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NOTICE.

NEW JERSEY SUPREME COURT.

| | | |
|--|---|--|
| <p style="text-align: center;">Julia Plaskon, <i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">The National Sulphur Co., <i>Respondent.</i></p> | } | <p>10</p> <p><i>On Certiorari.</i></p> |
|--|---|--|

TAKE NOTICE that on Saturday, November 25th, 1933, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we will apply to the Honorable Thomas J. Brogan, Chief Justice of the New Jersey Supreme Court for a Writ of Certiorari to review the determination and judgment in favor of petitioner in the Workmen's Compensation Court and also the affirmance thereof and the judgment thereon by the Hudson County Court of Common Pleas.

COULT, SATZ & TOMLINSON,
Attorneys for Respondent.

Service of the within Notice is hereby acknowledged this 10th day of November, 1933.

JOHN C. GRIMSHAW,
Attorney of Petitioner.

AFFIDAVIT.

NEW JERSEY DEPARTMENT OF LABOR,
Workmen's Compensation Bureau.

10

Julia Plaskon,
Petitioner,

vs.

The National Sulphur Co.,
Respondent.

} *On Certiorari.*

State of New Jersey }
County of Essex } ss. :

20

JOHN J. FRANCIS, of full age, being duly sworn according to law, upon his oath deposes and says:

He is a counsellor at law of the State of New Jersey, he is associated with the firm of Coult, Satz & Tomlinson, attorneys for respondent, and he is actually entrusted with the conduct and management of the above case.

He further says that this affidavit is made to support respondent's application for a writ of certiorari.

30

On the 8th day of July, 1925, petitioner filed a formal petition for compensation in the Workmen's Compensation Bureau of New Jersey, Department of Labor. The petition was filed under and by virtue of the provisions of an act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder, approved April 4, 1911, and the various supplements and amendments thereof.

40

Affidavit.

The said petition alleged that on the 6th day of June, 1925, petitioner's husband suffered an accident arising out of and in the course of his employment with respondent, which resulted in his death, and prayed that compensation be allowed to her and the deceased's dependent children as provided by the said act. A hearing was had on the said petition on the 29th day of November, 1925. At the conclusion of petitioner's case, judgment was entered in favor of respondent on the ground that petitioner had failed to establish that the deceased met his death from an accident arising out of and in the course of his employment. 10

On the 30th day of April, 1932, over six years later, petitioner obtained a rule to show cause from Deputy Commissioner Charles E. Corbin, requiring respondent to show cause on the 9th day of March, 1932 "why the determination and rule for judgment heretofore entered should not be set aside and for nothing holden and the case reopened for the purpose of taking newly discovered evidence." Ex parte affidavits and the unverified petition on which the rule was granted were attached to and made part of the rule and appear on pages 13-16 of State of Case. 20

The matter was subsequently argued and decision was reserved pending the submission of memoranda of law by the respective parties and also any counter-affidavits respondent might wish to offer. On the argument of the said rule no testimony was taken for the purpose of establishing that the alleged newly discovered evidence set forth in the affidavits was not available at the original trial, nor was testimony taken to establish that the newly discovered evidence could not have been secured by the exercise of due diligence for the original trial, nor was testimony taken to establish that petitioner had embraced the first opportunity which presented itself in making this, the said application, nor was any testimony 40

Affidavit.

taken to establish the facts alleged to have been newly discovered or to establish that said facts, if produced at the original trial, would in all probability have resulted in a conclusion different from that reached by the court.

10 The matter was considered entirely on the ex parte affidavits and unverified petition submitted by petitioner.

20 On the 10th day of June, 1932, an order was entered by the said Deputy Commissioner Charles E. Corbin, a true copy of which is attached hereto and made part hereof, which order adjudged that petitioner had in fact discovered new evidence; that she was reasonably diligent in the preparation of her case for the original trial, and that petitioner was reasonably diligent in her subsequent investigations and that petitioner moved to present the newly discovered evidence at the earliest opportunity and further that the said evidence was materially important to the issue.

30 It further ordered that the judgment of 1925 be opened and petitioner given an opportunity to present the new evidence, and further ordered that if the said newly discovered evidence, coupled with the testimony already taken in the case, was sufficient to make out a prima facie case, then respondent would be given the opportunity to present its defense.

40 On the return day of said order, respondent appeared in the said Workmen's Compensation Court in Jersey City and moved to dismiss the said order on a number of grounds appearing on pages 92 to 95, inclusive, of the State of Case. This motion was denied and an exception allowed (C-95). The hearing thereupon proceeded and petitioner began to attempt to establish that the evidence set forth in the affidavits was newly discovered within the contemplation of the law. After some argument, the court announced

Affidavit.

that he would not require petitioner to prove this matter, since he had already by the order above referred to reopened the case on the ex parte affidavits above referred to. Petitioner thereupon offered the persons who made the said affidavits and unverified petition for cross-examination on the facts set forth therein, by respondent. Respondent declined to do this, asserting that the burden was on petitioner to establish that the alleged newly discovered evidence was in fact newly discovered within the meaning of the decisions of the State of New Jersey. The case then proceeded over respondent's exception (C 18-29).

10

As the hearing continued the petitioner confined herself to the proof of the alleged facts and circumstances of the case which she contended established that the deceased met his death as the result of an accident arising out of and in the course of his employment with the respondent. The hearing was not a new trial but in accordance with the order this said evidence was permitted to go into the record for the purpose of augmenting that which was received in 1925 when the cause was originally tried.

20

At the conclusion of this testimony and some other incidental matters such as proof that petitioner had remarried since the original trial, the petitioner rested her case. After reserving decision, the court decided that with the testimony thus taken augmenting that produced at the original trial in 1925, petitioner had made out a prima facie case. Respondent was then ordered to proceed with its defense. Respondent however rested its case and moved for dismissal of the petition on substantially the same grounds urged for dismissal of the order under which the said testimony was taken (C 184-186). This motion was denied and exception allowed (C 190).

30

Subsequently and on the 25th day of October, 1932, a determination and award were made in favor of

40

Affidavit.

petitioner, a true copy of which determination and award is set forth in the State of Case on page 34.

10 Thereafter, respondent made an application to the late Chief Justice Gummere for a writ of certiorari to review this determination and award. The application was denied on the ground that respondent was required, under the provisions of the Workmen's Compensation Act, to first appeal from the said award to the Court of Common Pleas (C 40).

Thereafter respondent appealed from the award to the Court of Common Pleas of the County of Hudson and assigned the following reasons why the said award should be set aside:

20 1. The court erred in reopening the judgment on the ex parte affidavits and unverified petition presented by petitioner.

2. The court abused his discretion in reopening the judgment on the ex parte affidavits and unverified petition presented by the petitioner.

30 3. The evidence disclosed by the ex parte affidavits and the unverified petition is not newly discovered within the contemplation of the law.

4. The finding of the Deputy Commissioner that deceased met his death as the result of an accident arising out of and in the course of his employment is contrary to the weight of the evidence.

5. The hearing after the opening of the judgment was improper and irregular in that it was not a new trial within the established practice.

40 6. The Deputy Commissioner erred in computing the award to petitioner.

Affidavit.

This appeal was argued before the Honorable Thomas Brown, Judge of the Hudson County Court of Common Pleas, and thereafter Judge Brown affirmed the said judgment for petitioner.

An application for counsel fee allowance was later made to Judge Brown and, over respondent's objection, a fee of One Thousand Dollars (\$1,000.00) was granted, all of which fee was assessed against respondent. 10

JOHN J. FRANCIS.

Sworn and Subscribed to before me }
 this 9th day of November, 1933. }
 DAVID A. MOSCOWITZ
 An Atty.-at-Law of New Jersey. 20

30

40

DENIAL OF APPLICATION.

SUPREME COURT OF NEW JERSEY

Chief Justice Thomas J. Brogan
Jersey City

10

December 19, 1933.

{John C. Grimshaw, Esquire,
{Richard W. Baker, Esquire,
207 Market Street,
Newark, N. J.

Coult, Satz & Tomlinson, Esquires,
60 Park Place,
Newark, N. J.

20

Gentlemen:

The application for writ of certiorari in the case of Plaskon *vs.* National Sulphur Company has received careful consideration and after an examination of the record and the authorities cited on both sides I have concluded that the application should be denied.

30

A state of the case, the appellant's and respondent's briefs and the affidavit of Mr. Francis together with copy of the state of case in another matter, Katz *vs.* Zapela, have been left with me. Will counsel please call at their early convenience for these exhibits which may be required if the application should be pursued further.

Very truly yours,
T. J. BROGAN.

40

Petition for Compensation.

PETITION FOR COMPENSATION.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Trenton, N. J.

Dependent's Claim Petition for Compensation. 10

| | |
|--|---|
| Julia Plaskon, <p style="text-align: right;"><i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> National Sulphur Co., <p style="text-align: right;"><i>Respondent.</i></p> | } |
|--|---|

Received at Trenton July 8, 1925. 20
July 6, 1925.

Date of Accident June

If known, state name of insurance company.

Attorney for Petitioner, Anthony A. Gottko, 6 East
25th street, Bayonne, N. J.

To the Workmen's Compensation Bureau of New
Jersey:

The claimant respectfully alleges the following
facts: 30

1. What was the full name of the decedent? John Plaskon.
2. Where did decedent live? 220 Prospect Ave., Bayonne, N. J.
3. Sex of decedent? Male.
4. Date of birth of decedent? March 6, 1875.
5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death: 40

Petition for Compensation.

| Name of Each Dependent | Age at Last Birthday | Date of Birthday | Relation to Decedent |
|------------------------|----------------------|------------------|----------------------|
| Mike Plaskon | 22 | Aug. 28, 1903 | son |
| Joseph Plaskon | 18 | Dec. 28, 1907 | son |
| Julia Plaskon | 16 | March 7, 1909 | daughter |
| Stephen Plaskon | 14 | June 11, 1911 | son |
| Wasil Plaskon | 10 | July 20, 1915 | son |
| Mary Plaskon | 8 | Sept. 3, 1917 | daughter |
| Annie Plaskon | 5 | July 3, 1920 | daughter |

- 10
6. By whom was decedent employed at the time of accident? (Give name and business address.)
National Sulphur Company,
Constable Hook,
Bayonne, N. J.
7. What was the business of the employer? Sulphur manufacturer.
- 20
8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him?
9. Did he receive such notice from the employer?
10. Did the employer have knowledge of this accident? Yes.
11. Did you notify the employer of this accident? Yes.
- 30
12. If so, on what date? June 18th, 1925.
13. Have you made claim to the employer for compensation? Yes.
14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Laborer, Wheeling sulphur.
15. When did the accident happen? June 6th, 1925.
- 40
16. Where did the accident happen? Company's pier.

Petition for Compensation.

17. What was the nature of the accident, and how did it happen? Decedent was walking along pier of Company and fell into river and was drowned.
18. Did deceased work any after the accident? No. 10
19. If so, give date he was compelled to stop work.
20. Give date of death. June 6th, 1925.
21. Were his wages fixed by piece work? No.
22. If so, what was his average weekly wage?
23. If wages were fixed by the hour, state rate per hour.
24. Give number of hours in an ordinary working day. Eight. 20
25. Give number of days in an ordinary working week. Six.
26. State the amount of weekly wages. \$32.76.
27. How much money have you received from the employer as compensation (not medical aid) since the accident? None. 30
28. Has the employer promised to pay you any compensation? No.
29. If so, how much?
30. Was medical aid required? No.
31. If so, was this service furnished by the employer?
32. What other sum did you expend for medical, surgical or hospital service? None.
33. Give name and address of physician and hospital. 40

Petition for Compensation.

- 10 34. What other facts are there which you believe important? Decedent was compelled to take the place of another employee after he had completed his day's work, under penalty of losing his job. Decedent complained to his boss about working after he had completed his day's work.

On June 13, 1925, a representative of the respondent called at the petitioner's house and placed \$200.00 in the hand of the petitioner, which the petitioner offered to return to the representative but was informed by him that it was a "present" from the Company. Petitioner never agreed to accept this amount in lieu of any claim which she might have against the Company as provided by law.

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

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

And your petitioner will ever pray, etc.

JULIA PLASKON,
Petitioner.

40

220 Prospect Ave., Bayonne, N. J.

Petition for Compensation.

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

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

JULIA PLASKON,
 Petitioner.

Subscribed and sworn to before me,
 this sixth day of July, 1925, at
 Bayonne, N. J.

20

ANTHONY A. GOTTKO,
 Attorney at Law of N. J.

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

30

40

*Petition for Compensation.**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.

10

We hereby notify you that unless an answer shall, within ten days from the receipt of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU,

20

W. E. STUBBS,
Secretary.

30

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Answer to Claim Petition by Respondent.

**ANSWER TO CLAIM PETITION BY
RESPONDENT.**

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Trenton, N. J.

