(6)

INDEX

	Page
Notice of Appeal	i
Grounds of Appeal	ii
Writ of Certiorari	1
Return	3
Employee's Claim Petition for Compensation	4
Respondent's Answer to Employee's Claim Petition	10
Testimony	14
Statement and Determination of Facts and Rule for Judgment	50
Notice of Appeal	54
Determination and Order Affirming Judgment and Dismissing Appeal	56
Reasons	58
Opinion of Supreme Court	61
Judgment of Reversal	65

WITNESSES.

Petitioner's:

Leroy Thompson,		
	Direct	16
	Cross	19
	Re-direct	24
Re-called:		
	Direct	39
	Cross	39
Re-called:		
	Direct	46
Frederick Thompson,		
	Direct	24
	Cross	27
Charles Sykes,		
	Direct	29
	Cross	29

New Jersey State Library

PAGE

Respondent's:

Thomas Carpenter,
Direct 32
Cross 37
Dr. William Eckert,
Direct 41
Cross 44
Re-direct 45
Re-called:
Direct 47

Notice of Appeal.

NOTICE OF APPEAL.

Filed March 5, 1927.

NEW JERSEY SUPREME COURT.

LEROY THOMPSON, *Respondent-Appellant,* *vs.* CHARLES WAGNER, *Prosecutor-Appellee.*	*Workmen's Compensation.* *On Appeal from Supreme Court.* *Notice of Appeal.*

To. Messrs. McDermott, Enright & Carpenter, attorneys for appellee.

PLEASE TAKE NOTICE, that the respondent, Leroy Thompson, appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Respectfully yours,

RASKIN, HORNSTEIN & RUSKIN,
Attorneys for Appellant.

Dated February 3, 1927.

Service acknowledged February 4, 1927.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Prosecutor-Appellee.

Grounds of Appeal.

GROUNDS OF APPEAL.

Filed March 5, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LEROY THOMPSON, *Respondent-Appellant,* *vs.* CHARLES WAGNER, *Prosecutor-Appellee.*	*On Appeal from Supreme Court.* *Grounds of Appeal.*

LEROY THOMPSON, the respondent-appellant, sets down the following ground of appeal from the judgment of the Supreme Court in the above-entitled cause:

1. The said New Jersey Supreme Court reversed the judgment of the Hudson County Court of Common Pleas awarding compensation, whereas the said Supreme Court should have affirmed the judgment of said Hudson County Court of Common Pleas.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys for Appellant.

Service of a copy of the foregoing grounds of appeal is duly acknowledged this 4th day of February, 1927.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Appellee.

New Jersey Supreme Court

Writ of Certiorari.

New Jersey, ss:

(Seal) The State of New Jersey, to the Judges of the Court of Common Pleas in and for the County of Hudson, GREETING:

We being willing for certain reasons to be certified of a certain judgment by you lately made and rendered on an appeal to your said Court of Common Pleas in and for the County of Hudson aforesaid, from the determination of Charles E. Corbin, Deputy Commissioner of the New Jersey Department of Labor, Workmen's Compensation Bureau, in a cause wherein Leroy Thompson was the petitioner and Charles Wagner was the respondent, by which said determination was affirmed, do command you that you send under your seals to the Justices of our Supreme Court of Judicature at Trenton on the 19th day of January, inst., as well the judgment aforesaid, your determination and order affirming the judgment of the Workmen's Compensation Bureau and dismissing the appeal, as the determination, order and proceedings made and given by the said Charles E. Corbin, with all things touching or concerning the same as fully and entirely as they remain in your Court before you, by whatsoever

Writ of Certiorari

names the parties may be called therein, together with this our writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, William S. Gummere, Chief Justice of our said Court at Trenton, the 15th day of January, Nineteen Hundred and Twenty-Six.

EDWARD S. KELLEHER,
Clerk.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

I allow the within writ. Let it be sealed.

JAMES F. MINTURN,
J. S.

Return.

NEW JERSEY SUPREME COURT

LEROY THOMPSON, Petitioner, vs. CHARLES WAGNER, Respondent.	On Certiorari.

To the Justices of our Supreme Court of Judicature at Trenton, New Jersey:

I do hereby return the pleadings, proceedings and judgment in the Court of Common Pleas in and for the County of Hudson, as well as the record, determination, judgment and proceedings made and given before Deputy Commissioner Charles E. Corbin, with the exception of the testimony taken before the Deputy Commissioner, which is omitted by stipulation of counsel, with all things touching or concerning the same, as fully and entirely as remaining in our Court before me, and I do hereby certify and send under my seal with the schedule hereto annexed as within I am commanded.

February 17, 1926.

CHARLES M. EGAN,
Judge

Employee's Claim Petition for Compensation.

Filed Aug. 24, 1925.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Trenton, N. J.

LEROY THOMPSON, Petitioner, vs. CHARLES WAGNER, Respondent.	April 20th, 1925.

Attorney for Petitioner Raskin & Hornstein,
1 Exchange Place, J. C., N. J.
(Address)

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What is your name? Leroy Thompson.

2. Where do you live? 5 Hackensack Avenue,
(Street Address)
Town of Weehawken, N. J.
(City or Town)

3. Sex Male. 4. Age 21. 5. Married? No.

Employee's Claim Petition for Compensation

6. By whom were you employed at the time of the accident? (Give name and business address)
Charles Wagner
(Name)
142 Pavonia Avenue
(Street Address)
Jersey City, N. J.
(City or Town)

7. What was the business of your employer? Contractor.

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No.

9. Did you receive such notice from your employer? No.

10. Did your employer have knowledge of your accident? Yes.

11. Did you notify your employer of your accident? Yes.

12. If so, on what date? Jan. 28, 1925, same date as accident.

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

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Laborer. I was shoveling snow and my right hand was struck by the shovel and badly injured.

15. When did the accident happen? (State month, day, year and hour.) January 28, 1925.

16. Where did the accident happen? In the Erie yard, Weehawken, N. J.

17. What was the nature of the accident and how did it happen? While shoveling snow I was struck by a shovel and my right hand pinkey was badly injured.

18. On what date were you compelled to stop work because of the injury? Jan. 30, 1925.

19. On what date were you well enough to work again? April 16, 1925.

21. Give nature of any injury from which you will recover. The doctors had to amputate the finger.

22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. My right hand pinkey had to be amputated in order to save the hand, as blood poison had set in.

23. Were your wages fixed by piece-work? No.

25. If wages were fixed by the hour, state rate per hour. .50 per hour.

26. Give number of hours in an ordinary working day. 10 hrs. per day.

27. Give number of days in an ordinary working week. 6 days.

28. State the amount of weekly wages. $30.

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

30. Has your employer promised to pay you any compensation? No.

32. Was medical aid required? Yes.

33. Did you receive medical, surgical or hospital services? Yes.

34. Did you request your employer to furnish these services? Yes.

35. Were they furnished? No.

37. If not, what sum did you spend for them during the first four weeks after the accident? None.

38. Give name and address of physician and hospital. Dr. F. C. Wolf, 1109 Garden Avenue, Hoboken, N. J., and North Hudson Hospital, Weehawken, N. J.

39. What other facts are there which you believe important? After having sustained the injury, I was treated by Dr. Wolf of Hoboken, N. J. I then called *to* the North Hudson Hospital of Weehawken, N. J., where the Doctors stated that finger had to be cut off at once.

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

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 com-

pensation 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.

And your petitioner will ever pray, etc.

LEROY THOMPSON,
(Petitioner)
5 Hackensack Ave., Weehawken, N. J.
(Address)

State of New Jersey, }
County of Hudson. } ss:

Leroy Thompson, 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; and 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.

LEROY THOMPSON.
(Petitioner)

Subscribed and sworn to before me, this 20th day of April, 1925, at Jersey City, N. J.

E. JEREMIAH CAHICHIO,
Notary Public of New Jersey.

(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.

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate 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,

Secretary.

I, William E. Stubbs, Deputy Commissioner & Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the petition filed in this cause.

W. E. STUBBS.

Respondent's Answer to Employee's Claim Petition.

Filed Aug. 24, 1925.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Trenton, N. J.

LEROY THOMPSON,
Petitioner,

vs.

CHARLES WAGNER,
Respondent.

Attorney for Respondent McDermott, Enright & Carpenter, 75 Montgomery Street, Jersey City.
(Address)

In answer to Claim Petition filed in this cause:

1. What is the petitioner's name? Leroy Thompson.

2. Where does he reside? 5 Hackensack Ave.
(Street Address)
Weehawken, N. J.
(City or Town)

6. Was the Petitioner in your employ? Yes.

7. State your business. Contractor.

8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did you give such notice to him? No.

10. When did you first have knowledge of this accident? None.

11. Did you receive notice of this accident from the Petitioner? None.

13. Has any claim for compensation been made? Yes.

14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Laborer.

15. When did the accident happen? Claims on Jan. 29, 1925—froze finger.

16. Where did the accident happen? Don't know. Was working at Erie Yard, Weehawken.

17. What was the nature of the accident, and how did it happen? This man claimed he froze his finger while shoveling snow at Weehawken.

18. On what date was the petitioner compelled to stop work because of the injury? Didn't stop.

19. On what day was the injured well enough to work again? Don't know—discharged.

20. If still disabled, on what date do you estimate he will be able to work? No disability.

22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ. Explain fully. None.

25. If wages were fixed by the hour, state rate per hour. 36c.

Respondent's Answer to Employee's Claim Petition

26. Give number of hours in an ordinary working day. 10.

27. Give number of days in an ordinary working week. 7.

28. State the amount of weekly wages. $32.20.

29. How much money have you paid the injured as compensation (not including medical aid) since the accident? Nothing.

30. Have you promised to pay compensation? No.

32. Was medical aid required? Don't know.

34. Were you requested to furnish the necessary medical services required by law? No.

39. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reasons for this conclusion.

1. There was no accident arising out of and in the cause of the employment.

2. Because there was no actual or imputed negligence on the part of the employer which caused the condition.

3. Because the frozen fingers of the petitioner are the result of weather conditions over which respondent has no control.

4. Received no notice of any accident.

(Signed) CHARLES WAGNER,
(Respondent)
142 Pavonia Ave., J. C.
(Address)

Respondent's Answer to Employee's Claim Petition

State of New Jersey, }
County of Hudson. } ss:

Charles Wagner, of full age, being fully sworn according to law, on his oath deposes and says: That he is 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.

(Signed) CHARLES WAGNER.
(Respondent)

Subscribed and sworn to before me, this 12th day of June, 1925, at Jersey City.

(Signed) EDMOND TYLER,
Notary Public of New Jersey.

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

We hereby consent to the filing of the within answer as within time.

June 15, 1925.

RASKIN & HORNSTEIN,
Attys. of Petitioner.

I, William E. Stubbs, Deputy Commissioner & Secretary of the Workmen's Compensation Bureau, hereby certify the foregoing to be a true copy of the answer filed in this cause.

W. E. STUBBS.

Testimony.

(*Filed, Sept. 5, 1925*)

WORKMEN'S COMPENSATION BUREAU

DEPARTMENT OF LABOR OF NEW JERSEY, JERSEY CITY

Hudson County District

LEROY THOMPSON, Petitioner,

vs.

CHARLES WAGNER, Respondent.

Transcript of stenographer's notes of evidence taken in the above entitled matter before the Honorable Charles E. Corbin, Deputy Compensation Commissioner, at Workmen's Compensation Bureau, 571 Jersey Avenue, Jersey City, on the 3d day of July, A. D., 1925, at 10:30 o'clock a. m.

Appearances:

Mr. Isidore Hornstein, Esq., (Raskin & Hornstein) for the petitioner; Carl Kuebler, Esq., (McDermott, Enright & Carpenter) for the respondent.

Mr. Kuebler: I would like to move to amend my answer by inserting therein, as a fifth defense, that he was a casual employee.

The Court: Is that agreeable to you?

Mr. Hornstein: Yes.

The Court: All right. Suppose we go ahead. It is stipulated the amendment of the answer as to casual employmen. You can stipulate something else?

Mr. Kuebler: Wages are $32.20 per week.

The Court: What was it?

Mr. Kuebler: That is what it would amount to on weekly figures, $32.20. Thirty-six cents per hour.

Mr. Hornstein: Fifty cents an hour.

The Court: It would make no difference anyway. It would be the maximum anyway. Can you stipulate anything else?

Mr. Hornstein: Do you agree he was working for the—

Mr. Kuebler: He was on that day, yes, working for them on the day of the accident.

The Court: Working for the respondent.

Mr. Hornstein: It is simply a question of whether he suffered an accident.

The Court: Or whether it was casual employment.

(Discussion of counsel off the record.)

The Court: We stipulated that the wages were thirty-two dollars and twenty cents and he worked for the respondent on January 29th, 1925.

LEROY THOMPSON the petitioner, sworn:

Direct-examination by Mr. Hornstein:

Q. How long before the day of the accident had you been working? A. Before this accident?

Q. Yes. A. Why, I had been working all the time.

Q. For the respondent? A. I had been working all the time.

Q. How long? A. Seven or eight months.

Q. And had you been paid in that time? A. I wasn't working for this concern at that time. I was working—

The Court: Speak a little louder.

