. A period of probably fifteen minutes elapsed from the time of his inoculation to the time he fell; this covered merely the time it took him to walk back to his desk from the plant hospital.

Such an occurrence as evidently resulted—and medical testimony did not disclose anything different—a fainting spell, as such, resulting in the man's falling and hitting his head on the floor, un-

fortunately fracturing his skull, without anything more, cannot be said in any way to be an injury for which the employer is liable. An employer is not an insurer of the good health, proper breathing or other physical aspects, as such, of an employee. This injury is not a hazard of the employment for which the employer should be chargeable.

This employee at the time was not engaged in any physical exertion of the employment sufficient to have caused by such exertion normally a man to faint.

It is to be recalled that the testimony disclosed, further, that this man was the only one who fainted or had any ill effects as the result of inoculation, and some 900 employees had been inoculated.

Clearly this fact alone is sufficient to indicate that the reason for the fainting was purely personal with the injured person. If he had been a foundry employee or one who, after inoculation, had then gone and started in some arduous labors, and thereafter overstimulated his heart action, or because of some undue or extreme exertion of his employment, sustained a fainting spell with resultant injury, there might be more basis for asserting the likelihood of a possible claim. Under the existent facts in the case at bar there is no similarity and emphatically no basis for such assumption.

Merely because he fainted will not make the employer liable; and because also he had voluntarily submitted to influenza inoculation—for his own protection against disease, and no evidence given to the contrary—the mere fact that he fainted thereafter, having in mind the circumstances which transpired, does not change the case in any way.

As a matter of fact, he was likely to have fainted anywhere, and merely because he did so there and at that time does not alter the relations.

The cases on the subject of "fainting" demonstrate what attitude should be taken on this point.

An accidental injury resulting from disease is not compensable. A "*fainting spell*" due to a weak heart caused an employee to fall upon a hard pavement and fracture his skull; held not compensable.

Collins v. Brooklyn Union Gas Co., 171 A. D., 361.

In this case the Court found that the deceased was assistant foreman; his duties were negligible, so far as active physical work was concerned; while sweeping off pebbles on a paving near where he was working he suddenly *fell to the street, receiving a fracture of the skull*; he died seventeen days afterwards. Diagnosed that his fall was evidently due to cardiac syncope, to which the previous condition of his heart predisposed him. At the time, after the fall, he said he had a "dizzy spell."

The Court said:

"The Act does not undertake to make the employer an insurer of the life, health or regular heart action of an employee during the hours of labor, in the absence of proof that the injury was due, for example, to a fall caused by cardiac syncope arising from over-exertion in the course of the employment."

In *Erickson v. Empire Laundry Co.*, 1 Cal. I. Acc. Com. (p. III), 612, where an employee became faint from vertigo and illness and fell, injuring herself on a table, it was held that this injury did not arise out of the employment, where it was found that the faintness was not due to any condition under which she was working, but to her own physical condition.

In *Rodger v. Paisley School Bd.*, 49 *Sc. L. R.*, 413; 5 *B. W. C. C.*, 547, it appears a school janitor was sent on a message on a very hot day. He fainted from the heat and fell backwards, striking his head on the pavement, subsequently dying from the effects of the injury. It was held that this was not an injury arising from the employment.

To the same effect are the following:

Honor v. Painter (1911), 4 *P. W. C. C.*, 188.

Brown v. Kidman, 4 *B. W. C. C.*, 199.

Jacobs v. Davis-Schonwasser, 2 *Cal. I. A. C.*, 938.

Butler v. Burton, 5 *B. W. C. C.*, 355.

Swart v. Panama-Cal. Exp. Co., 1 *Cal. I. A. C.*, 50.

Lewis v. Globe Ind. Co., 1 *Mass. I. A. B.*, 48.

Injuries sustained from a fall due to a faint or an epileptic seizure do not entitle a workman to compensation *unless there is some peculiar hazard connected with the place of employment* (*Henneld on W. C.*, Vol. I, p. 302). In case at bar there was no hazard bringing his claim under a possible basis for compensation.

We submit that claimant offered no evidence that that inoculation was the cause, or, in fact, that it contributed toward his said accident and death. Such was the finding of the Deputy Commissioner, which should be recognized as the correct legal view (*Case*, p. 16).

As has been aptly stated in the cases of *McNicol*, 215 *Mass.*, 497, and *In re Madden*, 222 *Mass.*, 487, the rule is given that "an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a haz-

ard to which the workman would have been equally exposed apart from the employment," does not arise out of the employment.

The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant.

Federal Rubber Mfg. Co. v. Havolic, 162 Wisc., 341.

Further, it is held in *Sheldon v. Needham* (1914), 7 B. W. C. C., 471, that it is essential that there be *some special risk* incident to the particular employment, *a risk which imposes a greater danger upon an ordinary member of the public in order to be compensable.*

Does the case at bar come in any way within the above exclusion? The answer is, no.