10

Respondent's Answer to Defendant's Claim Petition.

| | |
|--|---|
| <p>Julia Plaskon, <i>Petitioner,</i></p> <p><i>vs.</i></p> <p>National Sulphur Co., <i>Respondent.</i></p> | } |
|--|---|

20

Claim Petition No..... Received at Trenton
August 10, 1925, August 1, 1925.

Attorney for Respondent, Frank G. Turner, 76
Montgomery St., Jersey City, N. J.

In answer to Claim Petition filed in this case:

1. What was decedent's name? John Plaskon.
2. Where did decedent reside? 220 Prospect Ave-
nue, Bayonne, N. J. 30
5. Do you question the dependency, age or relation
of any of the persons named in question No. 5
of the Claim Petition? If so, specify. Have no
knowledge as to the dependency.
6. Was the decedent in your employ at the time of
the accident? Prior to the time of the accident.
7. State your business. Manufacturing sulphur. 40

Answer to Claim Petition by Respondent.

8. Did you receive written notice from the decedent 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 10. When did you first have knowledge of this accident? June 6, 1925.
11. Did you receive notice of this accident from the Petitioner? No.
12. If so, on what date? No.
13. Has any claim for compensation been made? Yes.
- 20 14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? He had been a shopman. He was not working at the time of the accident.
15. When did the accident happen? June 6, 1925.
16. Where did the accident happen? In the Kill-Von-Kull.
- 30 17. What was the nature of the accident and how did it happen? John Plaskon was drowned. No one knows how he got into the water. His work did not take him near the water. It is not known whether he jumped into the water or fell into the water.
18. Did the decedent work any after the accident? No.
19. If so, give date he stopped work.
- 40 20. Give date of death. June 6, 1925.

Answer to Claim Petition by Respondent.

21. Were his wages fixed by piece-work? No.
22. If so, what was his average weekly wage? No.
23. If wages were fixed by the hour, state rate per hour. 63 cent per hour.
24. Give number of hours in an ordinary working day. 8 hours. 10
25. Give number of days in an ordinary working week. 6 days.
26. State the amount of weekly wages. \$30.24.
27. How much have you paid as compensation (not medical aid) since the accident? Nothing.
28. Have you promised to pay compensation? No. 20
29. If so, how much? Nothing.
30. Was medical aid required? No.
31. If so, did you furnish all the medical, surgical, or hospital services, or other expenses of last sickness? None.
32. Between what dates was service rendered? None.
33. Give name and address of physician and hospital rendering service at your direction. None. 30
34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion. If this was an accident it did not arise out of or in the course of the employment of the deceased.

NATIONAL SULPHUR COMPANY,

By G. A. WEIDIG, Supt.

40

Answer to Claim Petition by Respondent.

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

10 G. A. Weidig of the National Sulphur Co., Inc., of full age, being duly 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.

G. A. WEIDIG.

Subscribed and sworn to before me,
 this fifth day of August, 1925, at
 Bayonne, N. J.

20

WILLIAM BARNES.

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

30

40

*Determination and Judgment.***DETERMINATION AND JUDGMENT.****NEW JERSEY DEPARTMENT OF LABOR.****Workmen's Compensation Bureau.**

| | | | |
|--|---|--|----|
| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } | <i>Determination and Judgment.</i> | 10 |
|--|---|--|----|

A petition was duly filed on July 5, 1925, in this cause and the respondent filed its answer. The cause came up for hearing at Jersey City, on November 20th. The petitioner called witnesses on her behalf and established the following facts: That she was the widow of John Plaskon, who was employed by the National Sulphur Company, at Bayonne, N. J., on June 6, 1925. He was employed as a laborer, in the respondent's plant and he used a shovel in his work. He went to work about 3 o'clock in the afternoon and at about 4 o'clock he left his work and prepared some coffee for himself and two other workmen. After preparing the coffee he went out on a part of the plant which is known as a bridge connecting two buildings of the plant. This is about three hundred feet from the water. It was a warm day and he went on the bridge to cool off. He returned to his work for a few minutes and then his fellow workmen could not find him. He was last seen coming from a barge owned by the American Borax Company. The American Borax Company had the adjoining plant. When he came from the barge of the American Borax Company, he had in his hand a large white lump of borax. This had no connection with his work. While he was carrying the borax from the borax company's barge he

Determination and Judgment.

stepped upon the dock and stumbled and fell into the water. His work did not take him near the dock and did not take him near the water. He was not engaged in his employment at the time of this accident.

10 I do find and determine on this 20th day of November, 1925, that the said accident did not arise out of and in the course of his employment. It is hereby ordered that the petition herein be and the same hereby is dismissed.

CHARLES E. CORBIN,
Deputy Commissioner of Labor.

Dated December 16, 1925.

20

30

40

RULE TO SHOW CAUSE.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau,
Jersey City, Hudson County District.

Julia Plaskon,

Petitioner,

vs.

National Sulphur Co.,

Respondent.

10

*On Claim
Petition*

It is on this 30th day of April 1932 ORDERED that the respondent show cause before me at the Workmen's Compensation Bureau in the City of Newark, County of Essex, on the 9th day of May, 1932, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the determination and rule for judgment heretofore entered in this case should not be set aside and for nothing holden and the case reopened for the purpose of taking newly discovered evidence, all in accordance with the statute made and provided;

20

AND IT IS FURTHER ORDERED that a copy of the petition and this rule to show cause, with accompanying affidavits, be served upon the attorney for the respondent within 5 days from the date of this order.

30

CHARLES E. CORBIN,
Deputy Commissioner.

40

Petition.

PETITION.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau,
Jersey City, Hudson County District.

| | | |
|----|--|---|
| 10 | Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } <i>On Claim Petition No. 4124. Petition.</i> |
|----|--|---|

20 The above is a formal compensation case which was tried at Jersey City on November 20, 1925. A determination of facts and rule for judgment in favor of the respondent on motion for dismissal of the petition upon the petitioner resting her case, was signed by this Court on December 16, 1925 and entered in this court on or about said date.

30 The petition was dismissed on the grounds that said accident which occurred on June 6, 1925 and which resulted in the death of John Plaskon did not arise out of and in the course of his employment. The only testimony produced in this case was that in behalf of the petitioner and which was the only evidence available to the petitioner at the time of the aforesaid trial. No evidence was produced by the respondent, the respondent making a motion for dismissal at the conclusion of the petitioner's case. A digest of the evidence produced is set forth in determination and judgment filed in this case and from which determination and judgment it must be assumed that the Court found that the petitioner's deceased met his death while carrying a lump of borax from the Borax Company's barge and from which statement an assumption arises that the petitioner's deceased was stealing said borax
40 or had no right nor business in obtaining said borax.

Petition.

In behalf of the petitioner, Julia Plaskon, I have carefully reviewed the evidence produced in her behalf at the original trial and carefully investigated certain facts pertaining to the case and have located several witnesses whose testimony is of vital importance to the custom employed at the National Sulphur Company and which was evidence not obtainable by the petitioner at the time of her original trial and which evidence I humbly believe that your Honor will find will not only clarify that evidence already produced but will prove beyond a reasonable doubt that the petitioner's deceased, John Plaskon, met his death in an accident arising out of and in the course of his employment.

10

The evidence that I have uncovered will show your Honor that it was a custom of the employees of the National Sulphur Company to obtain borax from the Borax Company's grounds or their barges and which borax was also termed as mud and which was the refuse from the borax plant that was placed on barges and taken out to sea for disposal and that the National Sulphur Company employees used this borax or borax mud for the purpose of sealing the furnaces or other parts used by the National Sulphur Company in their manufacturing process. Brief affidavits of several of the witnesses located in behalf of the petitioner since her original trial setting forth in brief statement of the facts above referred to are hereto attached.

20

30

In view of the above facts which it is believed will prove the petitioner's case to the extent that the accident arose out of and in the course of the employment and which resulted in the death of petitioner's deceased husband, John Plaskon, the petitioner respectfully requests that this case be reopened for the purpose of taking the new evidence referred to above.

J. C. GRIMSHAW,
Attorney for Petitioner.

40

Affidavit of Joseph Plaskon.

AFFIDAVIT OF JOSEPH PLASKON.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

10 _____
Julia Plaskon, *Petitioner,*
vs.
National Sulphur Co., *Respondent.*
_____ } *Affidavit.*

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

JOSEPH PLASKON, of full age, residing in Bayonne, New Jersey, being duly sworn according to law on his oath deposes and says:

30 I am the son of Julia Plaskon. My father, John Plaskon, was employed by the National Sulphur Company and met with an accident on June 6, 1925, which resulted in his death and as a result of his death, my mother instituted proceedings to recover compensation for herself and children and I aided her in the preparation of her case for trial and consulted with the lawyer who tried the case, Mr. Gottko, and subsequent to the trial, consulted with Mr. Melniker and Mr. Roberson, lawyers whom my mother interviewed as to whether anything could be done in her case.

40 As a result of the interviews with Mr. Melniker and Mr. Roberson, I again interviewed employees of the National Sulphur Company that I could locate and also employees of the borax company and as a result of this last investigation, I was unable to learn any different facts than those that had been testified by

Affidavit of Joseph Plaskon.

two employees of the National Sulphur Co., Thomas Szewczak and Frank Zaworski, and which were the witnesses that I interviewed for the original trial.

I called at Mr. Grimshaw's office in the early part of 1930 with my mother when she first interviewed Mr. Grimshaw and advised him that the only information that I was able to locate and the only witnesses that gave me any information pertaining to my father's case were the witnesses that testified in the case and their testimony Mr. Grimshaw could read from the court records.

10

There was no other information that I was able to obtain in reference to my father's case except that which has already been presented. I talked to a number of employees of the National Sulphur Company and did not learn anything other than was presented at the original trial and in many instances employees stated that they did not know anything about my father's case.

20

To my knowledge, I never saw my father bring home any sulphur or borax material.

Witnesseth my hand and seal this 6th day of May, 1932.

JOSEPH PLASKON (L. S.)

30

Subscribed and sworn to before me
this 6th day of May, 1932.

J. C. GRIMSHAW,
Attorney at Law of N. J.

40

Affidavit of Julia Plaskon.

AFFIDAVIT OF JULIA PLASKON.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

10

Julia Plaskon,

Petitioner,

vs.

National Sulphur Co.,

Respondent.

} *Affidavit.*

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

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JULIA PLASKON, of full age, residing in Bayonne, New Jersey, being duly sworn according to law, on her oath deposes and says:

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I am the widow of John Plaskon who was employed by the National Sulphur Company in Bayonne, New Jersey and who I claim met with an accident on June 6, 1925 while in the employ of the said company which resulted in John Plaskon's death and as a result of which I filed a formal petition as dependent and in behalf of the surviving children and this case was tried in November, 1925 at the Workmen's Compensation Bureau in Jersey City and the case was dismissed, the determination and judgment being signed in December, 1925.

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At the conclusion of the case, I was advised by my attorney, Mr. Gottko, that the only thing I could do was to appeal my case to a higher court. This lawyer asked me for a fee which I did not pay and my relations with Mr. Gottko came to an end. After this, I consulted Mr. Melniker and subsequent to that, Mr.

Affidavit of Julia Plaskon.

Roberson, both of Hudson County, and stated the facts in my case and I was advised by both that the only thing that I could do would be to locate additional witnesses.

Joseph, my son, and myself again inquired of a number of employees whom we could locate as to their knowledge of the accident in question and in all of our investigations, either prior to the original trial or subsequent to the original trial, the only witnesses that we could obtain that would state anything and that did state anything to us in reference to the accident were Thomas Szewczak and Frank Zaworski, both of whom testified at the original trial. The testimony of these two witnesses covers every fact known to us in reference to the accident in question and every fact that we were able to obtain throughout our several investigations and interviews with the employees of the National Sulphur Company that we were able to locate. These investigations also covered employees of the borax company that could be located.

In the early part of 1930, through an acquaintance in Bayonne, I called upon John C. Grimshaw at his office in Newark, New Jersey, and stated my case to him and he advised that he would review the case and inform me as to whether anything could be done in my behalf and in behalf of the dependent children. Mr. Grimshaw also asked me to endeavor to locate other witnesses which both I and my son tried to do but without success and the matter rested in Mr. Grimshaw's hands.

At no time, to my knowledge, did Mr. Plaskon ever bring home either sulphur or borax or any other material with which he worked.

Affidavit of Julia Plaskon.

Witnesseth my hand and seal this sixth day of May, 1932.

JULIA PLASKON, (L. S.)

10 I read the above statement to my mother, Julia Plaskon, and she stated it was the truth.

JOSEPH PLASKON.

Subscribed and sworn to before me
this sixth day of May, 1932.