A. I wasn't working for the railroad then. I was working for the docks, marine company.

Q. How long had you been working for Charles Wagner, the respondent in this case? A. Two days.

Q. Two days? A. Two.

Q. And how long were you hired for? A. I don't know exactly. As long as I worked.

(Answer repeated by the stenographer.)

Q. I see. As long as you were able to work? A. Yes.

Q. In January 28th, 1925, what happened to you?

The Court: Is it the 28th or 29th?

Mr. Hornstein: It is the 28th I have it.

The Court: The stipulation I think is the 29th.

Mr. Kuebler: 29th my records show.

Witness: 28th.

The Court: Do you want to amend the petition.

Q. What date did the accident happen? A. 28th of January.

Mr. Kuebler: He alleged 28th. You have it as the 29th, I answered as the 29th.

The Court: Can you agree on the date? Well, go ahead.

Q. On what date did this accident happen? A. On the morning of the 28th of January shortly after I went to work, I was clipped on the finger by a shovel.

Q. You what? A. (Answer repeated by the stenographer.) Not paying any attention to the cut—

Q. Did it bleed? A. Yes, sir; it did.

Q. Did you do anything for it to stop the bleeding? A. No more than rub snow on it, rub my hand on the snow. (Answer repeated by the stenographer.)

Q. And then did you continue to work? A. I did.

Q. And what happened? A. Later my finger began to feel funny. It began to pain me, and afterwards along about twelve o'clock, I reported to my foreman.

Q. You told your foreman? A. Yes.

Q. What was his name? A. Tom Carpenter.

Q. Tom? A. Tom Carpenter.

Q. Carpenter? A. Yes, sir.

Q. And what did he do? A. He looked at it and he said it was frozen.

Q. He said it was frozen? A. Yes.

Q. Did you tell him it was frozen? A. I did not.

Q. Then what happened? A. Then I continued to work that day and Thursday night I worked. The next following night I worked and on Friday morning my finger and hand were swollen so badly I couldn't work, so I got an order from him to attend the doctor.

Q. What doctor did you go to? A. Dr. Wolff, Hoboken.

Q. And did you show him your finger? A. Yes.

Q. And what did he do? A. He dressed it.

Q. Yes. A. And the following night my finger pained me so badly that I couldn't sleep and I thought it best to go to the hospital.

Q. And you went to the hospital A. Yes, sir.

Q. North Hudson Hospital? A. North Hudson Hospital.

Q. What did they do there? A. They dressed my finger for five or six days and on the following week after I went there the doctor told me they had to cut the finger off or I would lose my whole arm.

Q. And did they cut it off? A. They cut it off.

The Court: Which finger?
Witness: (Witness indicates.)
The Court: Right little finger.

Q. Have you reecived any compensation since then? A. No, sir.

Q. Received any money from the company? A. No.

Q. Respondent. Have you spent any money for doctors' bills for medicines? A. No.

Q. Who paid Dr. Wolff? A. I don't know who paid him.

Q. How long were you out of work as the result of this injury? A. Sixteen weeks.

Q. Sixteen weeks. And then you went back to work? A. Yes.

Q. Did you go back to this respondent's employ? A. No.

Mr. Hornstein: That is all.

CROSS-EXAMINATION by Mr. Kuebler:

Q. You say you went to the hospital on Friday? A. That Friday night, yes.

Q. Friday night? A. Yes.

Q. Did the accident happen the day before? A. It happened on a Wednesday.

Q. That would be the 28th. The 28th of January. You say you were struck on the finger by a shovel? A. Yes, sir.

Q. By your own shovel? A. No, sir; I have a witness that struck me—

Q. Tell us how you were struck on the finger by a shovel. A. I was working, we were all working together, sort of in a bunch like, and I was standing in front of my fellow workman and the fellow workman behind me and all of a sudden I felt a gash from the shovel strike my finger. I was working about fifty feet from him.

The Court: About fifty feet?
Witness: Yes, sir.

Q. Fifty feet from this other man? A. Yes.

The Court: How did he hit you?

Q. He did not throw his shovel at you, did he? A. When I seen it the shovel was on the ground. When I looked around the shovel was on the ground and he was standing up looking.

Q. What part of the shovel hit your finger? A. The shovel part, part that picks up the snow.

Q. Bottom part? A. Yes, sir.

Q. Where did it hit your finger? A. Hit it along there (indicating).

Mr. Hornstein: Right on the joint?
Witness: Yes, sir.

Q. Was there any mark there? A. It certainly was.

Q. What is that? A.Yes, sir; it was.

Q. How big a mark was on your finger? A. It cut a sort of a gash, like, not very deep.

Q. How long? A. I couldn't exactly tell how long. I didn't measure it.

Q. You saw it, didn't you? A. I don't know how long it was.

Q. Do you know how long an inch is? A. Sure I know how long an inch is.

Q. Was it an inch long? A. No; it wasn't an inch long.

Q. Was it a half inch long? A. I don't know.

Q. Or was it just like the prick of a pin? A. Just about the size safety head pin.

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

Q. Safety head pin. Did you show that to Mr. Carpenter? A. Certainly.

Q. You did? A. Yes, sir.

Q. And when did you show that to him? A. At noon time.

Q. At noon time on the 28th? A. 28th.

Q. And what did he tell you at that time? A. He said the finger was frozen.

Q. He told you your finger was frozen. And did you have any pain in any other finger besides this one finger? A. No.

Q. No other finger but that one finger? A. No.

Q. How did the finger feel? A. It felt sort of numb like; dead.

Q. And how long did it feel that way? A. Felt that way until they cut it off.

Q. What is that? A. It felt that way until after I went to the hospital.

Q. And what hospital did you go to? A. North Hudson.

Q. And who did you see at the North Hudson Hospital? A. Who did I see?

Q. Yes. A. I don't know what you mean. I seen a lot of patients there.

Q. Do you know who the doctor was who treated you there? A. Dr. Sweeney.

Q. Any other doctor? A. I don't know the other's name.

Q. What is that? A. I don't know the other's name.

Q. There was another doctor, wasn't there? A. Yes, sir.

Q. On what date were you employed? A. On the 28th.

Q. On the 28th. The very date that this happened? A. Yes, sir.

Q. And that is the only day you worked for the Wagner Construction Company? A. I worked that day and the next night.

Q. And the next night. What time did you go on work on the 28th? A. Seven o'clock.

Q. Seven a. m. And you worked until what time that day? A. Until quitting time, four thirty.

Q. Until what? A. Until quitting time, four thirty.

Q. Three thirty? A. Four thirty.

Q. That is the 28th. And you went back what time on the 29th? A. Six o'clock.

Q. Six o'clock a. m. A. a. m. yes, sir; six o'clock I came.

Q. In the evening or morning? A. In the evening

Q. In the evening? A. In the evening.

Q. What time did you leave? A. About five o'clock next morning.

Q. What? A. Five o'clock next morning.

Q. Five o'clock the 30th. Those are the only two days you worked there? A. Those are the only two days I worked for the railroad.

Q. While you worked there what were you shoveling? A. Shoveling snow.

Q. Snow. You had never worked for Wagner before, had you? Charles Wagner. A. No.

Q. And you were hired to shovel snow, weren't you? A. Yes, sir.

Q. What is that?

Mr. Hornstein: He said "yes."

Q. Yes. How deep was the snow at that time?

Mr. Hornstein: I object. What difference does that make, your Honor, how deep it was.

Any reason for that question?

Mr. Kuebler: I just thought—

Witness: How deep was this snow?

Mr. Hornstein: Never mind. Do not answer.

The Court: Objection sustained.

Q. How much pay did you get from Charles Wagner? A. I was getting fifty cents an hour.

Q. How many days were you paid for? A. Paid for two days.

Q. Now before you worked for Charles Wagner, what were you doing? A. I worked for the New York Marine Company.

Q. New York Marine Company. And what work were you doing for them? A. Long shore.

Q. Long shoreman? A. Yes, sir.

Q. How long did you work for the New York Marine Company? A. About seven months.

Q. Seven months. Was that your line of work, long shoreman work? A. That is what I did while I was working there.

Q. That is what you did working there. At the time you went to Charles Wagner you were out of work over there; were they shut down over the snow storm? A. Were they shut down?

Q. Yes. A. No. They weren't shut down.

Q. You had left the work over there at the New York Marine? A. Yes, sir.

Q. And you were hired by whom? A. Mr. Carpenter.

Q. By Mr. Carpenter, and when he hired you he hired you to shovel snow, didn't he? A. Sure he hired me to shovel snow.

Q. How did your finger look just before it was cut off? A. How did it look?

New Jersey State Library

Q. Yes. Look any different from the ordinary finger? A. Certainly it did.

Q. Will you describe how it looked? A. It was sort of dark like. It turned dark like.

Q. It looked dark? A. Yes.

Q. Did the doctor say what was the matter with it? A. He said it was blood poisoning.

Q. What? A. He said it was blood poisoning.

Mr. Kuebler: That is all.

RE-DIRECT-EXAMINATION by Mr. Hornstein:

Q. Prior to January 28th, 1925, had you had any trouble with that finger? A. Had I ever any trouble?

Q. Before this injury did you have any trouble with that finger? Was that finger all right before the accident? A. Yes, it was.

Mr. Hornstein: That is all.
The Court: That is all.

FREDERICK THOMPSON witness on behalf of the petitioner, sworn:

Direct-examination by Mr. Hornstein:

Q. Are you any relation to Leroy? A. Yes, sir.

Q. Brother? A. Yes, sir.

Q. And were you working with him at the time of this accident? A. Yes, sir; at the same time.

Q. Did you see him sustain any injuries on the

day in question? A. Well, of course, I did work with him right enough, so when he got hit—

Mr. Kuebler: What is that?

Witness: I did the work with him. Of course I saw him when I struck him with the shovel.

Q. You struck him with the shovel? A. Yes, sir.

Q. Tell us how you came to strike him with the shovel? A. I will tell, you see? We were all working together and of course we were told to clean all the switches leading to the different tracks, see? Of course five men were sent to each switch you see. And we came; of course when two switches ran together ten men would be working in a bunch. So we hardly had any place to shovel at all. We had to shovel right in between each other. Of course he was working right in front of me and I happened to hit him with the shovel through an accident, swinging the shovel.

Q. When you swung the shovel you struck him? A. Yes, I did.

Q. Did he say anything when you struck him? A. He simply turned around and looked at me, see, and he kept on working again.

Q. Did you notice his finger bleeding? A. Well, of course, after I had hit him with the shovel—

Mr. Kuebler: Just a minute. Did you notice it bleeding?

Witness: No. I never noticed it bleeding.

Q. What were you going to say?

Mr. Kuebler: I think he has answered the question.

Q. All right. After that what happened? A. Well, after that this fellow remarked to me, he says—

Mr. Kuebler: Who remarked to you?
Witness: Sax.

Q. Who is Sax? A. That fellow sitting there.
Q. What did he say?

Mr. Kuebler: I object to what he remarked.
The Court: Objection sustained.

Q. Did you see his finger swell? A. Well, of course I did see it after. He came to me at twelve o'clock and he said to me his finger felt rather funny. Of course I didn't know exactly what was the trouble with the finger. I never thought the shovel would do anything at all.

Q. When he complained to you his finger felt funny what did you do? A. I said that wasn't anything. He could go back to work, and keep on working.

Q. Do you live with him? A. Yes.

Q. Sleep with him? A. Yes.

Q. What happened that night? A. Well, that night he went to work again. He told me his finger was hurting him and he said, "I believe I will go back to work tonight, because I don't know how long the job might last and I will try to make as much time as I can on the job." So I told him "Go ahead on back to work."

Q. Were you with him when he went to the

doctor? A. No; I wasn't with him. I am working with him.

Mr. Hornstein: All right. That is all.

CROSS-EXAMINATION by Mr. Kuebler:

Q. You were employed by whom? A. Well, a tall man, you know, foreman.

Q. Carpenter? A. Sure.

Q. And when were you employed? A. Well, I went to work that Wednesday morning. Wednesday morning all of us went to work.

Q. (Question and answer repeated by the stenographer.) There had been a heavy snow storm at that time. A. Yes, the snow was falling pretty heavy.

Q. And you were employed to shovel snow, weren't you? A. Yes.

Q. And at the time you were employed you understood that you were employed to shovel snow? A. Oh, sure.

Q. You were all given to understand you were to shovel snow? A. Yes.

Mr. Hornstein: We admit that.

Q. Now, how far were you from your brother at the time you struck him with the shovel? A. He was standing just about, I should say, four feet from me.