On this same subject of accident Fletcher Moulton, L. J., says in *Pell v. Lawrence & Sons, Ltd.* (1912), 5 B. W. C. C., 274:

"There is no risk whatever, other than to which every other human being is exposed. True, it was done for the purposes of his work. Suppose in an employment part of the terms was that a man should be given lunch, and that he bolted his food and so burst a blood vessel; there is no doubt that he took his refreshment for the purpose of enabling him to do his work, but there was no risk whatever connected with the work. That is not an accident arising out of the employment."

The burden of proof rests on claimant to show that the workman met with an accident arising out

of and in the course of the employment. The rule is one of general applicability.

Bradbury on W. C. (3rd Ed.), p. 1034.

Cramer v. Lanterman, 37 N. J. L. J.

Bryant v. Fissel, 84 N. J. L., 72.

Phillip v. Hamburg Am. S. S. Co., 37 N. J. L., 167.

In the determination of facts and rule for judgment, signed by Judge Pierce at paragraph 3 thereof, he concludes as follows:

"3. That on October 23, 1918, said Harry Freedman was invited, recommended and *induced* by the respondent to accept such inoculation, and was inoculated at the plant along with the other men in his department; upon his returning to his desk after such inoculation, and as a result of the inoculation, he fainted and fell to the floor." (*Italics ours.*)

This was also taken as one of the points of finding by the Supreme Court in its opinion in this case (Case, p. 89).

We respectfully submit that the evidence in this case does not legally warrant such conclusion that the employer *induced* the inoculation. There was no "inducement" to be gathered from the testimony. There was *no* form of persuasion employed. Whether or not *this* employee or *any* employee should decide that he did not wish to accept the offer given by the employer made no difference to the employer as such. A different status would have been created if the inoculation had been ordered, but it was not ordered, and to charge responsibility against the employer irrespective of the *clear* evidence on that point is legally an erro-

neous holding. His voluntary action created a different legal relationship for the moment. The motive on the part of the employer was humanitarian, and the employee accepted the treatment voluntarily. It is quite natural that the employer would be interested in doing all it could to relieve the distress in so far as it could among its employees and even among the families of the men. It is quite natural, also, that in a plant as large as this one there would be a proportionately increased number of men ill or out during the period within which the disease was at its point of greatest severity; and, as it lessened in intensity, a gradual reduction in the number of absentees due to illness alone followed.

It cannot be successfully argued by the petitioner that the plant was crippled because of absentees. This is refuted in the evidence. The mere fact that employees are out in goodly numbers during a particular period does not by that circumstance alone prove that a plant is crippled and cannot complete its orders or work. We must look to the evidence for that, and the testimony is clear upon that question.

We submit that this Court may determine from the evidence as presented whether the Common Pleas Court properly weighed it to arrive at the legal conclusions found by it or not. Reference to the testimony of Mr. Kimsey (Case, pp. 35-39). Mr. Houseman (Case, pp. 47-51) and Mr. Berry (Case, pp. 65-75) leads us to no other view than that the inoculation was voluntary, optional, for the benefit of the men and their families, and offered as many large employers now do in line of their welfare work and just as this large employer did under its welfare plan. The ravage of this dreadful disease required an heroic effort, and well

was such a measure recognized by Mr. Berry (Case, p. 68).

We consider the fact that deceased submitted himself voluntarily to accept the inoculation material and of the essence. No other conclusion, in fact or law, could otherwise be taken or applied accordingly.

It may be urged by the petitioner that an employer comes generally under the terms of the Workmen's Compensation Act, yet such is a rule of guidance rather than of finality or actuality. There are many circumstances which take a case or claim outside the statute, such as horse-play, disobedience of orders, accidents which do not arise "out of" the employment, injuries, the result of disease having no relation to the employment, hernia cases under certain conditions, occupational diseases, diseases which are the occasion of accident rather than the cause, illnesses having no relation to exertion of employment, and many others. All accidents which occur during the hours of labor are *not* compensable, and under the evidence and law come within the exclusion.

The case of *Nevich v. D., L. & W. R. R. Co.*, 100 Atl., 234, which had been cited by counsel for petitioner in his brief in the lower Court, is not in point of similarity or principle with the instant case. In that case the employee was clearly doing what he was hired to do. He was protecting his employer's property as well as obeying his boss' orders in getting the barrel. The injuries sustained by him were the result of an assault upon him while in his regular work. He was ordered or directed in a mandatory manner, as incidental to his work, to get the barrel. In no way is that case similar to the principle involved in our case. Freedman could have refrained from accepting inoculation just as freely as he elected to accept it, and, for the

time being, he was as much apart from his employment as though he had elected to accept such offer from the employer to have his teeth filled by a doctor who was at the plant supplied by the employer, who through the same humanitarian motives desired to aid the physical well being of his men. There was no inducement compelling him to go with the other men at the time. He simply went along when the foreman of that department notified the men that all who wanted to be inoculated were to go in that morning at the time set (see Case from p. 37, line 30 to p. 38, line 25).