J. C. GRIMSHAW,
Attorney at Law of N. J.

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NEW JERSEY DEPARTMENT OF LABOR.
 Workmen's Compensation Bureau,
 Newark, Essex County District.

| | |
|-------------------------------|------|
| Julia Plaskon, | } 10 |
| <i>Petitioner,</i> | |
| <i>vs.</i> | |
| The National Sulphur Company, | } 10 |
| <i>Defendant.</i> | |

I, ROBERT BERCHMAN, do certify that I was the official court reporter in the New Jersey Department of Labor, Workmen's Compensation Bureau, Essex County District, on the 9th day of May, 1932, when the rule to show cause why the determination and rule for judgment in the above case should not be set aside and for nothing holden and the case reopened for the purpose of taking newly discovered evidence, was returnable, 20

I do further certify that I made stenographic notes of the argument of the said rule; that I have examined the said notes and nowhere do I find therein any offer by counsel for petitioner that the witnesses who made affidavits in support of the rule be produced and their testimony taken in connection with the argument of the rule, nor any suggestion that any testimony of any witnesses be taken on said argument or at the time of said argument, nor do I find any offer for the production of the said witnesses on the said argument for the purpose of having the facts which were incorporated in the affidavits attached to the rule submitted in the form of oral testimony in open court. 30

ROBERT BERCHMAN.

Dated:

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Affidavit of Mike Matus.

AFFIDAVIT OF MIKE MATUS.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

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Julia Plaskon,

Petitioner,

vs.

National Sulphur Co.,

Respondent.

} *Affidavit.*

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

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MIKE MATUS, of full age, residing at Bayonne, New Jersey, being duly sworn according to law on his oath deposes and says :

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I was employed by the National Sulphur Company for about eleven years and worked on the furnaces at said plant and was in the employ of the National Sulphur Company in June, 1925. I worked on the shift from three to eleven on June 5th, 1925. The weather was very hot and my face and eyes were affected by fumes and gases from the furnaces, my eyes were bloodshot and swollen and on Saturday, June 6th, 1925, my wife telephoned to the National Sulphur Company and advised that I would not report on my shift from three to eleven on that day. I understand that John Plaskon was requested to work my shift from three to eleven although he had worked on his regular shift on June 6th, 1925, from seven a. m. to three p. m.

40

At various times cracks would form in the furnaces which would result in gases and fumes escaping into the room and when this did occur, I would get borax

Affidavit of Mike Matus.

mud from the barges or from the grounds of the Borax plant and which would be used to seal the cracks and if the borax mud was hard, water would be mixed with it to soften same so that it could be applied to the cracks. I have done this on several occasions and I know the Borax Company had no objection to our using any of the borax mud as the borax mud was loaded in barges and taken out to sea where it was dumped. When the fumes and gases were very strong and I would have an opportunity to get some of the borax mud, I would go to the barge to obtain same as this would give me an opportunity of being in the fresh air for a few minutes longer than if I obtained it from the premises of the Borax Company. 10

As I recall, June 6th, 1925, was a very hot day and working before the furnaces the heat would be terrific and with the conditions that had existed on June 5th, resulted in my being unable to work on June 6th, which was responsible for Plaskon working my shift and at my furnace. 20

The aforesaid facts are the conditions that existed on the above dates and until I was approached within the last ten days I never had occasion to state the facts, was never called upon to make statement of the facts and I had no occasion to volunteer any information but upon being questioned and asked, I voluntarily stated the aforesaid facts as being the conditions existing and the circumstances surrounding the work involved at the National Sulphur Company in June, 1925. 30

Witnesseth my hand and seal this 8th day of June, 1931.

MICHAEL MATUS.

Subscribed and sworn to before me
this 8th day of June, 1931.

MICHAEL JEWUSIAK,
Notary Public of N. J. 40

Affidavit of Frank Fernan.

AFFIDAVIT OF FRANK FERNAN.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

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|----|--|---|-------------------|
| 10 | <p>Julia Plaskon, <i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>National Sulphur Co., <i>Respondent.</i></p> | } | <i>Affidavit.</i> |
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State of New Jersey, ss. : }
County of Hudson.

20 FRANK FERNAN, of legal age, residing in Bayonne, New Jersey, being duly sworn according to law on his oath deposes and says:—

I was employed by the Pacific Coast Borax Co., which was next to the National Sulphur Company, as assistant yard foreman and handy man for the past eighteen years until about 1930.

30 In the refining the borax there is a certain amount of borax known as mud which was of no value and which was put on barges and taken out to sea to be dumped. The mud or borax would be taken to the barges from the plant on dump cars run by electricity.

40 The employees of the National Sulphur Company used this borax or mud for sealing cracks in the furnaces. They would get the mud either from the grounds of the Borax Company or their barges. The Borax Company often dumped the mud near the National Sulphur Company so they could use the mud. The employees of the National Sulphur Com-

Affidavit of Frank Fernan.

pany would get the mud in pails, they had small trowels which they used to put the mud in the pails.

I knew Plaskon when he worked for the National Sulphur Company but did not see his accident and only know what I was told. I saw Plaskon get the mud on several occasions. I also saw the man get the mud from the barges. 10

When the borax, known as mud, would dry it would get lumpy.

Witnesseth my hand and seal this 27th day of February, 1932.

FRANK FERNAN. (Seal)

Subscribed and sworn to before me
me this 27th day of February,
1932. 20

JOHN C. GRIMSHAW,
Atty. at Law of N. J.

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Affidavit of Thomas Stberke (Stsbiewski).

AFFIDAVIT OF THOMAS STBERKE.
(Stsbiewski)

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

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|---|---|-------------------|
| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> | } | <i>Affidavit.</i> |
| <i>vs.</i> | | |
| National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | | |

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

THOMAS STBERKE (Stsbiewski), of legal age, residing in Bayonne, New Jersey, being duly sworn according to law on his oath deposes and says:

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I was employed by the National Sulphur Company for a period of about four years, from 1923 to about 1927 as a bricklayer's helper. I worked on the furnaces most of the time, repairing and installing new ones. The bricklayer I worked for on many occasions sent me to the Borax Company for borax or also known as Mud for use in sealing cracks in the furnaces. I would get this either from the grounds or the barge. The borax we used was taken from the pile which was to be taken out to sea to be dumped.

I knew John Plaskon when he was working for the National Sulphur Company and on several occasions saw him get this borax or mud for use at the furnaces.

40

The National Sulphur Company supplied the men with trowels to apply the borax into the cracks in the furnaces, but did not supply the bricklayers.

Affidavit of Thomas Stberke (Stsbiewski).

Witnesseth my hand and seal this 27th day of February, 1932.

THOMAS STSBIEWSKI (Stberke).

Subscribed and sworn to before me this 27th day of February, 1932. 10

JOHN C. GRIMSHAW,
Atty. at Law of N. J.

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Affidavit of Patrick L. Joyce.

AFFIDAVIT OF PATRICK L. JOYCE.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

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|----|--|---|-------------------|
| 10 | Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } | <i>Affidavit.</i> |
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State of New Jersey, }
County of Hudson. } ss. :

20 PATRICK L. JOYCE, of full age, residing in Bayonne, New Jersey, being duly sworn according to law on his oath deposes and says:

30 I was employed by the Pacific Coast Borax Company for a period of about eight years. At different times during the course of my employment I saw men from the National Sulphur Company obtain borax or mud from the barges of the Pacific Coast Borax Company, which were tied up at their dock adjoining the National Sulphur Co. plant. This mud or borax when dried was a color between slate and white and when wet nearer a slate color.

Different men that I saw take the borax told me that they used it for the purpose of sealing the furnace which would become cracked at various times and to my knowledge, it appeared to be a custom of the plant to use the borax for the aforesaid purpose.

40 The borax which was obtained from the Borax Company's barges was also known as mud and was placed on the barges for the purpose of being taken out to

Affidavit of Patrick L. Joyce.

sea to be disposed of and at no time did I hear of any complaint about the men from the National Sulphur Company taking the borax from the barges.

Witnesseth my hand and seal this 17th day of February, 1932.

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PATRICK L. JOYCE.

Subscribed and sworn to before me this 17th day of February, 1932.

JOHN A. WARNOCK,
Notary Public of New Jersey.

My commission expires May 21, 1934.

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Affidavit of John Hagan.

AFFIDAVIT OF JOHN HAGAN.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

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|-----------------------|--|----------------|--------------------|---|-------------------|------------|--|-----------------------|--------------------|
| 10 | <table border="0" style="width: 100%;"> <tr> <td style="width: 60%;">Julia Plaskon,</td> <td style="width: 40%; text-align: right;"><i>Petitioner,</i></td> <td rowspan="3" style="font-size: 3em; vertical-align: middle; padding-left: 10px;">}</td> <td rowspan="3" style="vertical-align: middle;"><i>Affidavit.</i></td> </tr> <tr> <td style="text-align: center;"><i>vs.</i></td> <td></td> </tr> <tr> <td style="padding-top: 10px;">National Sulphur Co.,</td> <td style="text-align: right; padding-top: 10px;"><i>Respondent.</i></td> </tr> </table> | Julia Plaskon, | <i>Petitioner,</i> | } | <i>Affidavit.</i> | <i>vs.</i> | | National Sulphur Co., | <i>Respondent.</i> |
| Julia Plaskon, | <i>Petitioner,</i> | } | <i>Affidavit.</i> | | | | | | |
| <i>vs.</i> | | | | | | | | | |
| National Sulphur Co., | <i>Respondent.</i> | | | | | | | | |

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| 20 | State of New Jersey, } | } | ss.: |
| | County of Hudson. | | |

JOHN HAGAN, of full age, residing in Bayonne, New Jersey, being duly sworn according to law on his oath deposes and says:

I was employed by the National Sulphur Company from about June, 1921 to October 1925, as a general utility man. At times I rolled tubes and did various other jobs in the furnace room and although the plant worked on a shift basis, my hours were during the day shift and on Saturdays I worked one-half day.

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|----|---|
| 30 | I know at various times during my employment at the National Sulphur Company that mud or borax was used on the furnace to seal cracks and as I recall, the employer furnished trowels to the employees for the purpose of applying the mud or borax. The mud or borax was obtained from the barges or the grounds of the Borax Company which is adjoining the National Sulphur Company and to my knowledge, there was never any complaint made about the employees of the National Sulphur Company obtaining the borax or |
| 40 | mud from the Borax Company's grounds or their |

Affidavit of John Hagan.

barges. The borax was placed on the barges and then taken out to sea to be disposed of.

Witnesseth my hand and seal this 30th day of January, 1932.

JOHN HAGAN. 10

Subscribed and sworn to before me this 20th day of January, 1932.

JOHN A. WARNOCK,
(Seal) Notary Public of New Jersey.

My commission expires May 21, 1934. 20

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Order.

ORDER.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.
Jersey City, Hudson County, District.

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| 10 | Julia Plaskon, <div style="text-align: right; padding-right: 20px;"><i>Petitioner,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right; padding-right: 20px;"><i>Respondent.</i></div> | } <i>On Claim Petition No. 4124. Order.</i> |
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20 Judgment for the respondent having been entered in the above action on December 16, 1925; and application for a new trial having been made by the petitioner upon the grounds of newly discovered evidence; and the Court having granted a rule requiring the respondent to show cause why said judgment should not be opened and a new trial granted; and it appearing that the said rule and affidavits were duly served upon the attorney for the respondent, by the petitioner's attorney, an argument on the rule was heard by the Court on May 9, 1932 and on June 7, 1932; and it appearing from the affidavits presented by the petitioner that she has in fact discovered new evidence;

30 and it also appearing that the petitioner was reasonably diligent in the preparation of her case for the original trial and further, was reasonably diligent in her subsequent investigations in checking the facts pertaining to the case in issue; and it appearing that the petitioner moved to present the newly discovered evidence at the earliest opportunity upon the discovery of the said evidence; and it further appearing that the said evidence is materially important to the issue in this case.

40 It is, on the 10th day of June, 1932, on motion of John C. Grimshaw, Esquire, (Richard W. Baker, esq.

Order.

of counsel) attorney of the petitioner, ordered that said judgment be opened and that the petitioner be given an opportunity to present her new evidence, which I have ruled is in fact newly discovered evidence, material to the issue, and goes to the merits of the case. I further order that if the newly discovered evidence, coupled with the testimony already taken in the case, is sufficient to make out a prima facie case then the respondent shall be given the opportunity to present its defense. The case shall be heard at ten o'clock in the forenoon on the 21st day of July, 1932, at the Workmen's Compensation Bureau, 571 Jersey avenue, Jersey City, New Jersey, or as soon thereafter as counsel can be heard. 10

CHARLES E. CORBIN,
Deputy Commissioner. 20

On motion of

J. C. GRIMSHAW,
Attorney for Petitioner.

RICHARD W. BAKER,
Of Counsel.