Q. Four feet from you? A. Something like that.

Q. And if he said you were fifty feet from him that is not true? A. Fifty feet?

Q. Yes. A. I couldn't be fifty feet. Because we were all working right in a bunch together.

Q. You did not see any mark on his finger afterwards? A. You mean after he got hit?

Q. You did not see anything on his finger? A. Sure. I saw a cut on his finger.

Q. You saw a cut on his finger? A. Yes. His finger was split open like, you see? But it wasn't very long or anything like that.

Q. How long was it? A. I couldn't exactly tell you how long it was, but it was a small cut anyway.

Q. How much blood was on it? A. I never noticed any blood on it.

Q. Never noticed any blood on it? A. No, not at that time. I never saw any blood.

Q. Do you mean the finger was split open wide and there wasn't any blood? A. The time he showed it to me, chief. At the time he did, he could have washed it off.

Q. Did he have it bandaged up? A. Not at that time. He showed it to me at noon time.

Q. He showed it to you at noon time? A. Yes.

Q. You went to work Wednesday morning? A. Yes; Wednesday morning.

Q. And isn't that the same morning you went to work? A. Sure, same morning.

Q. About what time did he strike his finger? A. We came together about somewhere between eight and ten o'clock, something like that, and we all worked together.

Q. What time? A. Between eight and nine o'clock. I couldn't exactly tell you.

Mr. Kuebler: That is all.

CHARLES SYKES a witness on behalf of the petitioner, sworn:

Direct-examination by Mr. Hornstein:

Q. Were you working on January 28th, 1925, in the same gang with these Thompson boys? A. I was.

Q. Was Leroy Thompson working at that time? A. Yes, sir.

Q. What do you know about the accident? A. I was standing up lighting my pipe, and I saw Mr. Thompson.

Q. What were you doing? A. I was standing up lighting my pipe and I saw Mr. Thompson make a careless lick and he hit the boy on the hand. I said, "Go slow. You just hit the man with your shovel."

Q. You told that to whom? A. Mr. Thompson, Fred Thompson.

Q. Did you see his shovel strike Leroy Thompson? A. That is the time I told him to go slow. He just struck a man.

Q. Did you see the injury Leroy Thompson sustained? A. No, sir.

Q. Is that all you know about it? A. Yes, sir.

CROSS-EXAMINATION by Mr. Kuebler:

Q. Did you look at his finger? A. No, sir.

Q. You were hired to shovel snow too? A. Yes, sir.

Q. When were you hired? A. I had been there quite a few days. I went there some time in January.

Mr. Hornstein: I want to rest at the present time, with the permission if any medical testimony is offered to show any facts other than that this man's finger was amputated as the result of this accident, I want permission to put in medical testimony.

The Court: You can raise that on rebuttal.

Mr. Hornstein: I simply want to establish a prima facie case, and as the result—

The Court: You have that right on rebuttal.

Mr. Hornstein: Plaintiff rests.

Mr. Kuebler: I move to dismiss on the plaintiff's case on the ground the plaintiff's testimony now shows this man was a casual employee, hired to shovel snow. He came there during the snow storm and came there with another man, and the testimony is they were hired to shovel snow. There is no testimony they had any other work that they intended to do. Simply for the purpose of shoveling snow. That seems to me certainly comes under the head of casual employment, if anything possibly can.

The Court: I will deny the motion. I have had this question before me before on the ground the law states, the law defines casual employment, "If in connection with the employer's business the occasion for which arises by chance or is purely accidental," it is my opinion shoveling snow is a part of an employer's business, especi-

ally in the railroading business, clearing switches; it is part of his business. He had to clear those switches of snow, and for that reason I do not think that occasion arose by chance or was purely accidental. It was something that could be expected, and it happened every year. And I believe the intent of the law is a work that can be expected to have to be done in the employer's business is not casual. Deny the motion.

Mr. Kuebler: The only case I can find anywhere similar to that is the case of Saspada against Public Service, 38 Law Journal. In that case two questions came up: One question of freezing and the other question of casual employment. In that case the man was hired to remove snow from the tracks of the respondent Public Service Railway, and the necessity for the work was due to the snow storm, and in that case they held that the employment was a casual employment, saying the casual employment is one which comes about more or less by chance to meet the exigencies of a certain situation or a temporary emergency. And while it may or may not be within the general scope of the business of the employer—that holds it does not have to be—

The Court: That decision was rendered before this amendment was made. I think it is an old case.

Mr. Kuebler: That is about 1915.

The Court: You see this is a definition

here which was passed along around 1923. The reason I am ruling rather abruptly is I had that question rather lately and I gave it lots of thought.

(Further discussion of counsel.)

Mr. Kuebler: Exception. (To the denial of the motion.)

RESPONDENT'S CASE

THOMAS CARPENTER a witness on behalf of the respondent:

Direct-examination by Mr. Kuebler:

Q. By whom are you employed? A. Erie Railroad.

Q. Erie Railroad? A. Yes, sir.

Q. And what is your position? A. Track foreman.

Q. Track foreman? A. Yes, sir.

Q. And did you hire a man by the name of Leroy Thompson? A. Yes, sir.

Q. Have you your records with you? A. Yes, sir.

Q. By referring to your records can you tell us when you hired him? A. Yes, sir.

Mr. Hornstein: Well, I just want to object to this record at this time for this reason: What difference is it going to make whether he was employed on the 28th or 29th? Suppose he does prove it was the

29th, for the sake of argument? They admitted he was employed by the respondent at this time.

Witness: January 28th.

Q. January 28th? A. Yes.

Q. For whom did you employ him? A. For the Erie Railroad.

Q. What is that? A. Erie Railroad.

Q. Well, for the Erie Railroad or Charles Wagner? A. Charles; yes.

Q. And why did you employ him that day? A. To shovel snow.

Q. And did you employ other men to shovel snow at that time? A. What is that?

Q. And did you employ other men to shovel snow at that time? A. Yes, sir.

Q. Was he employed to do anything else besides shovel snow?

Mr. Hornstein: I object.

A. That's all; shovel snow.

Mr. Hornstein: I will withdraw the objection, go ahead.

A. Only for snow.

Q. Only shoveled snow? A. Yes.

Q. Was he or was he not to be a permanent employee?

Mr. Hornstein: I object.

The Court: Objection sustained.

Q. Was he employed for any special length of time? A. No, sir.

Q. Was he to do any other work besides shovel snow? A. No, sir.

Q. How much snow was there at that time? A. Well, I don't remember just that week. Probably was a foot.

Mr. Hornstein: We will admit there was a lot of snow.

Q. And do you remember Leroy Thompson reporting any accident to you? A. Well, there was about midnight he came in from supper—

Mr. Hornstein: The same day?

Witness: No; the 29th.

Mr. Hornstein: That you hired him?

Witness: The 29th.

Mr. Hornstein: What time of day was that? Midnight, January 28th, is that what you mean?

Witness: Seven o'clock in the morning.

Mr. Hornstein: He was hired?

Witness: January, seven o'clock in the morning.

Q. January 28th? A. On the 28th.

Q. And then he came to you? A. And then he came to me. He was working on the 28th and next day at seven o'clock to twelve o'clock.

Mr. Hornstein: Yes.

Q. And he came to you what time? A. Seven o'clock.

Q. Seven o'clock? A. Seven o'clock.

Q. On the 29th? A. On the 29th.

Q. And what did he say to you? A. He didn't say nothing then. We kept working.

Q. You mean he was employed by you seven o'clock on the 28th. A. 28th.

Q. Did he report anything to you? A. No, sir; he reported on the 30th in the morning.

Q. On the morning of the 29th? A. Morning of the 30th. I got him the last day's working on the 30th—on the 29th.

Q. Did he ever come to you and tell you he had hurt his finger? A. No, sir; no, sir.

Q Did he ever come to you and tell you—show you his finger? A. No, sir.

Q. Did he ever come to you at any time and say anything about his finger being frozen? A. No, sir.

Q. He did not? A. No, sir.

Q. How many days did he work there? A. He has got ten hours on the 28th and sixteen hours on the 29th.

Q. On the 29th? A. Yes. (Answer repeated by the stenographer.)

Q. He worked a total of twenty-six hours. A. Yes, sir.

Q. And during all that period of time you never had any knowledge of any accident having happened to him? A. Well, the 29th about twelve o'clock, when we went to go for supper he came in and started over his hand like this, over by the stove. I asked him what was the matter—"What is the matter with you?" And he said, "Oh, I got a little froze." It being frozen, I had it all right. Next day it was all right. I seen him kept rubbing and rubbing. I wanted to chase him home. He went out the door and he came back again and he said, "I am all right for tomorrow morning." I had Johnson, one of the colored fellows, he had the same thing. I wanted

to send him to the hospital the next day. He refused to go to the hospital.

By Mr. Hornstein:

Q. Who refuesd? A. Thompson and I sent him to the hospital.

Q. You sent Leroy Thompson to the hospital? A. Yes, sir.

Q. You did send him to the hospital? A. I sent him to the doctor.

Q. You told him to go to Dr. Wolff? A. Yes.

By Mr. Kuebler:

Mr. Kuebler: Are you cross-examining?

Mr. Hornstein: No.

Q. How long was he there? A. He was there next morning I know, six o'clock.

Q. And what time did you send him to Dr. Wolff's? A. Well, ten o'clock—the time the office was open.

Q. On what day was that? A. On the 30th.

Q. On the 30th? A. On the 30th of the month.

Q. On the 30th? A. Yes, sir.

Q. At the time he came in and called your attention to his finger did he have any gloves on? A. No.

Q. Did you observe anything wrong with his finger? Did you look at his finger carefully? A. No.

Q. You did not. So he did not say anything to you at that time about his finger having been hurt with a shovel? A. No, sir.

Q. Is it the custom in your work to hire men especially for the purpose of shoveling snow after these snow storms?

Mr. Hornstein: I object if the Court please. What relevancy would it have to this particular hiring, as to him hiring other men at other occasions?

The Court: They have the right to show the custom. I will allow the question.

(Question repeated by the stenographer.)

A. No; not after the snow storms.

Q. At this particular time, you said, did you not, this man was hired to shovel snow? A. That's all. He was only hired for snow, yes.

Q. When you hired him did you tell him he was hired to shovel snow? Did you tell him? A. Sure.

Q. At the time you hired him he was hired to shovel snow. A. Sure.

Q. Did you tell him he was to do anything else besides shovel snow? A. Only snow.

Q. Only snow? A. Only snow. The commissary he had the straight orders not to hire any employees besides—

The Court: Just answer the question.

Mr. Kuebler: Wait a minute. That is all.

CROSS-EXAMINATION by Mr. Hornstein:

Q. You knew that his finger, there was something the matter with his finger, didn't you? A. Well, he came to the shanty and started rubbing up snow on the hand.

Q. You did know when he rubbed his hand there was something wrong with his finger, didn't you? A. Sure, I asked him.

Q. Didn't you tell him to go and see the doctor and give him Dr. Wolff's name and address? A. Yes.

Q. So that you did know that he was injured, isn't that a fact? A. Why, sure.

Q. Did you examine his finger to see the cut? A. No; didn't have no cut on.

Q. Did you look at the finger? A. No; I didn't look at the finger.

Q. How did you come to tell him to go to see the doctor? A. He told me, he said his finger is frozen.

Q. He told you it was frozen? A. Yes; frozen.

Q. You are sure about that? A. Well, I am sure.

Q. Was his finger swollen? Did you look at his finger at all? A. When I sent him to the doctor—

Q. Before you sent him to the doctor did you look at his finger? A. Yes, sir.

Q. Did it appear to be swollen? Yes or no. A. Only the fat of the finger was started to turn white.

Q. It started to turn white? A. White.

Q. Pus?

Mr. Kuebler: No. I object to that.

The Court: Strike it out.

Q. Did that white look like matter? A Yes.

Q. And was the finger swollen? A. No; finger just was like mine.

Q. The finger was just like yours except there was a white spot there? A. A little white.

Q. For the purpose of the record the witness

indicates the same part of the finger that was indicated by Leroy Thompson. That is all.

Mr. Kuebler: That is all. We have sent for the doctor. We haven't got the doctor here. He is supposed to be down here.

LEROY THOMPSON, the petitioner, re-called:

Direct-examination by Mr. Hornstein:

Q. Did you ever tell Mr. Carpenter that your finger was frozen? A. Why, no.

Q. When is the first time after you sustained this injury that you called his attention to it? A. When was the first time? At noon time.

Q. That you called his attention to the fact that your finger was hurt? A. I called his attention to it at noon time.

Q. The same day that you were hurt? A. Yes.

Mr. Hornstein: That is all:

CROSS-EXAMINATION by Mr. Kuebler:

Q. Your finger was frozen, wasn't it? A. I don't know what was the matter with the finger. I don't know whether it was frozen or whether the injury was from the shovel. I don't know what was the matter with it.

The Court: You said—who was the man that hit you with that shovel?

Witness: Fred Thompson.

The Court: That is your brother?

Witness: Yes, sir.

Argument

The Court: Did I understand you to say he was fifty feet away from you?

Witness: Five feet.

The Court: Five feet. On the record you said fifty feet. Did you mean that?