If Mr. Freedman had gone to his own doctor for inoculation, it is most likely the same result—fainting—would have ensued, as his condition was personal rather than a hazard of the employment.

The case of *Emorick v. Slavonian Roman Greek Catholic Union*, 108 *Atl.*, 223, as similarly cited by counsel for petitioner, is open to the same objection as given by me to the *Nevich* case, *supra*, and, further, he was killed while clearly doing his regular work, and it was justly determined an accident under the purview of the statute and decisions.

Our Act does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment or collateral to it. Not every diseased person suffering a misfortune while at work for an employer is entitled to compensation. Decisions of our sister states are analogous.

Matter of Alpert v. Powers, 223 *N. Y.*, 97, 101, 102.

Kass v. Hirschberg, Schultz & Co., 181 *N. Y. Supp.*, 35.

Cavalier v. Chevrolet Motor Car Co., 189 *A. D.*, 412.

Collins v. Brooklyn Union Gas Co., 171 *A. D.*, 381.

Appellant asserts that as a matter of fact the petitioner has failed to present evidence sufficient to justify an award. As a matter of fact and law, the alleged claim does not come within the category of a compensation claim. The submission of the injured person to influenza serum inoculation was apart from his work or duties, and on his part was optional and voluntary. Nothing was in any manner compulsory. The families of the employees came in the same class. The employer, through humane motives and through their welfare department work, and following custom and practice which now has become quite general among large employers of labor, sought to aid their employees, as well as their families, in the manner of which testimony was given. The employer through benevolent motives sought to offer an aid to the employees, and merely because *one* of those who so decided to accept the offer generously given by the employer, because of some physical condition existent in his body, and with no exertion of employment, fainted, it is going very far afield to say that the employer is liable for the result.

This prosecutor presents to this honored Court that the circumstances in this case are unusual. A careful examination of authorities in various jurisdictions has failed to disclose a case identical in point of actual happening with the instant facts. We are, hence, left to a consideration of the facts as presented and the application of the law as properly applicable. We consider that in the light of reason no other conclusion or holding is properly tenable than that this case is *not* one by accident arising out of the employment. We further respectfully assert and present that the Common Pleas Court's conclusions, as well as the views expressed by the Supreme Court upon certiorari, were erroneous for the reasons herein given and not sup-

ported or warranted in law; and that the findings and conclusions of the Deputy Commissioner of the Workmen's Compensation Bureau should be held to have been the correct and proper finding in this case, inasmuch as he was the trial commissioner in fact who heard the testimony and the witnesses, and there is raised a question of law by virtue thereof.

We assert that whether or not there is evidence to support or tending to support a finding of fact is a question of law (*People ex rel. Stephenson v. Bingham*, 204 N. Y., 168, 169, 170; *Kade v. The Greenhut Co.*, 193 A. D., 862), and therefore the propriety of such question comes properly before this Court for interpretation.

POINT II.

The petitioner, Nathan Freedman, has failed to sustain the burden of proof required of him sufficient to sustain or warrant an award to the alleged dependents under the statute.

Reason No. 6 will be considered under this point.

It is respectfully submitted that the Court will take judicial notice, without reference to citation of authorities, that a petitioner has upon him in cases coming under our Workmen's Compensation Act the burden of proof to show not alone that an accident occurred, but that it arose out of as well as in the course of the employment; and in cases of death that the death of decedent was caused by accident under the statute; and, further, that those designated as alleged dependents were dependent in fact and law upon the deceased at the time of death.

We assert that the petitioner has failed to sustain the burden so cast upon him in the case at bar, and that the claim for compensation herein shall fail for such reason.

However much we may be swayed by sympathy, we cannot in law allow such to warp the judgment which due regard to the facts justify. If it were held as a general proposition that an employer is to be chargeable with liability for acts of benevolence which it may do, offer or perform, to, for or on behalf of its employees, under its welfare plan, then it will have a far-reaching effect upon all acts of employers in this State. If such is held, as in this case, that an act which is humane in motive is to be construed to charge an employer, *this employer*, with liability, then it will have a direct influence to throttle the impulses of benevolence among our large employers lest their acts be to charge them with a liability. To so charge *this* employer with a liability under the facts in this case will tend to cause a retrenchment in its plan of welfare work, and a most serious consideration by it and other companies of their programs for the uplift and welfare of their employees because of the liability involved.

The only logical thing for a manufacturer to do would be to withdraw to a great extent its activity along this line of work, which activity has been encouraged and fostered by the Federal Government, and by all organizations interested in the welfare of the more unfortunate and the advancement of our working population and civilization in general.

POINT III.

The Trial Court's findings of fact and determinations are inconsistent, and its judgment is in divers other respects illegal, erroneous, improper and oppressive to the prosecutor.

For the above reasons it is respectfully submitted that the Court below erred in its findings and conclusions, and that the judgment of the Court below should be reversed and the claim for compensation dismissed.

Respectfully submitted,

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