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*Determination and Rule for Judgment.***DETERMINATION AND RULE FOR
JUDGMENT.**

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.

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| 10 | Julia Plaskon, <div style="text-align: right; padding-right: 20px;"><i>Petitioner,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right; padding-right: 20px;"><i>Respondent.</i></div> | } | <i>Claim Petition No. 4124.</i> <i>Determina- tion and Rule for Judgment.</i> |
|----|--|---|--|

20 A formal petition having been filed in the above matter asking for compensation under the terms of the Compensation Law of this State and an answer having been duly filed, the same came on for a hearing before me in Jersey City on November 20, 1925, the petitioner being represented by Attorney Anthony A. Gottko and the respondent by Attorney Frank G. Turner.

30 At the time of the hearing in this case the petitioner testified in her own behalf and she also called to testify Mr. Owen O'Neill, Mr. Otto Christensen, Mr. Thomas Szewczak, and Mr. Frank Zaworski. At the end of the petitioner's case the attorney for the respondent moved for a non-suit on the grounds that the petitioner had failed to show that the deceased died as a result of an injury by accident arising out of and in the course of the employment, stating that there was no proof whatsoever that there was an injury by accident arising out of and in the course of the employment. After argument of counsel the motion for a non-suit was granted.

40 On April 25, 1932, on behalf of the petitioner, Julia Plaskon, a petition was made to Deputy Workmen's

Determination and Rule for Judgment.

Compensation Commissioner Charles E. Corbin by Attorney John C. Grimshaw, representing the petitioner, to reopen the case for the purpose of taking newly discovered testimony. Thereafter, on April 30, 1932, Attorney Chester W. Rothfuss, representing the respondent, was served with a rule to show cause why the determination and rule for judgment theretofore entered in this case should not be set aside and the case reopened for the purpose of taking newly discovered evidence. Thereafter copies of affidavits secured by the attorney for the petitioner were served upon the aforesaid Chester W. Rothfuss and the case came on for a hearing before me in Newark on May 9th and June 7th, 1932, at which time the petitioner was represented by Attorney John C. Grimshaw (Richard W. Baker of counsel), and the respondent by Attorney Chester W. Rothfuss. At the termination of this hearing an opportunity was given to both parties to submit a memorandum as to law, to submit the affidavits on behalf of the petitioner, and an opportunity was given to the respondent to submit any affidavits that it desired. Thereafter, after going over the memorandums and affidavits duly filed with me, I came to the conclusion that the further evidence secured in behalf of the petitioner was such evidence as would, if presented, make out a prima facie case on behalf of the petitioner and further decided that this evidence was in fact newly discovered evidence. Thereupon, as a matter of law, I concluded that it was within the power of this court to reopen the case and thereupon I did order that the case be reopened and signed an order to that effect dated June 10, 1932.

Thereafter the case came on for trial before me in Jersey City on July 21, 1932, the petitioner being represented by Attorney John C. Grimshaw (Richard W. Baker of counsel), and the respondent by Attorney John J. Francis. At the time of the hearing in this case on the order for reopening the same to give the petitioner a chance to produce newly discovered testi-

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Determination and Rule for Judgment.

mony the petitioner testified in her own behalf and also called to testify Joseph Plaskon, Attorney John C. Grimshaw, Mr. Otto Christensen, Mr. Mike Matus, Mr. John Hagan, Mr. Thos. Stberke, Mr. Patrick L. Joyce and Mr. Frank Fernan. Also on behalf of the petitioner there was introduced in evidence photographs of the scene of the accident and the death certificate of the decedent's death. At the end of the petitioner's case a motion was made by the attorney for the respondent for a non-suit.

After reviewing the testimony in the case I found that the petitioner sustained the burden of making out a prima facie case that the deceased died as a result of an accident arising out of and in the course of his employment. The case was thereby adjourned to give the respondent an opportunity to put in a defense of the case and the case came on again for a hearing on 10/6/32, the same attorneys being present.

When the case came up for completion on 10/6/32 the respondent rested without putting in any case and thereupon both attorneys summed up and after hearing the argument of the attorneys and carefully going over the evidence produced in the case I find that the petitioner has sustained the burden of proving that the deceased died as the result of an injury by accident arising out of and in the course of his employment. I therefore find that the petitioner is entitled to an award of compensation based upon herself as a dependent and based upon the dependency of her son, Stephen Plaskon, her son, Wasil Plaskon, her daughter, Mary Plaskon and her daughter, Annie Plaskon.

Accordingly, I hereby order that the respondent pay to the petitioner for herself and for her minor children one hundred and three (103) weeks' compensation at the rate of \$18.02 per week, which includes the period from June 18, 1925 until June 11, 1927, when Stephen Plaskon became sixteen years of age.

Determination and Rule for Judgment.

This is based upon 55% of the wages of \$32.76 per week and based upon five dependents at that time.

After the expiration of the one hundred and three weeks I order that the respondent pay the petitioner one hundred and sixteen (116) weeks' compensation at \$16.38 per week, being 50% of the wages based upon four dependents, which includes the period from June 11, 1927 to September 4, 1929, when the petitioner, Julia Plaskon, remarried. 10

Thereafter I order that the respondent pay the petitioner ninety-seven and five-sevenths ($97 \frac{5}{7}$) weeks' compensation at the rate of \$14.74 per week, being 45% of the wages based upon three dependents, including the period from September 4, 1929 to July 20, 1931 when Wasil Plaskon became sixteen years of age. 20

Thereafter I order that the respondent pay the petitioner one hundred and ten and six-sevenths ($110 \frac{6}{7}$) weeks' compensation at the rate of \$13.11 per week, being 40% of the wages based upon two dependents, including the period from July 20, 1931 to September 3, 1933, when Mary Plaskon becomes sixteen years of age.

Thereafter I order that the respondent pay the petitioner one hundred and forty-eight and four-sevenths ($148 \frac{4}{7}$) weeks' compensation at the rate of \$11.47 per week, being 35% of the wages based upon one dependent, including the period from September 3, 1933 to July 3, 1936, when the last dependent, Annie Plaskon, becomes sixteen years of age. 30

I further order that the respondent pay the petitioner \$150.00 to cover funeral expenses allowed under the Compensation Law. 40

Determination and Rule for Judgment.

I further order that the attorney for the petitioner, John C. Grimshaw (Richard W. Baker of counsel) be allowed a counsel fee of \$900.00, one-half to be paid by the petitioner and one-half to be paid by the respondent.

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CHARLES E. CORBIN,
Deputy Commissioner.

Dated October 25, 1932.

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Notice of Application for Writ of Certiorari.

**NOTICE OF APPLICATION FOR WRIT OF
CERTIORARI.**

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.

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|--|---|---------------------------|
| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> The National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } | 10 NOTICE. |
|--|---|---------------------------|

To John C. Grimshaw, Esq., attorney for petitioner,
207 Market St., Newark, N. J.

Sir: 20

PLEASE TAKE NOTICE that on Saturday, November 5th, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall apply to the Hon. William S. Gummere, Chief Justice of the New Jersey Supreme Court at the Court House in the City of Newark, New Jersey, for a writ of certiorari to review the determination of the Workmen's Compensation Bureau of the State of New Jersey in the above entitled cause.

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COULT, SATZ & TOMLINSON,
Attorneys for Respondent.

Dated: October 27, 1932.

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*Rule Denying Application.***RULE DENYING APPLICATION.**

Filed: November 15, 1932.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.

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| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> The National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } <i>Rule.</i> |
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This matter having been presented to the Court by
 Coult, Satz & Tomlinson, attorneys for the respon-
 dent, The National Sulphur Co. on an application for
 a writ of certiorari to review the determination and
 judgment of the Workmen's Compensation Bureau of
 the State of New Jersey, entered on the 25th day of
 October, 1932, and it appearing to the Court that
 respondent has not appealed to the Court of Common
 Pleas from the said determination and judgment,

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It is on this 12th day of November, 1932, OR-
 DERED that the said application be, and the same
 is hereby denied.

WM. S. GUMMERE,
 Chief Justice of the New Jersey Supreme Court.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed November 12, 1932.

NEW JERSEY DEPARTMENT OF LABOR.
Workmen's Compensation Bureau.

| | | | |
|--|---|--------------------------|----|
| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } | <i>Notice of Appeal.</i> | 10 |
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To Julia Plaskon, petitioner, and John C. Grimshaw,
attorney for petitioner, 207 Market street, New-
ark, N. J.:

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PLEASE TAKE NOTICE that respondent hereby
appeals to the Court of Common Pleas for the County
of Hudson, from the determination and award and
judgment entered thereon in favor of petitioner and
against respondent, entered by the New Jersey De-
partment of Labor, Workmen's Compensation Bureau,
Hudson County District, on the 25th day of October,
1932.

CHESTER W. ROTHFUSS, 30
Attorney for Respondent.

Dated November 7, 1932.

DETERMINATION.COURT OF COMMON PLEAS
of Hudson County, N. J.THOMAS H. BROWN
President Judge

10

October 2nd, 1933.

JOHN C. GRIMSHAW, Esq.,
207 Market Street,
Newark, N. J.RICHARD W. BAKER, Esq.,
Counsellor at Law,
Trenton, N. J.

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COULT, SATZ & TOMLINSON, Esqs.,
Counsellors at Law,
60 Park Place,
Newark, N. J.*Dear Sirs:**Re: Plaskon vs. National Sulphur Co.*

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I have given the above case a tremendous amount of time and thought. The question involved is a very close one, but I have determined to sustain the findings of the Compensation Commissioner below.

Counsel will present an order accordingly and can mail me an order leaving blank the amount of counsel fees and at the same time can write me a letter stating approximately how much time they have put in the case and what the total amount of the award in dollars and cents, will amount to.

Yours very truly,

THOMAS H. BROWN.

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Judgment of Court of Common Pleas on Appeal.

**JUDGMENT OF COURT OF COMMON PLEAS
ON APPEAL.**

HUDSON COUNTY COURT OF COMMON PLEAS.

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| <p style="text-align: center;">Julia Plaskon, <i>Petitioner-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">National Sulphur Co., <i>Respondent-Appellant.</i></p> | } | <p><i>On Appeal</i></p> <p><i>Workmen's</i></p> <p><i>Compensation</i></p> <p><i>Judgment</i></p> <p><i>Final</i></p> | <p>10</p> |
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It appearing a petition having been filed in the Workmen's Compensation Bureau in the above stated case praying for compensation to which the petitioner may be entitled by virtue of the forms and provisions of an act of the Legislature of the State of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for injuries received by the employee in the course of the employment and further, make compensation for dependents of a deceased employee whose death arose out of and 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 together with the several supplements thereto and acts amendatory thereof; the case having been duly heard by the Deputy Workmen's Compensation Commissioner; and a judgment having been duly made by the Deputy Workmen's Compensation Commissioner (New Jersey Department of Labor) in the above cause on October 25th, 1932, in favor of the petitioner and against the respondent below, and the respondent having appealed to this Court from said judgment and award and the appeal having been heard and briefs submitted by the respective parties; and the testimony taken before the Workmen's Compensation Bureau

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Judgment of Court of Common Pleas on Appeal.

having been duly filed and considered by this Court on the said appeal, I do find as facts and determine from the evidence and said stipulations as follows:—

10 First:—That the petitioner's deceased John Plaskon, met with an accident arising out of and in the course of his employment with the National Sulphur Company, the respondent, as a shop man on June 6th, 1925, which employment is subject to the compensation section of Chapter 95, Laws of 1911 and supplements and amendments thereto;

20 Second:—That said accident consisted in the deceased, John Plaskon, while walking along bulkhead, returning from a scow carrying borax-mud for use in the respondent's plant to fill cracks in the furnaces of the respondent's plant, tripped and fell into the water being drowned;

Third:—That the wages were \$32.76 per week;

Fourth:—That the petitioner, Julia Plaskon, and her sons, Stephen Plaskon and Wasil Plaskon and her daughters, Mary Plaskon and Annie Plaskon are dependents and entitled to the benefits under the aforesaid act in accordance with the terms of the act;

30 Fifth:—That the Workmen's Compensation Bureau had jurisdiction of this matter in accordance with the decision of the New Jersey Supreme Court in the case of *Rose vs. Wagner Construction Co.*, 2 N. J. M. R. 118;

40 Sixth:—That there was no abuse of the Deputy Commissioner's exercise of discretion as the evidence was newly discovered and that the case is analogous to *Kursheedt et al. vs. Standard Bleachery, et al.*, 71 Atl. 39, a New Jersey Su-

Judgment of Court of Common Pleas on Appeal.

preme Court decision and from a review of the case in issue in comparison with the aforesaid case I find that the Deputy Commissioner was justified in finding for the petitioner-appellee below and