Witness: No, sir, five feet. I must have made a mistake if I said fifty feet.

The Court: That is all.

Mr. Kuebler: That is all.

(Case held temporarily but doctor failed to appear.)

Mr. Kuebler: I do not believe I can get him today. There are two doctors. The one I counted on is sick, and the other is out now.

Mr. Hornstein: Was he subpoenaed?

Mr. Kuebler: No. He was not subpoenaed. I do not usually subpoenae doctors.

(Case was thereupon adjourned until Friday morning July 9th, 1925, at 9:30 o'clock a. m.)

Dr. William Eckert—Direct

WORKMEN'S COMPENSATION BUREAU

DEPARTMENT OF LABOR OF NEW JERSEY, JERSEY CITY

Hudson County District

LEROY THOMPSON,
Petitioner,
vs.
CHARLES WAGNER,
Respondent.

Case resumed pursuant to adjournment.

Appearances as before noted.

July 10th, 1925, 9:30 a. m.

DR. WILLIAM ECKERT, a witness on behalf of the respondent, sworn:

The Court: For the respondent?

Mr. Kuebler: For the respondent.

Direct-examination by Mr. Kuebler:

Q. Doctor, you are a practicing physician in New Jersey? A. I am.

Q. And practicing in this city? A. Yes, sir.

Q. How long have you been practicing?

Mr. Hornstein: We admit his qualifications.

Q. Are you connected in any way with the North Hudson Hospital? A. I am.

Q. And in your connection with the North Hudson Hospital did you have occasion to treat or assist in the treatment of a man named Leroy Thompson? A. I did.

Q. In February, 1925? A. Yes, sir.

Q. Can you tell us when you first saw Leroy Thompson up there? A. The day after he entered the hospital.

Q. And can you tell us what day that was? The date to the best of your recollection. A. The 1st of February.

Q. The first of February? A. Yes.

The Court: February 1st?
Witness: February 1st.

Q. And did you observe his little finger at that time? A. Yes, sir.

Q. Will you tell us what the condition of that little finger was when you saw it on February 1st? A. On examination and observing it it was a dark bluish hue, it was warm, and the nail of the finger was loose, loose and coarsened, this was the exposed flesh underneath, a little serum through it.

Q. A little what? A. Serum, fluid coming from any wound, and there was an anaesthesia, that is a loss of feeling throughout the finger except at the lower portion, that is the portion more toward the hand. The finger was kind of tender at that point. There was nothing to be seen in regard to any injury on the finger that I can remember. Of course there may have been, but

as far as I remember there was nothing outside of this trouble around the nail here.

Q. Yes. Did you make any diagnosis of his condition at that time? A. Yes, sir. From the history the patient told me he had been exposed to the cold shoveling snow for two days and we made a diagnosis of a frost bite of the finger.

Q. Frost bite? A. Frost bite; yes, sir.

Q. What would you give as a medical term for the condition of the finger at the time you first saw it? A. Why, there had been a gangrene due to exposure to the cold. At that time I just would say it was a threatening gangrene.

Q. What, if anything, was done to the finger? A. The finger was kept in warm—constant warm boric acid solution, that is there was a dressing placed on to the finger, was constantly kept warm to increase the circulation of the finger whereby to save the finger. After four or five days of that treatment the pain was getting severe and his general condition was starting to feel the effect of the condition of his finger, so we decided to amputate the finger as the finger was becoming gangrenous, real gangrenous and he would have to have it taken off.

Q. And the finger was amputated? A. And the finger was amputated; yes, sir.

Q. Do you know what date it was amputated? A. I think it was about four or five days later after he came in, about the fifth or something like that.

Q. And that amputation then was due to the gangrene? A. As the result of the gangrenous condition.

Q. His gangrenous—is gangrenous condition

such as that a possible result of a frost bite? A. Yes, sir.

Mr. Kuebler: That is all.

CROSS-EXAMINATION by Mr. Hornstein:

Q. Doctor, do you remember whether Thompson told you he had been struck on the finger by a shovel? A. No; I don't.

Q. Is it possible he may have told you? A. It is a possibility he might have told that to the other men. There were two doctors besides myself. There was Dr. Sweeney and Dr. Elsas, the house man.

Q. Did he tell you there was—did he tell you he had been treated by Dr. Wolff? A. No, sir.

Q. Who represented his employer? A. No, sir.

Q. Or that he had been advised to go to the hospital by Dr. Wolff? A. No; he didn't tell that to me.

Q. How was he admitted to the hospital? By whom? A. By Dr. Elsas, the ambulance surgeon.

Q. Isn't it a fact, doctor, that that condition that you found may have been the result of an accidental injury to the finger? A. It is possible.

Mr. Kuebler: "Probability." The question is a question of probability.

The Court: The question is probability.

Q. Isn't it possible that that condition has been the result of an accidental injury to the finger?

Mr. Kuebler: Objected to as improper. "Probability" not "possibility".

The Court: Possibility has no weight under the law, and the decisions.

Mr. Hornstein: I will withdraw the question.

The Court: The question is "probability".

Q. Change that word to probability to save time. A. Will you repeat that again?

Q. Is it probable such a condition could have arisen by reason of an accidental injury to the finger? A. Yes, sir; it is probable.

Mr. Hornstein: That is all.

RE-DIRECT EXAMINATION by Mr. Kuebler:

Q. Is it in your opinion, doctor, more likely to have arisen from a frost bite?

Mr. Hornstein: I object.

Q. In view of the history of the case given to you? A. Yes.

Q. Than any cut on the finger? A. Yes, sir.

Q. And in which case would a gangrenous condition develop most rapidly, in the case of a frost bite such as described to you by this man or from a slight cut about half an inch or an inch long, very shallow which did not even give evidence of bleeding? A. More probable due to a frost bite, especially in his case.

Mr. Kuebler: That is all.

The Court: That is your case?

Mr. Kuebler: That is my case, your Honor.

LEROY THOMPSON, re-called.

Direct-examination by Mr. Hornstein:

Q. Mr. Thompson, when you were first treated by Dr. Wolff did you tell him that you had sustained an injury to the finger?

Mr. Kuebler: Just a minute.

A. Yes.

Mr. Kuebler: I object to what he told Dr. Wolff?

The Court: Objection sustained.

Q. Did you tell Dr. Eckert and the other doctors who examined your finger that you had been injured on the finger? A. I did.

Mr. Kuebler: Just a minute now. I will permit it as Dr. Eckert, but not any others.

The Court: I have sustained the objection to the other doctor.

Mr. Hornstein: That is all.

The Court: Would you care to sum up?

Mr. Hornstein sums up on behalf of the petitioner.

Mr. Kuebler sums up on behalf of the respondent.

DR. WILLIAM ECKERT, re-called by the Court.

By the Court:

Q. Dr. Eckert you treated his finger? A. Yes, sir.

Q. And how long before this man was able to leave the hospital, do you remember, about? A. That I do not remember. They subpoenaed the records here.

Q. What is that? A. You subpoenaed the records here. I can see in a minute.

Mr. Hornstein: Suppose you refer to them? No objection.

Witness: Yes. February 12th his hand was redressed and was sent out and returned to clinic for dressing.

Q. How soon was he discharged? A. He was operated on on the 6th and he was discharged on the 12th.

Q. What was the condition at the time of his discharge? A. His condition was good. He was sent to clinic for dressing. It was not entirely healed. He came back for dressing. I don't know how long he was at the clinic.

Q. What is your opinion as to how long did that condition stay open? A. Why I should judge about three weeks until it is entirely healed.

Q. About three weeks after the operation? A. Yes, sir. That is a pretty reasonable estimate of it.

Q. Then do I understand that you think he could return to work after that? A. Yes, sir.

Q. How soon do you think he could return to

work? A. Oh, I think about a month after the operation he should return.

The Court: I thank you.

Any further examination?

Mr. Kuebler: No.

Mr. Hornstein: No.

The Court: In this case the weight of the evidence tends to show that this man suffered an accident when he injured his finger. It does not seem to be refuted by the respondent's testimony and being that I am to decide the case on the weight of evidence I find that this employee did suffer an accident arising out of and in the course of his employment.

On the question of casual employment, the law defines casual employment, "If in connection with the employer's business, his employment, the occasion for which arises by chance or is purely accidental" it is my opinion that employers, especially in this kind of work, expect each year that they shall have snow storms; they shall have to keep their tracks clear and they know that they have to employ help to keep their tracks clear and it is not my idea of the intent of the legislature that that is to be considered as casual employment. This is not employment which "arises by chance or is purely accidental". This company knows they have to have help to clear snow left by snow storms. And as far as the memory of man runs around this portion of the country we have had snow

storms every year. I am going to make an award in this case. I will make an award of temporary compensation of four weeks; permanent disability, loss of the right little finger, fifteen weeks, at seventeen dollars.

Mr. Hornstein: If the Court please I would like to ask for a counsel fee in this case. The petitioner was absolutely ready to complete the case last week and the respondent was unable to produce the proof which he deemed necessary, causing me to come here twice. I think seventy-five dollars would be a reasonable fee in view of the fact a new act was just passed by the legislature this year authorizing the referee in compensation cases to award a fee which in his discretion, was adequate, providing no limit, although they provided limits for surgeons, minimum and maximum but they provided no limits on this, and I think seventy-five dollars would be very reasonable in this case.

The Court: Have you anything to say about this?

Mr. Kuebler: I leave it to you entirely. The award amounts to seventeen weeks.

The Court: I will allow counsel fee of seventy-five dollars.

Mr. Hornstein: Nineteen weeks.

Mr. Kuebler: Nineteen weeks.

The Court: My judgment is temporary four weeks at seventeen dollars; permanent: loss of the right little finger fifteen weeks at seventeen dollars. Counsel fee seventy-five dollars, assessed against the respondent.

Statement and Determination of Facts and Rule for Judgment.

Filed Sept. 5, 1925

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU

Jersey City, N. J.

LEROY THOMPSON, Petitioner, vs. CHARLES WAGNER, Respondent.	On Petition for Compensation.

A formal petition having been duly filed in the above entitled proceeding between Leroy Thompson, petitioner, and Charles Wagner, respondent, praying for compensation under the Workmen's Compensation Act and the several acts amendatory thereof and supplemental thereto; and the respondent having appeared and answered to the said petition and a time and place for the hearing of said petition having been fixed; and the matter duly coming on to be heard before Charles E. Corbin, Deputy Commissioner of Compensation at Jersey City, on the third day of July, 1925 and the hearing continued and completed on July 10, 1925, and the petitioner appearing by his attorneys, Raskin & Hornstein, and the respondent appearing by his attorneys, McDermott, Enright & Carpenter, and the Court having duly heard the testimony offered on behalf of both the petitioner

and the respondent, and the Court having duly heard the counsel on behalf of the respective parties:

I DO HEREBY FIND AND DETERMINE, from the pleadings in this proceeding, the proof and testimony given by the petitioner and respondent and their respective witnesses as follows:

1. That the petitioner, Leroy Thompson, at the time of the accident hereinafter described, resided at 5 Hackensack Avenue, Weehawken, New Jersey.

2. That on January 28th, 1925, the petitioner was in the employ of the respondent and working in the Erie Railroad Yards at Weehawken, New Jersey.

3. That on the said date, petitioner, while employed as aforesaid, received personal injuries in an accident arising out of and in the course of his employment with the respondent, while in the performance of his duties, to wit: Petitioner was shoveling snow in the Railroad Yards together with a group of men and was struck on the little finger of the right hand by a shovel of a fellow employee. That as a result of said injuries the little finger of the right hand was subsequently amputated.

4. That the petitioner, as a result of this accident, was unable to resume his employment for four (4) weeks.

5. That petitioner, at the time of the accident, received as compensation $30.00 per week.

6. Petitioner has received no payment of the compensation due him for temporary disability resulting from the accident.

7. Petitioner has incurred an expense of $11 for service of subpoenas and payment of stenographer's fees in connection with the trial of this proceeding.

8. That the respondent had actual knowledge of the occurrence of the said injury.

9. That as a result of the accident herein, petitioner has suffered temporary disability which lasted for a priod of four (4) weeks, and that he had a disability permanent in quality and partial in character by the loss of the right little finger.

I find, therefore, that the petitioner is entitled to compensation for temporary disability for a period of four (4) weeks at the rate of $17.00 per week, and permanent disability for a period of fifteen (15) weeks at $17.00 per week.

The legal advisers of the petitioner are entitled to compensation in addition to their costs allowed by law in the sum of $75.00, to be paid by the respondent.

It is, therefore, on this 19th day of August, 1925, ORDERED, that judgment final be entered in favor of the petitioner, Leroy Thompson, and against the respondent, Charles Wagner, in the sum of $17.00 per week for a period of nineteen (19) weeks, and the period for said temporary and permanent disability having elapsed, I do

order that said sum be paid forthwith together with counsel fee of $75.00 as above set forth, together with costs.

CHARLES E. CORBIN,
Deputy Commissioner.

Endorsed on back:

Date of Judgment July 10, 1925.

SUMMARY OF AWARD

Weekly Compensation Rate	17.
For personal injuries sustained on January 28th, 1925.	
Compensation for temporary disability	$68.00
Compensation for permanent disability	255.00
Costs and disbursements of proceedings	
Attorneys' allowance	75.00

Notice of Appeal.

Filed Aug. 15, 1925

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU

JERSEY CITY, HUDSON COUNTY DISTRICT

LEROY THOMPSON, Petitioner, vs. CHARLES WAGNER, Respondent-Appellant.	On Petition for Compensation; Claim Petition #3743

To Honorable Charles E. Corbin, Deputy Commissioner, and Raskin & Hornstein, Attorneys of Petitioner:

TAKE NOTICE that the appellant, Charles Wagner, appeals to the Hudson County Court of Common Pleas from a judgment entered in the above entitled cause on August 19, 1925, which cause was tried on July 3rd and July 10th, on the following grounds;

1. Because the Deputy Commissioner erroneously ordered final judgment to be entered in favor of the petitioner, Leroy Thompson, and against the respondent, Charles Wagner, in the sum of $17.00 per week for a period of nineteen weeks together with costs;

2. Because the Deputy Commissioner erroneously found that the petitioner received personal

injuries in an accident arising out of and in the course of his employment with the respondent;

3. Because the Deputy Commissioner erroneously found that the respondent had actual knowledge of the occurrence of said injury;

4. Because there is no proof in the record that the respondent had notice of any accident occurring on the date alleged by the petitioner;

5. Because the Deputy Commissioner erroneously failed to take into consideration the testimony and find that the petitioner was a casual employe of the respondent at the time he sustained the injury;

6. Because the Deputy Commissioner erroneously found that the condition from which the petitioner complained was the result of the accident and not the result of frost bite.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Respondent-Appellant.

Endorsed on back:

Service of a copy of the within notice is hereby acknowledged this 24th day of August, 1925.

RASKIN & HORNSTEIN,
Attorneys of Petitioner.

Determination and Order Affirming Judgment and Dismissing Appeal.

Filed Dec. 11, 1925

HUDSON COUNTY COURT OF COMMON PLEAS

LEROY THOMPSON, Petitioner-Appellee, vs. CHARLES WAGNER, Respondent-Appellant.	On Appeal.

An award having been made herein in the Workmen's Compensation Bureau in favor of the Petitioner-Appellee and against the Respondent-Appellant, and judgment thereon having been duly entered in this Court, and the appeal therefrom having duly come on for argument before me, the Respondent-Appellant appearing by McDermott, Enright & Carpenter, Esqs., and the Petitioner-Appellee appearing by Raskin & Hornstein, Isidore Hornstein of Counsel, and argument on said appeal having been duly heard, the Court hereby determines as follows:

1. The award made in the Court below is in all things proper.

2. That the Petitioner-Appellee was injured on January 28th, 1925, in an accident arising out of and in the course of his employment with the Respondent-Appellant, by being struck on the little finger of the right hand and that said Respondent-Appellant had notice thereof.

IT IS therefore on this 11th day of December, 1925, ORDERED, that the appeal taken by the Respondent-Appellant herein is hereby dismissed and the judgment entered in favor of the Petitioner-Appellee affirmed, and

IT IS further ORDERED that Raskin & Hornstein, Attorneys of Petitioner-Appellee, be allowed the sum of One Hundred ($100) Dollars, as and for the reasonable value of their services in connection with this appeal, which said sum is assessed against the Respondent-Appellant in addition to the counsel fee of Seventy-five ($75) Dollars allowed for their services in the Court below, both of which said sums aggregating One Hundred Seventy-five ($175) Dollars shall be paid to said attorneys in a lump sum forthwith.

IT IS further ORDERED, that the Respondent-Appellant, in addition to the counsel fees herein, do pay to said attorneys the sum of Eleven ($11) Dollars, being legal disbursements incurred by them for stenographers services in the Court below.

IT IS further ORDERED, that judgment final be entered in favor of the Petitioner-Appellee, Leroy Thompson, and against the Respondent-Appellant, Charles Wagner, in the sum of Seventeen ($17) Dollars per week for a period of nineteen (19) weeks, which is to be paid in a lump sum forthwith, together with taxed costs and counsel fees.

CHARLES M. EGAN,
Judge of the Hudson County
Court of Common Pleas.

1032/H.

Reasons.

Filed March 1, 1926

NEW JERSEY SUPREME COURT

LEROY THOMPSON,
Petitioner-Respondent,

vs.

CHARLES WAGNER,
Respondent-Prosecutor.

On Certiorari:

The said Prosecutor, Charles Wagner, by McDermott, Enright & Carpenter, his attorneys, comes and prays that the judgment of the Hudson County Court of Common Pleas may be reversed for the reasons following, to wit,

1. Because the Court erroneously ordered final judgment to be entered in favor of Leroy Thompson and against Charles Wagner in the sum of $17 per week for a period of nineteen weeks together with taxed costs and counsel fees.

2. Because the petitioner was as a matter of law a casual employee under the provisions of Section 23-C of the Workmen's Compensation Act in this State.

3. Because the said Court failed to find that the petitioner was a casual employee, and hence barred from receiving compensation under the Workmen's Compensation Act of this State, as provided by Section 23-C.

Reasons

4. Because the Hudson County Court of Common Pleas had no jurisdiction of the proceedings before it, as the petitioner did not suffer from any accident arising out of and in the course of his employment.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Respondent-Prosecutor.

OPINION OF SUPREME COURT.

Filed January 25, 1927.

NEW JERSEY SUPREME COURT.

No. 217, May Term, 1926.

LEROY THOMPSON,
Petitioner-Respondent,

vs.

CHARLES WAGNER,
Prosecutor.

Submitted May 14, 1926; decided January 25, 1927.

A laborer, hired in the open market at a stipulated sum per hour to aid in removing a fall of snow from railroad tracks, subject to discharge at any time and in any event when the snow should be cleared, held to be under casual employment and not within Section II of the Workmen's Compensation Act, P. L. 1911, p. 134, as amended.

Certiorari to award by the Court of Common Pleas in a workmen's compensation case.

Before Justices Parker, Black and Campbell.

For the prosecutor, McDermott, Enright & Carpenter.

For the respondent, Raskin & Hornstein.

The opinion of the Court was delivered by PARKER, *J.*

Two points are made in this case; the first, that the accident is not shown to have arisen out

of and in the course of the employment; the second, that the employment on the undisputed facts was a casual one, and that the case was therefore not within the statute, paragraph 23 of the act, P. L. 1911, at p. 144, as amended P. L. 1913, at p. 312, and again amended in P. L. 1919, at pp. 211-212.

We shall assume for present purposes that the accident arose out of and in the course of the employment, but nevertheless conclude that the award should be set aside because in our opinion the employment was a casual one.

The material facts are that a snowfall had cumbered the tracks of the Erie Railroad Company, and that Wagner, who apparently was connected with that company as an independent contractor, was charged with the duty of having the snow cleared off. There was no regular working force assigned to such duty; the practice was to take on by the day or hour any able-bodied unemployed men who might present themselves or were known to be available, set them to work with shovels, etc., and as soon as the snow was cleared, discharge them. The case does not show how long a time was required in this instance to do the work.

The petitioner was hired like any other man standing idle in the market place; his pay was 50 cents an hour. There was no claim that he was held in reserve, that there was any regularity about his being called on, or any recurrence of employment at all, as in Sabella *v.* Lloyd Brazileiro, 86 N. J. L. 505, affirmed 87 *Id.* 710; the case simply shows that a snowfall occurred; that outside chance laborers were needed to

clear it off, and that petitioner was hired as one of these chancemen. He was injured on the very day that he went to work, by the shovel of another man striking his finger, making it bleed; and for lack of proper treatment gangrene set in and he lost the finger. He worked all or part of the second day and stopped because of the injury.

In La Spada *v.* Public Service Railway Co., 38 N. J. Law Journal 102, Judge Osborne in the Common Pleas held that shoveling snow under circumstances substantially identical with those of this case was a casual employment. That case was decided in 1915 at which time the statute merely used the language "exclusive of casual employments" without any attempt at definition. In 1919 the legislature added to the words "casual employments" the following: "which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if nor in connection with any business of the employer as employment not regular, periodic or recurring." The commissioner who heard the case, giving due weight to the cited decision, considered that the amendment of 1919 had altered matters in such wise that the decision was no longer a valid precedent. However this may be, we think the LaSpada case was well decided, and are unable to see that the language added to the statute and quoted above operates to make the petitioner's employment other than casual. It was of course "in connection with the employer's business"; and consequently the question is whether it was employment "the occasion for which arose by chance, or was purely accidental"; if either, it was casual. We think

it was plainly the first, if not the second. Whether there was occasion for it depended entirely on whether a snowfall should occur. This was, of course, likely to occur at some time in the winter season, but not certain, and should it occur, the time of occurrence depended wholly on vicissitudes of atmospheric conditions.

We conclude, therefore, that the employment was clearly casual, even under the definition laid down in the statute; and, consequently, the award will be set aside.

JUDGMENT OF REVERSAL.

Filed February 8, 1927.

NEW JERSEY SUPREME COURT.

LEROY THOMPSON, *Petitioner-Respondent,* *vs.* CHARLES WAGNER, *Respondent-Prosecutor.*	*On Certiorari.* *Judgment of Reversal.*

It appearing that the above-entitled cause was heard before one of the Referees of the New Jersey Department of Labor, Workmen's Compensation Bureau and a judgment rendered in favor of the petitioner and against the respondent, which judgment was subsequently affirmed by the Hudson County Court of Common Pleas upon an appeal taken by the respondent, and that judgment was entered in the County of Hudson thereon and said cause coming before this Court on a Writ of Certiorari allowed the 15th day of January, 1926, and the Court having examined the testimony in said cause and the briefs of counsel, and being of the opinion that the judgment entered in the New Jersey Department of Labor, Workmen's Compensation Bureau and in the County Clerk's office of the County of Hudson should be reversed;

IT IS ORDERED that the judgment in the above-entitled cause entered in the New Jersey Department of Labor, Workmen's Compensation Bureau and entered in the County Clerk's office of the

Judgment of Reversal.

County of Hudson, be and hereby is reversed with prosecutor's costs to be taxed.

Rule actually entered February 8, 1927.

On motion of

McDERMOTT, ENRIGHT & CARPENTER,

61 MAY.1.1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

LEROY THOMPSON, *Respondent-Appellant,* *vs.* CHARLES WAGNER, *Prosecutor-Appellee.*	*On Petition for Compensation under Workmen's Compensation Act.* *On Appeal from Supreme Court.*

BRIEF ON BEHALF OF THE APPELLANT.

1.

Statement of the Case.

The appeal in this case brings before this court for review a judgment of the Supreme Court reversing the Hudson County Court of Common Pleas, which had affirmed the judgment of Deputy Commissioner Corbin in the Workmen's Compensation Bureau allowing the respondent-appellant (hereinafter called the petitioner) compensation against Charles Wagner, the prosecutor-appellee (hereinafter called the respondent).

The petitioner filed a petition with the Workmen's Compensation Bureau under the Workmen's Compensation Act (P. L. 1911, p. 134 as amended). It appeared that he was employed by the respondent, who, presumably, had the contract with the Erie Railroad Company to maintain its tracks and incidentally to remove the snow therefrom. While he was removing snow he was accidentally struck by the shovel

of a fellow employee and thus received the injury for which he sought compensation. The Deputy Commissioner held that the employment was in connection with the respondent's business and that the occasion for the work was not mere chance or purely accidental so as to make it casual within the meaning of paragraph 23c of the act as amended by P. L. 1919, pages 211-212 (p. 30, l. 35, *et seq.*; p. 48, l. 20, *et seq.*). He, therefore determined that the petitioner was entitled to compensation and awarded him an allowance in accordance with the provisions of the act (p. 56).

The respondent thereupon appealed to the Hudson County Court of Common Pleas and the judgment below was affirmed. Thereupon the respondent prosecuted a writ of certiorari in the Supreme Court and that court in opinion filed at the May Term, 1926, reversed the lower courts, holding that the employment was clearly casual and, therefore, set aside the award (p. 61; reported 5 N. J. A. R. 187).

The petitioner thereupon appealed to this court (p. 1).

2.

GROUNDS OF APPEAL.

The only ground of appeal urged is that the Supreme Court should have affirmed the judgment of the Hudson County Court of Common Pleas (p. 11).

3.

BRIEF OF THE ARGMENT.

I.

The Supreme Court erred in holding that the employment of the petitioner by the respondent was casual within the meaning of the definition contained in the Workmen's Compensation Act.