Seventh:—I find no error on the part of the Deputy Commissioner in the procedure followed in the case in issue although ex parte affidavits were used in connection with the rule to show cause. The respondent-appellant had opportunity to present answering affidavits and subsequently, had the opportunity to examine those who made affidavits and which were filed in connection with the rule to show cause and that the procedure under ex parte affidavits is further proper in view of the decision of the New Jersey Supreme Court in the case of *Katz vs. Zapela*, 159 Atl. 306, and affirmed by the New Jersey Court of Errors and Appeals, 163 A. 662 which case in accordance with the State of Case was heard on motions of the respective counsel and on ex parte affidavits in which the Court of Errors and Appeals sustained the power of the Workmen's Compensation Bureau to reopen and hear a case upon ex parte affidavits and which decision is dispositive of the issues raised in the instant case as to procedure and that the petitioner-appellee was proceeding and did proceed in accordance with the provisions set forth in the case of *Assets Development Company vs. Wall*, 119 Atl. 10;

Eighth:—The Workmen's Compensation Bureau erred in its award of compensation at the rate of \$18.02 per week for period of one hundred three (103) weeks in that the maximum allowance at the time this action arose was \$17.00 per week and that portion of the Determination and Judgment of the Workmen's Compensation Bu-

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Judgment of Court of Common Pleas on Appeal.

reau shall be corrected to read \$17.00 per week for period of one hundred three (103) weeks and which applies to that paragraph providing for compensation for five dependents from June 18th, 1925 to June 11th, 1927;

10 Ninth:—That the respondent shall pay to the petitioner for herself and her minor children one hundred and three (103) weeks' compensation at the rate of \$17.00 per week which includes the period from June 18th, 1925 to June 11th, 1927 when Stephen Plaskon became 16 years of age. This is based upon 55% of the wages of \$32.76 per week and based upon five dependents;

20 Tenth:—After the expiration of the aforesaid payments, I order that the respondent pay the petitioner for herself and her minor children, one hundred and sixteen (116) weeks' compensation at \$16.38 per week being 50% of the wages based upon four dependents which includes the period from June 11th, 1927 to September 4th, 1929 when the petitioner, Julia Plaskon, remarried;

30 Eleventh:—Thereafter, I order that the respondent pay the petitioner for her minor children ninety-seven and five-sevenths ($97 \frac{5}{7}$) weeks' compensation at the rate of \$14.74 per week, being 45% of the wages based upon three dependents including the period from September 4th, 1929 to July 20th, 1931 when Wasil Plaskon became 16 years of age;

40 Twelfth:—Thereafter, I order that the respondent pay the petitioner one hundred and ten and six-sevenths ($110 \frac{6}{7}$) weeks' compensation at the rate of \$13.11 per week being 40% of the wages based on two dependents including the period from July 20th, 1931 to September 3rd, 1933 when Mary Plaskon became 16 years of age;

Judgment of Court of Common Pleas on Appeal.

Thirteenth:—Thereafter, I order that the respondent pay the petitioner one hundred and forty-eight and four-sevenths (148 $\frac{4}{7}$) weeks' compensation at the rate of \$11.47 per week being 35% of wages based upon one dependent including the period from September 3rd, 1933 to July 3rd, 1936 when the last dependent, Annie Plaskon, becomes 16 years of age; 10

Fourteenth:—That the petitioner is allowed \$150.00 under the compensation law to cover funeral expenses;

Fifteenth:—That the attorney for the petitioner, John C. Grimshaw, (Richard W. Baker of counsel) is allowed a counsel fee of \$450.00 assessed against the petitioner for work done in prosecuting the case in the Workmen's Compensation Bureau; 20

Sixteenth:—That the attorney for the petitioner, John C. Grimshaw, (Richard W. Baker of counsel) is allowed a counsel fee of \$450.00 assessed against the respondent for work done in prosecuting the case in the Workmen's Compensation Bureau;

Seventeenth:—That the respondent pay the full stenographic costs for the hearing of June 5th, 1929 in the amount of \$10.00 and one-half of the stenographic costs for the hearing of June 23rd, 1930, in the amount of \$5.00 or a total of \$15.00; 30

Eighteenth:—That the petitioner will pay one-half or \$5.00 of the stenographic costs of hearing June 23, 1930.

It is, therefore, on this 25th day of October, A. D., 1933 ORDERED that judgment final be entered in favor of the petitioner and dependents 40

Judgment of Court of Common Pleas on Appeal.

and against the respondent (National Sulphur Company) and that the respondent make payments to the petitioner in accordance with the above findings;

10 IT IS FURTHER ORDERED that the respondent pay counsel fee for petitioner's attorneys in the amount of \$1,000.00 for work done on appeal and the costs of testimony in the amount of \$29.60.

THOMAS H. BROWN,
Judge.

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Filed December 28, 1933.

NEW JERSEY SUPREME COURT.

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| Julia Plaskon, <div style="text-align: center;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> The National Sulphur Co., <div style="text-align: center;"><i>Respondent.</i></div> | <i>Action at Law</i> <i>NOTICE OF</i> <i>MOTION</i> <i>On Application</i> <i>for Certiorari.</i> | 10 |
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To: JOHN C. GRIMSHAW, Esq.,
 207 Market Street,
 Newark, New Jersey.

PLEASE TAKE NOTICE that on Tuesday, the 16th day of January, 1934, we will apply to Part Three of the New Jersey Supreme Court, or such other part as may be designated by the full court to hear motions, for a Writ of Certiorari to review the determination and award and judgment thereon entered in the Workmen's Compensation Bureau in the above case and the affirmance of the said award and judgment by the Court of Common Pleas of Hudson County. 20

COULT, SATZ & TOMLINSON,
 Attorneys for Respondent. 30

Notice of Motion.

(Endorsed)

NEW JERSEY SUPREME COURT.

Julia Plaskon,

Petitioner,

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vs.

The National Sulphur Co.,

Respondent.

Action at Law

NOTICE OF MOTION

On Application for Certiorari.

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Service of the within Notice is hereby acknowledged
this 27th day of December, 1933.

John C. Grimshaw,
Attorney for Respondent.

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(Not to be printed in any report)

NEW JERSEY SUPREME COURT.

No. 237 January Term 1934.

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|--|---|----|
| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> National Sulphur Co., <div style="text-align: right;"><i>Respondent.</i></div> | } | 10 |
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Submitted January Term 1934. Decided 1934.

On application for writ of *certiorari*.

Before Justices, CASE, BODINE and DONGES.

For Petitioner, RICHARD W. BAKER.

For respondent, JOHN J. FRANCIS, JOSEPH
COULT.

PER CURIAM

The court is of the opinion that the record presents a debatable question and that for the proper consideration thereof a writ of *certiorari* should issue. A writ will accordingly be allowed.

Opinion.

(Endorsed)

NEW JERSEY SUPREME COURT.

No. 237 January Term 1934.

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Julia Plaskon,
Petitioner,

vs.

National Sulphur Co.,
Respondent.

Per Curiam.

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(Not to be printed in any report)

Filed April 11, 1934,

Fred L. Bloodgood, Clerk.

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New Jersey, ss.

(L. S.) *The State of New Jersey to the Court of
Common Pleas in and for the County of
Hudson, Gustav Bach, Clerk of the said
Court, and Julia Plaskon.*

GREETINGS:

We being willing for certain reasons to be certified
of and concerning a certain determination and judg- 10
ment rendered on the 25th day of October, 1932, by
the Honorable Thomas Brown, Judge of the said
Court of Common Pleas in and for said County of
Hudson, in a certain proceeding brought on behalf
of Julia Plaskon, petitioner and against the National
Sulphur Co., respondent, for the determination and
recovery of compensation under an Act of the Legis-
lature of the State of New Jersey, entitled "An Act
prescribing the liability of an employer to make com-
pensation for injuries received by an employee in the
course of employment, establishing an elective com- 20
pensation and regulating procedure for the determi-
nation of liability and compensation thereunder," ap-
proved April 4, 1911, and the acts amendatory thereof
and supplemental thereto, we command you, the said
Court of Common Pleas in and for the County of
Hudson and Joseph Kelly, Clerk of said court, that
the said determination and judgment together with a
transcript of the evidence and all proceedings for
the making of the same and all things touching and
concerning the same as fully and entirely as before
you they remain, or are in your custody and control, 30
you do certify and send together with this writ to our
Justices of our Supreme Court of Judicature at Tren-
ton on the 7th day of May, 1934, that therein may be
caused to be done what of right and according to
law ought to be done.

Writ of Certiorari

WITNESS, the Honorable Thomas J. Brogan, Chief
Justice of our said Supreme Court at Trenton, this
17th day of April, 1934.

FRED L. BLOODGOOD,
Clerk. 40

Service of copy of the within Writ is hereby acknowledged this 18th day of April, 1934.

JOHN C. GRIMSHAW,
Attorney for Petitioner-Defendant.

(Endorsed)

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NEW JERSEY SUPREME COURT.

Julia Plaskon,
Petitioner-Defendant,

vs.

National Sulphur Co.,
Respondent-Prosecutor.

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—————
On Certiorari.
WRIT.
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COULT, SATZ & TOMLINSON,
60 Park Pl., Newark, N. J.
Attorneys for Respondent-Prosecutor.

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This writ is allowed by the full court. Let it be sealed.

, 1934.

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Chief Justice.

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Filed April 21, 1934.

HUDSON COUNTY COURT OF COMMON PLEAS.

Julia Plaskon,
Petitioner-Defendant,

vs.

National Sulphur Co.,
Respondent-Prosecutor.

*On Certiorari**AFFIDAVIT* 10

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

I, GUSTAV BACH, Clerk of Hudson County, New Jersey, do hereby certify and return to the New Jersey Supreme Court of Judicature a certain decision of this Court dated October 25, 1933, in relation to the appeal from the decision of the Workmen's Compensation in the within mentioned case, together with all things touching and concerning the same, as by the within writ to me, directed, I am commanded. 20

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 20th day of April, 1934.

GUSTAV BACH,
Clerk of Hudson County. 30

(Seal)

On Certiorari—Affidavit.

(Endorsed)

HUDSON COUNTY COURT OF COMMON PLEAS.

Julia Plaskon,
Petitioner-Defendant,

vs.

National Sulphur Co.,
Respondent-Prosecutor.

**On Certiorari
AFFIDAVIT.**

COULT, SATZ & TOMLINSON,
Military Park Building, Newark, N. J.
Attorneys for Respondent-Prosecutor.

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Filed April 21, 1934.

NEW JERSEY SUPREME COURT.

Julia Plaskon,
Petitioner-Defendant,
vs.
 National Sulphur Co.,
Respondent-Prosecutor.

On Certiorari
REASONS 10

The Respondent-Prosecutor presents the following reasons for setting aside the determination and judgment brought before this Honorable Court by the Writ of Certiorari in the above entitled cause:—

1. The judge of the Hudson County Court of Common Pleas erred in sustaining the Bureau's finding that the evidence disclosed by the ex parte affidavits and the unverified petition submitted by petitioner-defendant was newly discovered within the contemplation of the law. 20

2. The court erred in finding that the Bureau had not (a) abused its discretion, or (b) erred in reopening the judgment upon the ex parte affidavits and unverified petition presented by petitioner-defendant.

3. The court erred in affirming the award of the Bureau in favor of petitioner-defendant because there was no evidence reasonably tending to support the finding that deceased met his death as the result of an accident arising out of and in the course of his employment. 30

4. The court erred in finding that the hearing before the Bureau after the opening of the judgment was proper and regular when it should have been found that it was not a new trial within the established practice and, therefore, improper and irregular. 40

Reasons.

5. The court (a) erred, or (b) abused its discretion in ordering respondent to pay counsel fees on appeal in the sum of \$1,000.00, in that the said sum was grossly excessive and that, in any event, it should have been apportioned between petitioner and respondent.

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COULT, SATZ & TOMLINSON,
Attorneys for Respondent-Prosecutor.

(Endorsed)

NEW JERSEY SUPREME COURT.

Julia Plaskon,
Petitioner-Defendant,

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vs.

National Sulphur Co.,
Respondent-Prosecutor.

**On Certiorari
REASONS.**

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COULT, SATZ & TOMLINSON,
60 Park Pl. Newark, N. J.
Attorneys for Respondent-Prosecutor.

Service of copy of the within Reasons is hereby acknowledged this 20th day of April, 1934.

JOHN C. GRIMSHAW,
Attorney for Petitioner-Defendant.

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NEW JERSEY SUPREME COURT.

No. 241, May Term, 1934.

Julia Plaskon,
Petitioner-Respondent,

vs.

National Sulphur Co.,
Respondent-Prosecutor.

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Submitted May Term, 1934; decided 1934

On Certiorari. Prosecutor's appeal from a judgment of the Common Pleas Court of Hudson County, resulting in an affirmance of the determination and judgment of the Workmen's Compensation Bureau in favor of the respondent. Affirmed. 20

Before Justices Trenchard, Heher and Perskie.