The Workmen's Compensation Act of this State excludes in section 23c (P. L. 1919, pp. 211-212) mere casual employment from the benefit of its provisions and in that section defines what is mere casual employment as follows:

> "(c) Employer is declared to be synonymous with master, and includes natural persons, partnerships, and corporations; employee is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, *exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.*"

Before proceeding to a consideration of the legal question involved, we shall briefly summarize the facts:

The petitioner testified the accident happened on January 28, 1925, in the Erie Railroad yard at Weehawken. While he was shoveling snow he was accidentally struck by a shovel of a fellow workman and injured. He was compelled to stop work on January 30, 1925—two days after the accident (pp. 16-18, p. 22). His rate of pay was 50 cents an hour (p. 23). In the respondent's answer he stated that he was a con-

tractor and that the petitioner was in his employ as a laborer in the Erie yards at Weehawken (p. 11). Also that his ordinary working hours a day were ten and he was supposed to work seven days a week at a weekly wage of $32.20 (p. 12). In the answer under oath originally filed, it was not even claimed that the employment was casual (p. 12, l. 25), although at the hearing leave was given to amend the answer by setting up that the petitioner was a casual employee (p. 14).

Frederick Thompson testified that the men were all working together cleaning switches leading to the different tracks in the railroad yard. Five men were sent to clean each switch and when two switches came together ten men would be working in a bunch—so that they hardly had enough room to work. They had to shovel right in between each other. As he was working, the petitioner was right in front of him and he accidentally struck petitioner with the shovel as he was swinging it (p. 25).

Another employee, Charles Sykes, testified that he was in the same gang and as he was lighting his pipe he saw the petitioner struck by the shovel of a fellow employee (p. 29). Sykes had been employed as a member of the gang in January and had been working in the yard some time prior to the accident (p. 29).

Carpenter, the foreman of the gang, testified that he was a track foreman in the Erie Railroad yard and that he employed the petitioner—he first said for the Erie Railroad Company and then admitted that Charles Wagner was the contractor and his employer, as well as the petitioner's. He said the men were employed to remove snow from the tracks (p. 33). He said

it was *not* the custom merely to hire men to shovel snow after snow storms (p. 36, l. 40, to p. 37, l. 15).

The foregoing is all the testimony in the case. From it and the admissions in the answer of the respondent, the Deputy Commissioner had the right to conclude that the petitioner was employed by the respondent to work seven days a week, ten hours a day, at a weekly wage of $32.20 as a laborer in the Erie Railroad yard at Weehawken. All of these facts are personally sworn to by the respondent in his answer under oath (pp. 11-13). The laboring work that he was doing consisted in cleaning switches leading to the different tracks in the railroad yard, which included the removal of snow therefrom (p. 25, ll. 10-30).

The Deputy Commissioner did conclude that the petitioner was in the employ of the respondent and working for him in the Erie Railroad yard at Weehawken and that he was injured and received the personal injuries in an accident arising out of and in the course of his employment with the respondent while in the performance of his duties, namely, working as a laborer, shoveling snow and cleaning tracks in the railroad yard (p. 51, ll. 20-30).

The Hudson County Court of Common Pleas affirmed that conclusion upon a trial *de novo*. Section 19 of the act provides—

> "The trial of such appeal shall be based exclusively on the transcript of the record and testimony, and the judgment of the Court of Common Pleas on any such appeal shall be conclusive."

Both of the courts having found as a fact from the pleadings and testimony presented that the employment was not casual, such a finding of

fact if supported by any testimony, should have been conclusive in the Supreme Court. The Supreme Court cannot reverse merely because it may reach a different conclusion on conflicting testimony, especially when the testimony is supported by the sworn answer of the respondent as it is in this case. The writ of certiorari in this case is, in effect, a writ of error. The finding of facts by the Deputy Commissioner and the Common Pleas Court is conclusive in the Supreme Court where there is any evidence to support it.

> *Scott* v. *Payne Bros.*, 85 N. J. L. 446, 448; *Charlock* v. *M. W. Kellogg Co.*, 132 Atlantic 297.

Assuming, however, that a man who was employed as a laborer in a railroad yard at a weekly wage of $32.20 for seven days a week, ten hours a day, for the purpose of cleaning switches, which includes removing the snow therefrom, and from the tracks and yard, is only employed to remove snow, the question then presented is whether his employment comes under the head of "casual employment" within the meaning of the definition given in section 23c of the act which is quoted *supra*.

The word "casual" is from the Latin *casualis*, meaning an accident; happening or coming to pass without design and without being foreseen or expected; coming without regularity. The word "casualty" has the same origin (Bradbury's Workmen's Compensation, p. 188). The term "casual employee" as used in the various compensation acts has different meanings. In some of the statutes "casual employees" are excluded only when they are *not* engaged in the usual course of the trade or business of the employer. Bradbury, in his third edition goes

into the subject (p. 188, *et seq.*) exhaustively and gives the authorities from the various jurisdictions. The Compensation Act, when originally approved, did not define "casual employments (P. L. 1911, p. 133, par. 23)." Neither did the amendment of 1913 (p. 312). It was not until the year 1919 that the legislature amended section 23 so as to define "casual employments," and when it did define the meaning of those words, it gave them a limited or restricted meaning—the purpose and intent undoubtedly being to get away from the ordinary and broad meaning that could be given to so general an expression as "casual employments," and this intent is in accordance with the general purview of this legislation, namely, to provide compensation for employees whose injuries arise out of and in the course of their employment. The Supreme Court, in the opinion below (p. 63) seemed to think that the case of *La Spada* v. *Public Service Railway Co.*, 38 N. J. L. J. 102, decided by Osborne, *J.*, sitting in the Essex Common Pleas, was controlling, although that case was decided in 1915, prior to the amendment in 1919. The Supreme Court said (p. 63) (italics ours):

> "The commissioner who heard the case, giving due weight to the cited decision, considered that the amendment of 1919 had altered matters in such wise that the decision was no longer a valid precedent. *However this may be, we think the La Spada case was well decided, and are unable to see that the language added to the statute and quoted above operates to make the petitioner's employment other than casual.*"

We submit that the amendment of 1915 does add to the statute by limiting the meaning to be given to the words "casual employment" when the work that the employee is doing is

work "in connection with the employer's business," for in that event, it shall be defined "as employment, the occasion for which *arises by chance or is purely accidental,*" which words really bring us back to the true meaning of the word "casual," which is, as stated above, "an accident; happening or coming to pass without design and without being foreseen or expected."

THE WORKMEN'S COMPENSATION STATUTE IS A REMEDIAL LAW OF PRIME IMPORT. IT SHOULD BE LIBERALLY AND BROADLY CONSTRUED. *JERSEY CITY V. BORST,* 90 N. J. L. 454.

Again we pause to point out that the opinion of the Supreme Court proceeds to a decision of the facts contrary to that arrived at by the courts below which is in conflict with their determination of the facts, notwithstanding that the determinations of facts of the two lower courts are in perfect harmony and have testimony and the sworn admission of the defendant in his answer to support them. For instance, the Supreme Court says (p. 62):

> "The material facts are that a snowfall had cumbered the tracks of the Erie Railroad Company, and that Wagner, who apparently was connected with that company as an independent contractor, was charged with the duty of having the snow cleared off. There was no regular working force assigned to such duty; the practice was to take on by the day or hour any able-bodied unemployed men who might present themselves or were known to be available, set them to work with shovels, etc., and as soon as the snow was cleared, discharge them. The case does not show how long a time was required in this instance to do the work."

There is nothing in the testimony which indicates that there was no regular working force assigned to the duty to clean the tracks and keep them cleaned. There is nothing in the record to show that they were discharged as soon as the snow was cleared from the tracks. The answer of the respondent indicates that the petitioner at least was employed seven days a week, ten hours a day, at a weekly wage of $32.20, to do laboring work for the respondent in the Erie yard at Weehawken (pp. 11 and 12), and the testimony of the witness Frederick Thompson is specific that the men were employed "to clean all the switches leading to the different tracks" (p. 25), and the testimony of Sykes, another member of the gang, indicates that he had been employed there for quite some time prior to the accident (p. 29, ll. 30-40). Also there is nothing in the case to indicate that any man was discharged from the gang of laborers employed in the railroad yard to maintain the tracks, after the snow was removed. While it is true that he was injured on the very first day he went to work, the testimony is undisputed that he worked on the two following days until he was compelled to quit by reason of his injury. He went to work on January 28th, when he was injured, and continued to work on January 29 and January 30, 1925 (p. 18, l. 10), and when he quit he first reported to the track foreman, Carpenter (p. 17, ll. 30-35), and the foreman sent him to the doctor (p. 18, ll. 10-20). The foreman admitted that he sent the petitioner to the doctor and that he knew that he had been injured (p. 38, ll. 1-10). If the petitioner had been a mere casual employee, it is doubtful whether he would have been treated as a regular employee and given medical aid under the circumstances. In any event, providing the medical

aid was one of the facts from which it could be inferred that he was not a casual employee.

Not only did the statute not define in a narrow way "casual employments" at the time of the decision of *La Spada* v. *Public Service Railway Co.,* 38 N. J. L. J. 102, but the facts in that case are not analogous to those in the case at bar. There was no dispute as to the facts or as to the nature and extent of the employment, but, on the contrary, it was undisputed that the petitioner was engaged especially and solely for the purpose of removing snow from the tracks of the street railway and that he was not paid by the week or employed for any certain number of hours a day or a certain number of days a week but merely for twenty-five cents an hour. That is all that appeared in the case and the case was decided under the act which did not define "casual employment," and the court particularly pointed out that the work there was not within the general scope of the business of the employer. However, in the case at bar, the Supreme Court conceeded that inferentially it was the business of the respondent to clean the tracks and that the petitioner was employed in that business of his employer. It was not mere casual employment to clean the rtacks and switches if, as the Supreme Court says, the respondent was undoubtedly an independent contractor employed for that very purpose by the railroad company. The mere fact that part of the cleaning was with respect to the removal of snow did not make the work that was being done, the result of a mere accident or chance, which is necessary in order to exclude the petitioner from compensation where he is employed in the respondent's business. Also, getting back to the definition of "casual," it means accident;

happening or coming to pass without design and without being foreseen or expected. It can hardly be said that the cleaning of tracks, even of the removal of snow, is an accident or that it was a happening which could not be foreseen or expected.

We submit that the Deputy Commissioner truly interpreted the intent of the legislature when he concluded (p. 30)—

> "It is my opinion shoveling snow is a part of an employer's business, especially in the railroading business, clearing switches; it is part of his business. He had to clear those switches of snow, and for that reason I do not think that occasion arose by chance or was purely accidental. It was something that could be expected, and it happened every year. And I believe the intent of the law is a work that can be expected to have to be done in the employer's business is not casual."

Also at page 48, the Deputy Commissioner said—

> "It is my opinion that employers, especially in this kind of work, expect each year that they shall have snow storms; they shall have to keep their tracks clear and they know that they have to employ help to keep their tracks clear and it is not my idea of the intent of the legislature that that is to be considered casual employment. This is not employment which 'arises by chance or is purely accidental.'"

As shown *supra,* this conclusion is amply warranted by the admissions made in the sworn answer of the defendant and the testimony of the three witnesses for the petitioner.

Again in the La Spada case, *supra,* the court was particular to point out "what constitutes casual employment must necessarily depend upon the circumstances of each particular case. It is

difficult, therefore, to fix a standard applicable to all cases."

In *Scott* v. *Payne Bros.,* 85 N. J. L. 446, it appeared without dispute that the petitioner was employed for an indefinite period at $5.00 a day to work on a contract for the erection of a structural steel building. He had been working only a week when the injury happened. This case was decided before the amendment defining "casual employment" in the narrow sense. Yet, Swayze, *J.,* speaking for the Supreme Court at page 447, said:

> "This was not a case of casual employment. The petitioner was employed in the regular business of the defendant and likely to be retained for some time, and as long as the work remained unfinished. It was not a mere temporary accidental employment."

In the case at bar, Wagner's business was that of cleaning the tracks of the railroad company, and the petitioner was engaged in that work, and when several gangs of men finished in the Weehawken yard they would have probably gone to some other yard to have done the same kind of work. There was nothing in the case to indicate that the employment would cease at any particular time, while it was inferrable that it would continue for an indefinite period.

In *Sabella* v. *Brazileiro,* 86 N. J. L. 505, the employment again was held not casual, although the petitioner was paid by the hour only while he worked and when there were boats to be unloaded. The work would only continue while there was a ship to be loaded or unloaded. The class of work was not constant, depending upon

when there was a ship in port. The Supreme Court, speaking through Bergen, *J.,* said:

> "The ordinary meaning of the word 'casual' is something which happens by chance, and an employment is not casual—this is, arising through accident or chance, where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period."

A man employed to assist in filling an ice house is not a casual employee.

McNeil v. *Mountain Ice Co.* (Morris Com. Pleas). 38 N. J. Law J. 109; 11 N. CC. A. 238, aff'd. 38 N. J. L. J. 346.

The fact that an employment is temporary does not necessarily make it casual, and it is not casual when the employment is in the regular course of the business of the employer, even though it may be temporary.

Thompson v. *Parkin & Coleman* (Morris Com. Pleas). 38 N. J. L. 368.

Where a workman was employed to come Monday morning to do piece work, with the understanding that if he did the work properly he would receive additional compensation over the amount of the first agreement, and he was injured at eleven o'clock on the same day, it was held that he was not a casual employee, as the Court might find that the intent was to give the employee permanent employment at piece work in the defendants' regular business.

Schaeffer & DeGrottola, 85 N. J. L. 444.

An employee was paid by the hour and was not employed for any specific length of time. He was injured three hours after he entered

upon his employment and it was held that he was not a casual employee.

In re McAuliffe, 1 *Bull* v. *Ohio Ind. Com.* 144.

The case of *Otmer* v. *Perry,* 94 N. J. L. 73, is not in point because the court held that the petitioner was an independent contractor and, in passing, merely referred to the fact that the employment in that case would not be regarded as within the compensation act because it was casual. It appeared that the petitioner was employed merely to repair a well; he was unhampered and uncontrolled by the respondent and did just as he pleased in the doing of the work.

In conclusion, we wish to point out that the respondent was engaged in the business of cleaning the tracks and switches of the railroad company. That was his business and that is the work in which he employed the petitioner. This is not the ordinary case of a man being employed by a housekeeper or a property owner to remove a sudden fall of snow from the street. Here the work of cleaning tracks and switches was made a business. It was not a mere causal thing at all and the admissions in the answer, and the testimony, justified the conclusion that the petitioner was a regular employee in that business.

The distinction between engaging in a business which may be casual in its character and the employment of men to work in that business as long as it continues, even though for an indefinite period, which employment is not casual, can be made plain by consideration of the following examples of employment:

(1) Man asks if I want snow removed from in front of my house, after a snow storm. I hire him. *Casual.*

(2) I am in business to remove snow from sidewalks after storms. After storm I have several places to clear of snow. I get a dozen men to work for me to remove snow. I pay men I hire by hour and even only for length of time it takes to remove snow. *Not casual.*

In (1) employment arises by chance—because snowfall.

In (2) employment arises out of the fact that I am in a business (of removing snow) —that the business is dependent upon snowfall makes no difference—the carrying on of the *business* may arise by chance, but the employment of the men is not—it's because I am in a business.

In the City of New York seven million dollars are spent annually for the employment of men and trucks to remove snow from the streets of the City of New York. All of these men are engaged in the business of the contractor who has the contract for the removing of the snow and are entitled to compensation if they are injured; surely, under the restricted definition of casual employment in our Compensation Act they would be entitled to compensation under such circumstances, for it is a business which may take days or weeks. That is immaterial. A man may be engaged in the building of a sewer pipe or a house which may take several weeks. The mere fact that it is the one venture of the master and in that sense casual so far as he is concerned does not make it casual so far as his employees engaged in his business are concerned.

II.

The petitioner did suffer an accident arising out of and in the course of his employment.

It is admitted that petitioner was in prosecutor's employ at a fixed scale of wages, and was engaged in the performance of his duties on the day he was injured (Case, p. 15). As to the fact that petitioner actually did receive an injury, there was the testimony of petitioner (Case, p. 17), which was corroborated by the testimony of two witnesses. These witnesses, Frederick Thompson and Charles Sykes, were fellow employees who were eyewitnesses to the occurrence (Case, pp. 25 and 29). This testimony stands unimpeached, and prosecutor did not produce any witnesses or offer testimony to contradict or refute the evidence that petitioner was actually injured. The finding of the court on this point is supported by competent legal evidence, and should not be disturbed.

Charlock v. *Kellogg Co.* (March, 1926), 132 Atl. 297.

Also, it is respectfully urged that even assuming but not admitting prosecutor's contention that petitioner suffered frost bite (which we do not concede), the court below properly found that petitioner suffered an accident arising out of it.

Frost bite is an accident, and it has so been held by our own courts. See

Sullivan v. *Clark,* 3 N. J. Misc. 924, and cases therein cited.

Petitioner was engaged in an employment which exposed him to materially greater danger of getting his hands frozen than were ordinary outdoor workers. He was engaged in a task

which was necessary and required continuity of performance on account of the hazard involved. In order to keep the tracks and switches clear for moving trains, petitioner worked ten hours on January 28th and sixteen hours on January 29th, a total of twenty-six hours in two working days (Case, p. 35, l. 24). This, of itself, is some evidence of extraordinary risk and exposure.

This Court in *Kauffeld* v. *Pfund & Sons,* 97 N. J. L. 335, held that where an employee died as the result of exposure to artificial heat in the course of his employment, the death resulted from an accident arising out of and in the course of the employment, and further concluded that because of those facts the Trial Court's decision would not be distrubed in any event because of the Trial Court's finding that compensation was due was a finding of fact which had evidence to support it.

III.

For these reasons we respectfully submit that the judgment of the Supreme Court should be reversed, and the judgments of the Hudson County Court of Common Pleas and of the Deputy Commissioner, should be affirmed.

May Term, 1927.

Respectfully submitted,

EDWARD A. MARKLEY,
ISIDORE HORNSTEIN,
Of Counsel.

RASKIN, HORNSTEIN & RUSKIN,
Attorneys of Respondent-Appellant.

61 MAY.1.1927

New Jersey Court of Errors and Appeals.

Action at Law:

On Petition for Compensation under Workmen's Compensation Act.

On Appeal from Supreme Court.

LEROY THOMPSON,
Respondent-Appellant,

—VS.—

CHARLES WAGNER,
Prosecutor-Appellee.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER FOR THE PROSECUTOR-APPELLEE.

This appeal was taken by Leroy Thompson, respondent-appellant from a judgment entered in the New Jersey Supreme Court, February 8, 1927 (State of Case, p. 65), reversing the judgment of the Hudson County Court of Common Pleas which affirmed the judgment entered in the Workmen's Compensation Bureau allowing compensation to Leroy Thompson and entering judgment against Charles Wagner, Prosecutor-Appellee.

Brief Statement of Facts.

Leroy Thompson filed a petition with the New Jersey Department of Labor, Workmen's Compensation Bureau, dated April 20, 1925, in which

he alleged that while shoveling snow on January 28, 1925, he was struck by a shovel and the little finger on his right hand was badly injured. He further alleged that at the time he was employed by Charles Wagner, that blood poisoning developed and the little finger on his right hand had to be amputated in order to save the hand from blood poisoning.

The respondent by way of answer admitted that the petitioner was employed by Charles Wagner on the day in question but alleged that he did not at said time sustain any accident arising out of and in the course of his employment; that the petitioner froze his finger while shoveling snow; that the frozen finger was the result of weather conditions over which the respondent had no control and that the respondent did not have any notice of any accident. At the trial the answer was further amended to allege as an additional defense that the petitioner was a casual employee (State of Case, p. 14, l. 36).

In its final analysis the case involved two questions:

1. Whether Leroy Thompson, hereinafter referred to as petitioner, sustained an accident arising out of and in the course of his employment.

2. Whether or not the petitioner was a casual employee.

Argument.

POINT I.

The Supreme Court properly reversed the judgment entered in the Hudson County Court of Common Pleas and Workmen's Compensation Bureau.

The New Jersey Supreme Court in its opinion (State of Case, pp. 61, &c.) Rep. 5 N. J. A. R. 187, assumed that for the present purposes the accident arose out of and in the course of the employment but concluded that the employment was casual.

(A) The testimony in the case shows conclusively that the judgment was casual.

The testimony of Leroy Thompson shows that he was hired on January 28, 1925 (p. 16, ll. 22-25). This is corroborated by Thomas Carpenter, the foreman who hired him (p. 33, l. 9). Thompson only worked for the Company two days (p. 21, l. 38). He had never worked for Charles Wagner before and was hired at this time for the purpose of shoveling snow, as he himself testified (p. 22, l. 27).

> "Q. And you were hired to shovel snow, weren't you? A. Yes, sir."

He testified to the same fact (p. 23, ll. 35-39):

> "Q. And you were hired by whom? A. Mr. Carpenter.
> Q. By Mr. Carpenter, and when he hired you he hired you to shovel snow, didn't he? A. Sure he hired me to shovel snow."

Frederick Thompson, the brother of Leroy Thompson, was employed at the same time and they were working together. He testified that Leroy Thompson went back to work the second night, saying, "I believe I will go back to work tonight, because I don't know how long the job might last and I will try to make as much time as I can on the job" (State of Case, p. 26, ll. 32-39). Frederick Thompson also testified that there had been a heavy snow storm and that they were employed to shovel snow (State of Case, p. 27, ll. 17-27).

> "Q. There had been a heavy snow storm at that time. A. Yes, the snow was falling pretty heavy.
> Q. And you were employed to shovel snow, weren't you? A. Yes.
> Q. And at the time you were employed you understood that you were employed to shovel snow? A. Oh, sure.
> Q. You were all given to understand you were to shovel snow? A. Yes."

Charles Sykes, another witness for the petitioner, testified (State of Case, p. 29, l. 34) that he was hired to shovel snow.

Thomas Carpenter, the superintendent for the respondent, testified that he employed Leroy Thompson together with other men to shovel snow and only for the purpose of shoveling snow and that there was probably a foot of snow at that time (State of Case, p. 33, l. 16).

> "Q. And why did you employ him that day? A. To shovel snow.
> Q. And did you employ other men to shovel snow at that time? A. What is that?
> Q. And did you employ other men to shovel snow at that time? A. Yes, sir.

> Q. Was he employed to do anything else besides shovel snow? A. That's all; shovel snow."

Again on page 33, lines 38-41 he testified that Thompson was not employed for any special length of time and was to do no other work beside shovel snow.

On page 37, lines 14-26, the testimony shows that Thompson was hired to shovel snow; that he was told that that was the work he was hired for and that the orders were to hire only men to shovel snow.

(B) Such employment is within the definition of Casual employment, as defined by our Compensation Act.

The Workmen's Compensation Act of this State, Paragraph 23 of the Act, P. L. 1911 at p. 144 as amended P. L. 1913 at p. 312, and again amended in P. L. 1919 at pp. 311-312 in its amended form, provides as follows:

> "Employer is declared to be synonymous with master, and includes natural persons, partnerships and corporations; employee is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, *exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.*"

In the case *Sub Judice,* the petitioner, formerly employed by another company, was hired by the respondent clearly for the purpose of

shoveling snow, due to the fact that there was a fall of approximately one foot of snow at that time (State of Case, p. 34, ll. 1-3). He was not hired for any other work or for any definite period of time. He understood himself that the work was not to be permanent and was anxious to make as much time as he could while the work lasted. He worked only two days and did nothing during that period of time but shovel snow.

We submit that these facts bring the case clearly within Section 23-C of the Workmen's Compensation Act and for that reason the Supreme Court was correct in reversing the judgment entered below. The employment being casual, the petitioner was precluded from any recovery whatsoever.

The Supreme Court in its opinion relied upon *Laspada* v. *Public Service Railroad Co.,* 38 N. J. L. J. P. 103. The Court properly relied upon that case, for it is almost identical in its facts to the case under consideration.

In this case the petitioner was employed by respondent as an employee to remove snow from the tracks of the respondent's Railway. He was engaged solely for that work and the necessity of it was due to a snow storm. The Court in its opinion found as follows:

> "I think the circumstances of this employment bring it clearly within the twenty-third paragraph of the Act, which excludes 'Casual' employments.
>
> A casual employment is one which comes about more or less by chance, to meet the exigencies of a particular situation or a temporary emergency, and which may or may not be within the general scope of the business of the employer or the occupation of the employee.

> This employment was to meet a temporary emergency due to the extent and severity of the elements (than which there is nothing more variable or uncertain), and the necessity of the respondent to meet the temporary condition thus created in order to enable it to operate its cars. Certainly no occupation could be more uncertain or more casual in its very nature than shoveling snow."

When the above case was decided, Section 23 of the Compensation Act provided as follows:

> "Employer is declared to be synonymous with master and includes natural persons, partnerships and corporations; employee is synonymous with servant and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments."

The Act was amended in 1919 to its present form. As pointed out by the Supreme Court in its opinion, the Commissioner who heard the case considered that the amendment of 1919 had changed the law in such wise that the decision was no longer a valid precedent. The Supreme Court further held that the *Laspada* case was well decided and that the language added to the Statute did not operate to make the petitioner's employment other than casual. As a matter of fact, the Court in deciding the *Laspada* case based its finding on a definition of casual employment *"Supra"* which is entirely in harmony with Section 23-C as now in force in this State.

The Supreme Court in its opinion holds that the shoveling of snow from the tracks of the Erie Railroad was "in connection with the employer's business."