For the respondent, John C. Grimshaw (Richard W. Baker, of counsel)

For the prosecutor, Coult, Satz & Tomlinson (John J. Francis, Joseph Coult, of counsel).

The opinion of the court was delivered by 30

PERSKIE, J. This is a workmen's compensation case. The facts as well as the steps in this cause are rather unusual and are as follows: On July 8, 1925, petitioner filed a formal petition alleging, in substance, that her husband met his death on June 6, 1925, as a result of an accident arising out of and in the course of his employment with prosecutor. Her answer to question 17, "What was the nature of the accident and how did it happen?" was, "Decedent was walking along pier of company and fell into the river and was drowned." Prosecutor's answer thereto 40

Opinion.

was, "John Plaskon was drowned. No one knows how he got into the water. His work did not take him near the water. It is not known whether he jumped into the water or fell into the water." A formal hearing on the petition and answer was held on November 20, 1925, before deputy commissioner, Charles E. Corbin. In his determination and judgment, under date of December 16, 1925, it appears "that deceased was employed by respondent at the time of the accident as a laborer, in the respondent's plant, and he used a shovel in his work. He went to work about 3 o'clock in the afternoon and at about 4 o'clock he left his work and prepared some coffee for himself and two other workmen. After preparing the coffee he went out on a part of the plant which is known as a bridge connecting two buildings of the plant. This is about three hundred feet from the water. It was a warm day and he went out on the bridge to cool off. He returned to his work for a few minutes and then his fellow workmen could not find him. He was last seen coming from a barge owned by the American Borax Company. This company has the adjoining plant. When he came from the barge of the Borax Company, he has in his hand a large lump of borax. *This had no connection with his work.* While he was carrying the borax from the borax company's barge he stepped upon the dock and stumbled and fell into the water. His work did not take him near the dock and did not take him near the water. He was not engaged in his employment at the time of the accident."

Accordingly he found and determined that the accident did not arise out of and in the course of his employment and respondent, without offering proof, made a motion for a nonsuit, which was granted, and the petition was dismissed.

On April 30, 1932, the petitioner, on the unverified petition of her counsel and ex parte affidavits, obtained a rule to show cause from the same deputy commis-

Opinion.

sioner, Mr. Corbin, for leave to re-open the judgment of dismissal (December 16, 1925), on the ground of newly discovered evidence. The matter came on for argument, May 9 and June 7, 1932. The respondent was given the opportunity to file answering affidavits and submit memorandum of law in support of its challenge of the propriety of proceeding by way of ex parte affidavits, but did neither. Petitioner's affidavits disclosed that when the deceased came from the barge of the American Borax Company, with a large white lump of borax in his hand *that it was in connection with his work*; that the borax was taken by respondent's employees from the adjoining property or barge of the American Borax Company with the consent of the respondent. The borax was used to patch up cracks in the pipes and furnaces of the respondent. The latter even supplied trowels to its employees to do the work. This practice had become a custom. The affidavits further tended to indicate that all this information was discovered since the former trial; that it was within the particular knowledge of the respondent and its employees, and that it could not by reasonable diligence has been obtained; that it was material and went to the merit of the case and was not cumulative. *Kursheedt v. Standard Bleachery Company, etc.*, 77 N. J. L. 99. Thereupon, on June 10, 1932, the deputy commissioner entered an order that the former judgment be opened; that the petitioner be permitted to present her new evidence; which evidence, he ruled, was in fact newly discovered evidence, material to the issue, and that it went to the merits of the case; that if this newly discovered evidence, coupled with the testimony already taken, was sufficient to make out a prima facie case, the respondent would then be given the opportunity to present its defense. The date set for the final hearing was July 21, 1932.

On July 21, 1932, the date set, proofs were presented by petitioner all of which tended to substantiate the

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Opinion.

evidence as already outlined. The respondent again challenged the propriety of the proceeding, offered no proof and re-made the motion for nonsuit. This motion was denied. For, the deputy commissioner concluded that the petitioner had sustained the burden of making out a prima facie case; that the deceased died
10 as a result of an accident arising out of and in the course of the employment and that, therefore, petitioner was entitled to an award of compensation, which the commissioner made. We think that the proofs fully justified the finding and action by the deputy commissioner.

Application was then made to the late Chief Justice Gummere for a writ of certiorari to review the order made by the deputy commissioner. This writ was
20 denied for the reason that respondent had not appealed to the Court of Common Pleas. Chapter 25, P. L. 1932, p. 38.

Appeal was taken to the court of Common Pleas of Essex County. It sustained the determination and finding by the deputy commissioner.

Application was then made to our present Chief Justice for a writ of certiorari to review the judgment of the Essex County Common Pleas Court. He denied
30 the application. We think properly so.

It is, therefore, obvious that the respondent has had, at least three separate and independent branches of our judicial system consider its cause. These were the Workmen's Compensation Bureau, the Court of Common Pleas and this court, through our present Chief Justice. And while the disposition of the writ by the late Chief Justice Gummere appears to be based on procedure it may well be that it also received his consideration on the merits. At all events, we have
40 repeatedly held that when two independent and distinct tribunals have examined the facts and heard the

Opinion.

testimony, we do not think that a conclusion so reached should be lightly disturbed. *Pearson v. Armstrong Cork Co.* 6 N. J. Misc. R. 378; *Phillips v. Federated Metals Corp.* 12 Id. 160.

The workmen's compensation bureau had the jurisdiction to open its judgment. *Rose v. Wagner Construction Co.* 2 N. J. Misc. R. 118.

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The proof is conclusive, it has never been controverted, that the deceased met his death as a result of an accident arising out of and in the course of his employment. Perhaps this may be the explanation for the fact that respondent's efforts have been centered towards the procedural rather than the substantive phases of the controversy. It would indeed be a travesty on justice to hold that any judicial or quasi-judicial tribunal, in control of a cause, is without power to exercise its sound judicial discretion, governed and controlled by legal rules, to correct an improper and unjust result reached in the first instance. *Kursheedt v. Standard Bleachery Company*, supra. The whole philosophy of permitting judicial or quasi-judicial tribunals to exercise its sound judicial discretion, when in control of a cause, governed and controlled by proper rules, to open its judgment on newly discovered evidence permits not only the carrying out of the mandate of the legislature in compensation cases, to liberally construe the workmen's compensation act, but what is more important, it permits the working out of substantial justice in all cases where it is legally invoked and exercised.

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The use of ex parte affidavits on a rule to show cause to open a judgment in a workmen's compensation case seems to have received judicial sanction by the Court of Errors and Appeals of our State. *Katz v. Zapella*, 10 N. J. Misc. R. 258, affirmed 110 N. J. L. 14; 159 At. Rep. 306, affirmed 163 Id. 622.

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Opinion.

Counsel for petitioner did considerable work in helping to correct a grievous error and contributed much to bring about a correct result. The awards aggregate a substantial sum.

10 We are not able to say that the fees allowed are excessive.

We have considered all other reasons assigned and argued and find them to be without merit.

Judgment is affirmed, with costs.

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Order of Affirmance.

ORDER OF AFFIRMANCE.

NEW JERSEY SUPREME COURT.
No. 241 May Term 1934.

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| Julia Plaskon, <i>Petitioner-Respondent,</i> <i>vs.</i> National Sulphur Company, <i>Respondent-Prosecutor.</i> | } | <i>Order of Affirmance</i> | 10 |
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This cause having been duly submitted on brief at the May Term, 1934, of this court by Coult, Satz & Tomlinson, Esquires (John J. Francis, Esquire, Joseph Coult, Esquire, of counsel) for the prosecutor and John C. Grimshaw, Esquire (Richard W. Baker, Esquire, of counsel) for the petitioner-respondent and the court having inspected the record and judgment below and considered the reasons assigned for error, it is thereupon on this 16th day of August, 1934,

ORDERED, that the judgment of the Common Pleas Court of Hudson County, resulting in an affirmance of the order and judgment of the Workmen's Compensation Bureau in favor of the respondent, be affirmed with costs and the record be remitted to the court below to be proceeded with in accordance with the law and practice of said court.

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Rule entered August 16, 1934 on motion of

JOHN C. GRIMSHAW,
 RICHARD W. BAKER,
 Of counsel.

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Notice of Appeal.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

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| 10 | <p>Julia Plaskon, <i>Defendant-Appellee,</i> <i>vs.</i> National Sulphur Co., <i>Prosecutor-Appellant.</i></p> | <p><i>On Certiorari</i> NOTICE OF APPEAL</p> |
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To: JOHN C. GRIMSHAW,
Attorney for Defendant-Appellee,
207 Market Street,
Newark, New Jersey.

20 TAKE NOTICE that the Prosecutor-Appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered by the Supreme Court of the State of New Jersey in favor of the defendant Julia Plaskon and against the Prosecutor National Sulphur Co.

Dated: September 11, 1934.

Respectfully,

30 Attorneys for Prosecutor-Appellant.

Entered September 12th, 1934.

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Grounds of Appeal.

GROUND OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

| | | | |
|---|---|---|----|
| Julia Plaskon, <i>Defendant-Appellee,</i> <i>vs.</i> The National Sulphur Company, <i>Prosecutor-Appellant.</i> | } | <i>On Certiorari</i> GROUND OF APPEAL | 10 |
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To: JOHN C. GRIMSHAW,
 Attorney for Defendant-Appellee,
 207 Market Street,
 Newark, New Jersey. 20

The prosecutor-appellant states the following grounds of appeal:—

1. The Supreme Court erred in rendering judgment in favor of defendant-appellee, Julia Plaskon and against the prosecutor-appellant, National Sulphur Co.
2. The Supreme Court erred in affirming the determination and award of the Hudson County Court of Common Pleas and the judgment entered thereon, said determination and award and judgment affirming the determination and award of the Workmen's Compensation Bureau of the State of New Jersey and the judgment entered thereon in favor of the defendant-appellee, Julia Plaskon and against the prosecutor-appellant, National Sulphur Co. 30

Dated: September 11, 1934.

Respectfully,

Attorneys of Prosecutor-Appellant.

Entered: September 12th, 1934. 40

Julia Plaskon, for Petitioner, Direct.

Q Where did he live? A The same number, 220 Prospect avenue.

Q Bayonne? A Bayonne.

Q When were you married to Mr. Plaskon? A Twenty-four years ago, June 8, twenty-four years ago. 10

Q Do you know where your husband was working? The Sulphur Works.

Q Where is the Sulphur Works, what city?

The Interpreter: In Bayonne. She doesn't know the street.

Q Is it the National Sulphur Company? A Yes.

Q How long had your husband been working for the National Sulphur Company? A Ten years. 20

Q Was your husband working on June 6, 1925?

Mr. Turner: Now, if the Court please, I object to that on the ground it is not within her knowledge, it would be hearsay.

The Court: You have to lay a foundation, ask her if she knows.

Q Do you know if your husband was working on June 6, 1925? A He left seven o'clock that morning, come back about twelve o'clock, then leave two o'clock in the afternoon, he never returned. 30

Q When was the last time your husband received compensation from the National Sulphur Company?

Mr. Turner: When he was paid, ask her.

A That was the week before then, that he received his pay, the latter part of May.

The Court: The week before June 6? 40

Julia Plaskon, for Petitioner, Direct.

A Yes, the week before that.

Q Did your husband always turn over his pay envelope to you? A Yes, always gave me the envelope.

10 Q Was there a certain amount received by you from your husband as wages, every week? A She always received the entire pay, then if he wanted anything she would always give him whatever he wanted.

Q Do you know what his pay was?

Mr. Turner: I object to that, because she couldn't know that, it is incompetent and hearsay.

Mr. Gottko: She might know. I will ask her that.

20 The Court: Lay a foundation.

Q Was there any amount on the envelope when you received the envelope from your husband?

Mr. Turner: You mean written on it?

Mr. Gottko: Written on it.

30 The Interpreter: She says there wasn't anything written on the envelope, but he used to get every two weeks—

Mr. Turner: Wait a minute, I object to anything else if it wasn't written on the envelope, because that is the test.

Mr. Gottko: All right.

Q Was there any name on the envelope? A Yes, there was a name.

40 Q What name was on the envelope? A John Plaskon.

Julia Plaskon, for Petitioner, Direct.

Q Was there any other name on the envelope? A No.

Q Was the envelope sealed when you received it from your husband? A It was always sealed.

Q It was always sealed, did you count the money after you opened it? A Yes. 10

Q How much was in it? A Sixty-five dollars and fifty-two cents.

The Court: Is that agreeable to you sixty-five dollars?

Mr. Turner: That would be twice a month, I suppose.

A Yes, every two weeks. 20

Mr. Turner: Yes.

(At this point a discussion took place off the record between counsel with reference to the payroll, but no agreement was reached.)