The remaining question which it was obliged to decide was, whether it was employment, "the

occasion for which arose by chance or was purely accidental." The Court held, "We think it was plainly the first, if not the second. Whether there was occasion for it depended entirely on whether a snow fall should occur. This was, of course, likely to occur at some time during the Winter season, but not certain, and should it occur, the time of occurrences depended wholly on the vicissitudes of atmospheric conditions." Certainly the reasoning of the Supreme Court is most logical and reasonable. The Commissioner of Compensation in his opinion (State of Case, p. 48, ll. 20-40) held that the rule of casual employment did not apply in this case because employers, especially in this kind of work, expect each year that they shall have snow storms; that they have to keep their tracks clear and that they know that they have to employ help to keep their tracks clear. The Commissioner in rendering his decision lost sight of the fact that the respondent could not possibly prophesy or have knowledge as to when it would be necessary to have men to clear the tracks of the Railroad Company. He lost sight of the fact that a Winter may pass in which it is not necessary to have any men to shovel snow from the Railroad tracks; again it may be necessary to shovel snow early in November; again it may not be necessary to shovel snow until February or March. The Compensation Commissioner failed to consider that a fall of snow and employment occasioned thereby arises,

(A) By chance, or

(B) Is purely accidental.

This element the Supreme Court considered in formulating its opinion.

There is another phase of the case which should be considered. Section 23-C in its present form contains two distinct circumstances under which employment is casual.

(A) If in connection with the employer's business—when the occasion for the employment arises by chance or is purely accidental.

(B) If not in connection with any business of the employer when the employment is not regular, periodic or recurring.

This man was employed by Charles Wagner. He was not employed by the Erie Railroad and the petition is not filed against the Erie Railroad. Unless it therefore is inferred from the evidence that the keeping of the tracks of the Erie Railroad free from snow in the winter was in connection with the business of Charles Wagner, the case could also be decided under provision "B". Surely the petitioner was not a regular employee of Charles Wagner. His employment was not periodic or recurring.

Even if the occasion for the employment was in connection with the business of Charles Wagner, certainly nothing could be more by chance or accidental than a snow storm.

The Appellant in his brief (bottom p. 14 and top of p. 15) endeavors to illustrate when the shoveling of snow would be casual employment and when it would not be casual employment. He admits at the bottom of page 14, that when a man asks me if I want snow removed from in front of my house after a snow storm and I hire him, it is casual employment. This is exactly the situation which we have in this case. By chance or by accident the earth is covered with a blanket of snow about a foot deep. It is necessary to remove this from the tracks of the Rail-

road. Just as the business man does not feel that he has time to shovel his own walk, so the respondent in this case feels that he cannot divert his regular employees from their usual work to accomplish this duty, which has arisen by chance or pure accident. Just as a man or a boy rings the door bell and asks to shovel my side walk, so a gang of men realizing that the railroad tracks must be shoveled, come to the office of the respondent and ask for employment in shoveling snow. It is only in this way that the snow can be shoveled without interfering with the other work of the respondent. Thus our case comes clearly under classification I on p. 14 of the appellant's brief.

This case does not come within classification II. The respondent was not in the business of removing snow. There is nothing whatsoever in the testimony which would indicate that the business of the respondent was solely the removal of snow. But even under such circumstances the employment would have to arise by chance or accident, being occasioned purely by the fall of snow. If the respondent was foolish enough to engage solely in the business of shoveling snow, it stands to reason that he would be obliged to secure his help during or immediately after the snow storm and could not keep them in his employ indefinitely.

The Court must look to the contract of employment and the occasion under which the employment arose.

In the case of *Schaeffer* v. *DeGrottola,* 85 N. J. L. 444, the Court decided that the employment was not casual, but the Court in that case found that the employee was engaged in the regular business of the employer without limit as to time. The opinion of the Court in *Scott* v. *Payne,* 85

N. J. L. 446, was also based upon the finding that the employee was engaged in the regular business of the employer.

In neither of these cases did the occasion for the employment arise by chance or by pure accident.

In *Sabella* v. *Brazileiro,* 86 N. J. L. 505, the Court held that the employment was not casual, but in that case the Court found that the employee was frequently called upon by the employer to serve him as a longshoreman, being out of a class of stevedores ready to respond when called, and further found that this particular employment would at least continue until the ship was loaded.

In this case certainly the employer could anticipate when the boat would be in port. Its arrival was planned and did not occur by chance or accident.

The case of *Otmer* v. *Perry & Co.,* 94 L. 73, was decided under the 1919 amendment. In this case the petitioner was injured while repairing a well for the respondent, under a contract to repair the well for which he was to be paid $1 per hour. It was contended (1) that the employee was an independent contractor, (2) that the employment was casual. The Court held that he was an independent contractor and further held as follows:

> "Were this differentiation not maintainable under the statutory definition, I would still be forced to conclude that the nature of the employment in question brings the petitioner's contract within the statutory exception of 'casual employment', and therefore imposes no liability upon the defendant."

The case of *Martin* v. *Belais,* Vol. 5, N. J. Misc. p. 69, was recently decided by the Workmen's

Compensation Bureau. The petitioner was hired only to dust and arrange the respondent's summer home for occupancy prior to the opening thereof. The Court held that the petitioner was not performing work in connection with the employer's business; that it was not regular, periodic or recurring and that it was casual.

In the other cases cited by the appellant, where the employment was held not to be casual, the injury occurred while carrying out the regular business of the employer and the employment was not occasioned by chance or accident.

The appellant in his brief repeatedly refers to the fact that in our answer filed with the Workmen's Compensation Bureau, the respondent gave answers as follows (p. 12):

26. Give number of hours in an ordinary working day. 10.

27. Give number of days in an ordinary working week. 7.

28. State the amount of weekly wages. $32.20.

This is not a statement or an admission by the respondent that the petitioner was not a casual employee. It does not even state that the petitioner worked 10 hours in *his* ordinary day or seven days in *his* ordinary week or that he received wages of $32.20 per week. When a petition is filed with the Workmen's Compensation Bureau, a copy is served on the respondent or carrier together with a printed form of answer consisting of questions to be answered by the respondent. These three questions are designed to give the bureau sufficient information to determine the rate of weekly payments should the petitioner be entitled to an award, as such rate is two-thirds of the weekly wage subject to a maximum of $17 per week. It is clear to see therefore that $32.20 is the weekly wage the man would receive under ordinary conditions if he had been an employee other than casual and worked one week. There is no question about the fact that he did not receive even one week's pay from the respondent. The testimony all shows and it is admitted by the petitioner that he only worked two days, putting in, of course, over time on those days. In any event the inclusion of the defense of casual employment (State of Case, p. 14, l. 36), shows that his employment was not admitted to be regular.

The fact that the Courts have held in this State that the compensation statute is a remedial law of prime importance and should be liberally construed, does not mean that the law should be disregarded and held to be of no effect. When the Legislature amended Section 23-C, it did so to specifically define casual employment. It is a question of law for the Court to decide whether under given facts the employment is or is not casual.

If the employment of a person arising from the falling of snow, and for the purpose of shoveling snow, and no other purpose is not casual, then what could be considered casual employment?

POINT II.

The petitioner did not suffer an accident arising out of and in the course of his employment.

(A) The testimony supports a finding that the petitioner suffered from frost bite and not from an accidental injury.

There is a divergence of testimony as to whether the petitioner lost his finger from a cut inflicted through the negligence of a fellow employee, or by reason of the finger being frozen. The petitioner testified that on January 28, 1925, the day he went to work for Charles Wagner, "He was hit on the finger by a shovel" (State of Case, p. 17, ll. 14-17). He continued to work through that day. He testified that the finger bled but that he did no more than rub snow on it (State of Case, p. 17, ll. 22-26); that later his finger began to pain, at which time he reported to his foreman and that the foreman looked at it and said it was frozen (State of Case, p. 17, l. 38). Thompson continued to work that day and the following day and Friday morning was ordered to see Doctor Wolf of Hoboken, who dressed his finger. The following night he went to the North Hudson Hospital where, he testified, the finger was dressed five or six days, after which the finger was amputated.

The petitioner testified (State of Case, p. 19, ll. 27-40) that on the day in question they were working together and a fellow workman all of a sudden struck him on the finger. He stated that he was fifty feet from this man at the time he was struck and it later developed in the testimony that he was struck by his own brother, Frederick Thompson (State of Case, p. 25, ll. 13-31). He claimed his finger felt numb until it was amputated (State of Case, p. 21, ll. 12-15). According to the testimony of Mr. Carpenter, the foreman, Thompson came to him and told him his finger was frozen (State of Case, p. 38, ll. 14-16). Leroy Thompson himself, on cross examination, admitted that he did not know what was the matter with his finger and on page 39, lines 30-34, he testified as follows:

"Q. Your finger was frozen, wasn't it?

A. I don't know what was the matter with the finger. I don't know whether it was frozen or whether the injury was from the shovel. I don't know what was the matter with it."

Doctor William Eckert, the only doctor produced, was called by the respondent and testified that he examined Thompson at the North Hudson Hospital and found that his finger was of a dark bluish hue, it was warm and the nail of the finger was loose and coarsened; that there was a little serum through it; that the finger was tender and there was nothing to be seen in regard to any injury to the finger at that time (State of Case, p. 42, l. 24, to p. 43, l. 5). This examination was made on February 1st, and at that time the patient gave a history that he had been exposed to the cold, shoveling snow for two days, and the doctor made a diagnosis of frost bite of the finger (State of Case, p. 43, ll. 7-11). The doctor testified that in view of the history of the case the gangrene was more likely to be a result of frost bite than an injury (State of Case, p. 45, ll. 20-25).

The petitioner was unable to give a clear statement of how the accident happened or describe the nature of the injury (p. 10). He described a numbness which continued from the 28th of January to the day the finger was amputated, which is a condition more likely to result from a frozen finger than a small cut. He treated the finger of his own accord by rubbing snow on it, a recognized treatment for frost bite (p. 37, l. 35). He advised the superintendent, Mr. Carpenter, that his finger was frozen and finally admitted himself that he did not know whether it was frozen or whether the injury was from the shovel. His brother, Frederick Thompson, could not de-

scribe the alleged cut but claimed that his brother came to him at twelve o'clock and said his finger felt rather funny.

Mr. Sykes, another witness, saw the accident but did not look at the finger. Mr. Carpenter, the foreman, did not see any injury to the finger which could be attributed to the accident claimed by the petitioner (p. 35, l. 10). Thompson told him his finger was frozen (p. 38, l. 14). The petitioner did not produce any doctor to substantiate his testimony and the testimony of his brother that he was struck by a shovel and his finger was cut.

Doctor Eckert was, however, produced by the respondent and in view of his testimony that the petitioner gave a history of frost bite; that he did not observe any cut on the finger and that in view of the history given, it was more probable that the condition of gangrene was the result of frost bite than an injury, we submit that the testimony does support a finding that the petitioner suffered from frost bite. The testimony of the petitioner and his brother is very indefinite as to the happening of the alleged accident. The petitioner repeated at different times that he was fifty feet away from his brother when the shovel hit him and later when confronted by the unlikelihood of the accident having happened in that manner, he changed his testimony claiming that the man was only five feet from him. The testimony of Mr. Carpenter further shows that no accidental injury by being struck with a shovel was ever reported to the foreman.

(B) Frost bite is not an accidental injury within the meaning of the Workmen's Compensation Act.

It has been held in this State in the case of *Laspada* v. *Public Service Railway Co.,* 38 N. J. L. J., page 103, the same case referred to under Point I, that frost bite under circumstances such as found in this case is not compensible. In that case the Court held as follows:

> "There was nothing in this petitioner's employment which exposed him to more than the ordinary risk of frost bite, to which any other person working in the open was exposed on the day in question, nor has it been alleged or proven that it was due to any particular circumstance in connection with his employment. The accident was merely a consequence of the severity of the weather to which persons in that locality, whether so employed or not, were equally liable."

This is apparently the only case in this State. Cases from other jurisdictions all seem to hold that recovery for frost bite is not compensible unless the petitioner is exposed to greater danger than other ordinary persons in the same work or employment.

In re McMakmans Case, 225 Mass. 554, the Court held:

> "Injury arose out of and in the course of employment where the employee was exposed to materially greater danger of getting hands frozen than ordinary outdoor workers."

Fensler v. *Associated Supply Co.,* 1 Cal. I. A. C. Dec. 447.

> "Generally, injuries suffered from so-called acts of God, such as freezing, do not constitute accidental injuries unless the injured workman is exposed to greater risk

New Jersey State Library

of freezing than are the ordinary persons of the community."

Haremaker v. *S. S. Corsican*, 4 B. W. C. C. 295.

A seaman at work on his ship sustained a frost bite. The Judge found that the workman had not proved that the frost bite was due to any particular circumstances in connection with his employment or that he had been exposed to unusual risk and was not out of and in the course of employment.

There is no testimony in this case that the petitioner was exposed to any greater danger from frost bite than other persons engaged in the same work at that time or that the weather was unusually cold.

In view of the foregoing facts, we submit that the Court of Common Pleas did not have jurisdiction, as the petitioner did not suffer from an accident arising out of, and in the course of his employment.

POINT III.

We submit that the judgment of the Supreme Court, reversing the Hudson County Court of Common Pleas and Workmen's Compensation Bureau should be affirmed for the reasons set forth in Points I and II.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Prosecutor-Appellee.

CARL S. KUEBLER,
Of Counsel.