Q For how many weeks have you received thirty-two, seventy-six from your husband?

Mr. Turner: I object to that question because she said the payroll was sixty-five fifty-two. 30

Q For how many weeks or months had you received sixty-five, fifty-two from your husband?

The Interpreter: She doesn't remember how long, more than four years.

Q More than four years?

The Court: Ask her if it was always sixty-five fifty-two. 40

Julia Plaskon, for Petitioner, Special Cross.

Q Was it always sixty-five, fifty-two? A For the past four years I had been receiving sixty-five, fifty-two every two weeks.

10 Q When was the last time that you saw your husband alive? A From twelve-thirty to two o'clock on June 6, he was home, that was the last time she saw him.

Q Do you know what time did your husband leave the house on the morning of June 6, 1925? A At six o'clock that morning.

Q Do you know where he went to? A He went to work that day.

Q Where is that?

20 Mr. Turner: Now, if your Honor please, I object, she didn't see him go, she only knows he left the house.

The Court: She says she knows, I don't know whether she does or not.

Mr. Turner: She says he went but she don't know where he went.

The Court: I will allow you to cross-examine on that point.

30 *Special cross examination by Mr. Turner.*

Q When he left the house at two o'clock, did you go with him?

The Interpreter: No, he just leave the house and said good-bye.

Q He left the house and took the trolley and you stayed home?

40 The Interpreter: She stayed home, yes.

Julia Plaskon, for Petitioner, Direct.

Mr. Turner: Now, I object to her telling where he went because she wasn't with him.

The Court: Objection sustained.

Direct examination (resumed).

Q How many children have you, Mrs. Plaskon? A Eight. 10

Q All the children living home with you? A Seven home, one lives on a boat.

Q Were there any children living with you before June 6, 1925? A Yes, seven.

Q What is the name and age of the youngest child?
A Anna Plaskon, five years old. 20

Q When was Anna born? A The third of July.

Q What year? A 1920.

Q What is the name of the next child? A Mary Plaskon.

Q How old is Mary? A Eight years old.

Q When was Mary born? A The thirtieth of September. 30

Mr. Gottko: Ask her if it wasn't the third of September.

A The thirtieth of September.

Q What year? A 1917.

Q What is the name of the next child? A William, ten years old.

Q When was William born? A July 20, 1915. 40

Julia Plaskon, for Petitioner, Direct.

Q The next child? A Stephen Plaskon, fourteen years old, the eleventh of June.

Q What is the year? A 1911, I guess.

Q Ask her what year?

10

The Interpreter: She don't remember.

Mr. Turner: If the Court please, are we concerned about these children who are over the age?

Q Who is the next child? A Julia Plaskon.

Q How old is Julia? A Sixteen years old, the seventh of March.

20

Mr. Turner: I move to strike out the testimony concerning Julia.

Mr. Gottko: If we can show Julia was a part of the household, I think the law covers her, too.

The Court: Not unless she is incompetent. You don't claim she is incompetent?

Mr. Gottko: No.

30

The Court: Well, the law says under sixteen. To save time, there is no question about the law on that. Four dependents, Anna, Mary, William and Stephen, are alleged.

Mr. Gottko: Yes.

Q Now, on June 6, 1925, did your husband leave home at one-thirty, is that right? A He was home at one-thirty, but he left at two o'clock.

40

Q When was the next time that you saw your husband? A That was the last time she saw him alive.

Julia Plaskon, for Petitioner, Cross.

Q When was the next time you saw your husband?

A She saw him the next morning at ten-thirty, when they brought him home.

Q Does she know who brought him home? A The undertaker.

Q What was his name? A Javasicka. 10

Q Your husband was dead then? A He was dead then.

Q Do you know when your husband was buried?

A The ninth of June.

Q Did any representative of the company call at your home at any time after June 6?

Mr. Turner: I object to that on the grounds it is incompetent and immaterial. 20

The Court: I don't know how this is material, where is the materiality?

Mr. Gottko: I will withdraw the question. I think that's all.

Cross examination by Mr. Turner.

Q Were you ever married before you married John Plaskon?

The Interpreter: That was the first time that she was married. 30

Q Where were you married? A Perth Amboy, New Jersey.

Q By whom were you married? A Father Hoboday.

Q You have always lived with your husband, have you, since you were married? A Yes.

Mr. Turner: That's all. 40

Julia Plaskon, for Pet'r, Re-direct—Re-cross.

Re-direct examination by Mr. Gottko:

Mr. Gottko: I would like to ask one or two more questions, with the Court's permission.

The Court: All right.

10 Q Were all the children living with you on June 6, 1925, and prior thereto? A Seven children living.

Q Did you have any other source of income other than that you received from your husband? A The two boys working, she had an income from these two boys that were working.

The Court: During that time?

A Yes, the two boys and her husband.

20 Q Were you dependent on your husband for support?

Mr. Turner: I object to that, because she already answered that question.

Mr. Gottko: I want the question answered again.

30 The Court: I will allow the question. She may have received other income, and yet been dependent upon him also, partially or totally. I will allow the question.

A Yes, he was the main support.

Mr. Gottko: That's all.

Re-cross examination by Mr. Turner.

40 Q Now, how much money did your son Mike pay you each week? A She received twenty dollars a week from Mike.

Julia Plaskon, for Petitioner, Re-cross.

Q How much money did your son Joseph give you each week? A He gives her twenty-five dollars.

The Court: Straighten this out, the time of the accident.

Q Did Joseph give her twenty-five dollars a week last June? A Yes, previous to that. 10

Q Previous to that, did Frank give you twenty dollars a week previous to last June? A Yes.

Q Now, did any of your children work last June besides Joseph and Mike? A She has a son that is married.

Q A son that is married, the son that is married does not give you anything, does he? A No. 20

Q Did Julia work last June? A She started to work in June.

Q How much money did she give her mother—what time in June did she begin work?

The Court: Before or after the death?

A Before the death, she started work, she don't know the date, but about the first part of June. 30

Q How much money did Julia give the mother when she first started to work on the first of June?

A She worked two weeks before the death of her father and she brought her home fifteen dollars a week.

Q Does she still work and still bring her money home to her mother? A She is still working.

Q Does she still make fifteen dollars a week which she brings to her mother? A Yes. 40

Julia Plaskon, for Petitioner, Re-direct.

Q Now, did any of the other children work before the father's death? A No, no other children.

Mr. Turner: That's all.

Re-direct examination by Mr. Gottko:

10

Q From the money you received from Mike and Joseph and Julia, what did you do with it? A Used it for the house, dressed all the children, kept up the home.

Q Are you able to save any money?

Mr. Turner: I object to that as immaterial and incompetent.

20

Mr. Gottko: I will withdraw it.

Q How much of the money that you received from Mike, Joseph and Julia did you use? A She uses every bit, for the house.

Mr. Gottko: That's all.

Mr. Turner: That's all.

By the Court.

30

Q Out of this money that you receive from Mike and Joseph and Julia, do you finance them and give them their clothes? A They give her all the money and then she buys their clothes and gives them what they want.

Q And boards them? A And boards them.

The Court: That's all.

40

Owen O'Neill, for Petitioner, Direct.

OWEN O'NEILL, a witness called on behalf of the petitioner, being first duly sworn on his oath testified as follows:

Direct examination by Mr. Gottko.

Q Mr. O'Neill, where are you employed? A Staten Island, Edison. 10

Q On June 6, 1925, where were you employed? A Standard Oil.

Q How long did you work on June 6? A Three o'clock.

Q After you had completed your day's work, where did you go? A Down to get the launch and go home.

Q Which launch? A The Standard Oil. 20

Q What day was that, about? A Three fifteen.

Q Where were you going to? A Going home, Staten Island.

Q What part of Staten Island? A Snug Harbor.

Q How far is that from the place where you boarded this launch? A What, Snug Harbor?

Q Yes. A In Staten Island, you mean? 30

Q Yes? A I don't know, about a mile.

Q Have you travelled over that course before? A Yes sir; about seven years and a half.

Q How long did it take you on the previous occasions to make the trip? A About five to seven minutes.

Q About five to seven minutes? A Yes. 40

Owen O'Neill, for Petitioner, Direct.

Q In what direction do you proceed when you are on your way home, how do you go? A Well, by the Standard Oil Dock, east, southeast, it is out at an angle.

Q How far do you go? A I told you, a mile.

10 Q Do you travel toward the Kill-Vun-Kull ferry running from Bayonne to Staten Island? A No, the opposite way, South Ferry, New York Ferry.

Q In your run, do you pass along manufacturing companies docks? A Yes, drugs, chemical and sulphur docks, that's all.

Q You mean the National Sulphur Company? A Yes, sir.

20 Q Now, would you tell the Court what you saw on June 6, 1925, during the afternoon? A After leaving the dock, when about four hundred feet out, I seen a man walking along the bulkhead with a piece of sulphur in his hand. At one end he tripped, the sulphur went overboard and he went after it, and by the time we were turned around it was too late; we got him out of the water with a boat hook.

Q Did you later find out who this man was? A Yes, after I read the papers.

30 Q Who was with you? A The captain of the launch.

Q What is his name, do you know? A Otto Christensen.

Q Who else was with you? A The watchman and there were two other fellows; I don't know who they were.

40 Q You looked for the man that fell from the dock of the National Sulphur Company, after you saw him fall in the water? A Yes, we got into the dock and

Owen O'Neill, for Petitioner, Cross.

looked around for a while and couldn't see him, and we had one boat hook, and that wouldn't reach, and we tied the both of them together and hooked around a while and we got him.

Q After you got him out of the water, where did you take him? A Pulled him up on the bow of the boat. 10

Q From the bow, where did you take him? A I didn't take him; the Department men put him up on the barge.

Q Where was the barge at the time? A Up against the bulkhead.

Q Did you afterwards take him up on the dock? A They brought him up on a stretcher and laid him up on the dock. 20

Q They were doing everything at the time to try and revive him? A Yes, they worked on him about an hour and a half.

Q What time did you leave there? A Around five o'clock, I guess, that barge.

Mr. Gottko: That's all.

Cross examination by Mr. Turner 30

Q Now, you left which dock when you went out on your launch, Mr. O'Neill? A What do you mean, three-fifteen?

Q When you first started out to go home? A The Standard dock.

Q Where is the Standard dock, near what street is it, in Bayonne? A First street, I guess.

Q First street, now, what street is the National Sulphur dock? A I don't know. 40

Owen O'Neill, for Petitioner, Cross.

Q About how far is that from the Standard Oil dock? A I should judge about a hundred and fifty feet away.

Q Did you have to pass this National Sulphur dock on your course? A Yes, sir.

10 Q How far out in the water were you from the dock when you started to pass the National Sulphur dock? A Between three and four hundred feet.

Q Between three and four hundred feet, you say, you saw something in the hand of the man who fell overboard? A Yes, sir.

Q How big was what you saw in his hand? A I guess about that big, about a foot and a half.

Q One and a half feet— A Long.

20 Q Were you able to recognize this at a distance of three or four hundred feet, as to what it was? A Yes, sir; it was white.

Q It was white; now, you couldn't tell at that distance what the material was, could you? A I know it was sulphur docks, and I figured it was a piece of sulphur in his hand.

30 Q Because it was a sulphur dock and it was something white, you came to the conclusion it was sulphur? A Yes.

Q But you weren't close enough to identify the material itself? A No, sir.

Q Whatever it was he had in his hand went overboard with him? A It went overboard when he tripped, it went over and he went over after it, there was a piece of two by four on the dock there.

Q You think he tripped over something on the dock? A Yes, sir.

40 Q Were there any other men on the dock with him? A Nobody with him at all.

Owen O'Neill, for Petitioner, Cross.

Q No other men working on that dock, were there?

A No, sir.

Q Whatever it was that he had in his hand, that was white, did you notice whether that sunk or whether that floated? A There was nothing around there at all but his cap.

10

Q Nothing around there but his cap? A No, sir.

Q So you don't know what became of that thing that he had in his hand? A No, sir.

Q What kind of a day was this, Mr. O'Neill? A A very warm day.

Q This was one of those days in that very warm week? A Yes, sir.

20

Q The temperature was running pretty close to a hundred degrees every day? A Yes, sir.

Q This particular day, it was around a hundred, wasn't it? A Yes, it was very warm.

Q When you saw this man on the dock who fell overboard; was he walking along the dock itself? A I seen him first; he came off this sulphur barge and walked along and tripped and went overboard; that is the last I seen him alive; then after we got in there and got him out.

30

Q When he was on there, you saw him walking along the dock; how far did he walk on the dock? A I should judge about six or eight feet; that's all.

Q You didn't know this man, of course, that you saw? A No.

Q About how long was the dock there, do you remember? A The dock? It must be about a hundred feet, anyway.

40

Owen O'Neill, for Petitioner, Cross.

Q About a hundred feet long. This man you got out with the boat hook, that was the same man you saw overboard? A I couldn't tell who it was.

10 Q You could tell it was the same man? A That is the only man was on the bottom there.

Q That is the only fellow you found in the water? A Yes, sir.

Q Do you remember whether he had a mustache or whether he was smooth shaven? A That is a hard thing; I can't remember what he had.

Q Do you remember whether he was blonde or brunette? A No, sir.

20 Q Have you any idea about his size, I mean as to what his weight was? A I should judge it was about two hundred; he was a pretty heavy man.

Q You remember he was heavy because when he was being pulled out? A No, he was light pulling him out of the water, until he got on top.

Q At any rate, you would say about a two-hundred-pound man? A Yes, sir.

30 Q There was one around there—withdraw the question. This man's body, when you brought it up, he didn't have anything in his hands at all then, did he? A No, sir.

Q Now, when you were going out on your boat, you said you were three or four hundred feet out. Was the sun shining brightly then? A Yes, sir.

Q Reflected on the water, I suppose, didn't it, at that time? A Three o'clock in the afternoon, yes.

40 Q Would that interfere with your vision in any way? A No, sir.

Owen O'Neill, for Petitioner, Re-direct.

Q If you had been close enough so you could have distinguished the material that he had, why the light on the water would not have affected you in any way?
A I couldn't answer that except by saying it was white and he was walking along the dock string piece with it.

Mr. Turner: I think that's all. 10

Re-direct examination by Mr. Gottko.

Q This man fell off the dock and the man you brought out of the water are the same man? A Must have been; he was all full of sulphur.

Q Whom you afterward learned was John Plaskon? A Yes, sir.

Mr. Turner: I object to that on the ground it is leading, unless he did learn it was John Plaskon. 20

The Court: Your question is leading.

Q Did you learn later on who this man was? A Yes, sure; next Monday afternoon I did.

Q Who did you learn that it was? A I read it in the Bayonne Times.

The Court: He asked you who.

Q Who was it? A The fellow that fell off the dock? 30

Q Yes. A John Plaskon.

Q Now, you said this man came off the sulphur barge. Where was the sulphur barge? A Tied up to the bulkhead.

Q Was there any substance in the barge, was there anything in the barge? A It was a slop barge, a boat they dump the old sulphur in. 40

Owen O'Neill, for Petitioner, Re-cross.

Q This substance that Mr. Plaskon had in his hand was the same as that which was in the barge? A I don't know what was in the barge, I didn't look in the barge; the only thing I figured it was sulphur because it was white and he came off the barge with it in his hand.

10

Q Was that the same substance was in the barge? A I don't know what was in the barge, I didn't look in the barge.

Q Did you see what was in the barge? A No, I know it was the slop barge.

Q When you left Mr. Plaskon that afternoon, was he alive when you left him? A He was dead when they put him on the dock.

20

Mr. Gottko: That's all.

Re-cross examination by Mr. Turner.

Q Just what do you mean by slop barge? A I mean it looks as though there was old sulphur there, that's all I know.

Q Is it always there? A It has been there a couple of years now that I remember.

30 Q Attached to the dock for a couple of years? A Yes.

Q Was it ever removed from the dock? A I guess they tow it out to sea when they get it filled up, and dump it out.

Q It is a place where the old material is thrown and then that old material is taken out to sea and dumped, is that right? A Yes.

40 Q In other words, it is a dumping barge, isn't it? A Yes, that is better.

Otto Christensen, for Petitioner, Direct.

Q A sort of garbage barge, if you can call it that, and refuse material is put into it and the refuse material is eventually taken out to sea and dumped? A Yes.

Q This man was coming off this refuse barge? A Yes. 10

Q And climbed up on the dock? A No, the barge was even with the dock.

Q The barge was even with the dock, so he had just stepped over from the refuse barge onto the dock. He had something white in his hand and then he fell overboard? A He tripped, and fell over.

Q He tripped and went overboard? A Yes.

Mr. Turner: I think that's all. 20

Mr. Gottko. That's all.

(At this point the hearing was adjourned.)

AFTERNOON SESSION.

2 P. M.

OTTO CHRISTENSEN, a witness on behalf of the petitioner, being duly sworn on his oath according to law, testified as follows: 30

Direct examination by Mr. Gottko.

Q Where are you employed, Mr. Christensen? A The Standard Oil.

Q In what capacity? A I am captain of a launch.

Q What is the name of the launch? A Patrol No. 2.

Q Do you recall on June 6, 1924? A Yes, sir. 40

Otto Christensen, for Petitioner, Direct.

Q On Saturday afternoon? A Yes, sir.

Q Where were you going? A I was going from the Standard Oil to Sailors Snug Harbor.

Q That is in Staten Island? A Yes, sir.

10 Q Was that the only trip you made that afternoon? A No, we keep on continually back and forth.

Q On that Saturday afternoon, did you witness any drowning? A Yes, sir.

Q About what time was it? A It was three-fifteen.

20 Q Just tell the Court what you know about it. A Well, we were going toward Sailors Snug Harbor, we were about mid-stream when Mr. O'Neill came an and told me—

Mr. Turner: I object to what Mr. O'Neill told him.

The Court: Sustained. Just what you saw.

A He notified me that a fellow fell overboard.

Mr. Turner: I ask it be stricken out.

The Court: Not what you were told.

30 Mr. Turner: You didn't see the man fall overboard?

A No.

The Court: You were going along the stream. What else happened?

A We were going over to Sailors Snug Harbor, I turned the boat around and I seen the body there floating in the water, the head of it, before the sulphur works dock.

40 Q Is that the National Sulphur Works dock? A Yes.

Otto Christensen, for Petitioner, Direct.

Q What did you do? A Pulled the launch in alongside the dock and got two boat poles tied together and fetched him up from the bottom.

Q Fetched who up? A Plaskon.

Q Plaskon? A Plaskon. 10

Q After you fetched him up, as you say, where did you take him? A I got him up in the front on the bow of the launch, and worked on him until the police and fire department came down with a pulmotor.

Q Where was that that you worked on him? A Alongside the sulphur works dock.

Q Alongside the sulphur works dock? A Yes, sir. 20

Q When you worked on him, were you on the dock or on the boat? A On the boat.

Q On the boat. Did you take him from the boat to the dock? A Yes, sir, after the doctor pronounced him dead.

Q After the doctor pronounced him dead? A Yes, sir. 30

Q How long did you work on him? A We worked an hour and a half on him.

Q You pulled your boat patrol into the dock of the National Sulphur Company? A Yes, sir.

Q Did you see any barge alongside the dock of the National Sulphur Company? A Yes, sir, there is a barge belongs to the borax people. It is one of those dump barges, what they call it.

Q Dump barges? A Yes. 40

Otto Christensen, for Petitioner, Direct.

Q Do you know what was in it? A Borax in it, old stuff, waste stuff from the borax, taken out to sea to be dumped.

Q Was there any substance looked like sulphur in the barge?

10 Mr. Turner: I object to that as leading, he said it was borax.

The Court: Sustained. You are leading.

Q Are you sure that that stuff came from the borax? A Yes, sir, that boat is tied up facing into the sulphur dock right on a line, and the people come from the sulphur works out on the dock have to pass that barge to get out there.

20 Q The people from the sulphur works have to pass that barge?

Mr. Turner: I object to that and ask it be stricken out, in the first place it is not responsive and in the second place it is a conclusion.

Mr. Gottko: I think it is perfectly proper testimony.

The Court: I will allow it.

30 Mr. Turner: It is a conclusion, where they have to pass, because there is no proof anybody was there or they had to pass there.

Mr. Gottko: Then I think it is drawing a conclusion when he says it was the borax company's barge.

The Court: I will allow the question.

Mr. Turner: I pray an exception.

40 Q Just go on. A That's all, as far as I know.
Mr. Gottko: That's all.

Otto Christensen, for Petitioner, Cross.

Cross examination by Mr. Turner.

Q Now, captain, this borax company's barge, how far is that from the National Sulphur dock? A That is right alongside of it.

Q Right alongside of it, you mean right next to it? 10
A Right next to it.

Q The borax company's dock is adjoining the National Sulphur Company's dock? A Yes, sir.

Q This borax company's barge, you call the bow, was that up to the line of the sulphur company's dock? A Yes, it was in on the dock.

Q This borax company's barge, was that moored in the water, in the water, moored to the dock? A 20
Yes, tied up to the dock.

Q Tied up to the dock; you say that this barge had waste borax in it? A He was empty at the time.

Q You, I suppose, seen this waste borax, what it is like? A Yes.

Q Is it white? A It is white.

Q How does it come when it is on the barge there, is it in lumps? A No, it is only like mush. 30

Q Mush? A Yes.

Q Does it harden afterwards when the barge has been emptied? A That, I couldn't tell you.

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

Q You seen it when it is full of this white stuff? A Yes.

Q And you seen it, I suppose, too, after it has been emptied? A Yes, sir. 40

Otto Christensen, for Petitioner, Cross.

Q Did you ever see any lumps of borax there in the bottom of it after it has been emptied? A No, I haven't seen it.

Q You never looked in it when it was empty? A No.

10 Q You seen them take waste from the borax company out there and put it in the barge, haven't you? A Yes.

Q And when the borax company gets it full of this white substance they take it out to sea and empty it? A Yes, sir.

20 Q This was the only barge was there moored up to that dock? A Yes, sir, they have two barges, when they fill up the other one this one pulls in, when the other one pulls out.

Q The borax company has another empty one, when the first one is filled they put the second barge in to take its place? A Yes, sir.

Q Do you know how long the one in the place at the time, has been in the place? A They generally take about five days to fill them up.

30 Q You don't know how much borax was in this one at the time, do you? A No.

Q This borax company, how much of a plant has the borax company there, a big place? A Well, about, you might say about a hundred feet wide.

Q About a hundred feet wide? A Wide, across.

Q The dock is a hundred feet long? A Yes, from the Standard Oil over to the sulphur works.

40 Q In other words, first comes the Standard Oil Company along the dock and then the borax company

Otto Christensen, for Petitioner, Cross.

is a hundred feet along the dock, and then comes the sulphur company after that?

Mr. Gottko: I object to this testimony unless he shows how he knows this ownership along the docks.

10

Mr. Turner: He has been asked this all on direct examination, he has been asked to identify the barge and the dock. Besides, the captain is there every day, aren't you, captain?

A Yes, sir.

Q How many years have you been in that section?

A Six years.

Q So you know pretty much what is going on on that waterfront, don't you? A Yes, sir.

20

Q You have actually seen the borax company take this barge in and take it out, haven't you? A Yes, sir.

Q Sometimes the borax company has two barges there at the same time, don't they, one partially full or one empty? A Yes, sir.

Q How long are the barges? A The barges are about seventy-five or a hundred feet.

30

Q Seventy-five feet long? A Yes, sir.

Q So, when the borax company has two barges, then their dock isn't long enough to have them moored along in that size? A No.

Q They have to trespass on somebody else's dock, don't they? A They run from the borax works into the barge, the old one is tied up on this side and over there is the sulphur works.

40

Otto Christensen, for Petitioner, Cross.

Q The barge they are going to fill is tied right close to the sulphur plant? A No, the borax plant.

Q I mean the borax plant? A Yes.

The Court: Are there slips there or just a dock?
10

A Like a slip, with just a piece in it, there is a slip and a dock alongside of it.

The Court: Here is the shore here, here is one dock and here is another dock, is that right?

A Yes.

The Court: It is more or less a slip?

A Yes, it is a slip, he goes in.

The Court: This is the borax company there?
20

A Yes.

The Court: Then, this is the borax company's dock, and then there is a slip between?

A Yes, there is a slip between.

The Court: One barge was up against the borax company, the other barge, the empty barge, of which you are speaking, was up against the sulphur works?

30 A Yes, the sulphur works.

Q On the day of this accident, the borax company had two barges there, didn't they? A Two barges there.

Q Now, these docks, about how high do they arise above the water, at high tide? A At high tide, about five feet.

Q About five feet, about how much does the tide rise and fall there at that point? A About six feet.

40 Q About six feet? A Yes.

Otto Christensen, for Petitioner, Cross.

Q Now, on the day of this accident, was it high tide or low tide? A It was high tide.

Q It was high tide, so on the day of this accident, the barges then were standing up higher than the dock, weren't they? A No.

10

Q I mean the top of the barge? A No, flush with the dock like.

Q The top of the barge would be about flush with the dock? A Yes.

Q So that anybody wants to step from the barge to the dock or the dock to the barge, it was about level so they could do it? A Yes.

Q These barges, I suppose they are covered all over with this whitestuff, aren't they? A Yes.

20

Q So you can't tell really what color the barge is on account of the white borax all over? A No, they are so white.

Q In looking at the barges you couldn't tell whether there was any borax in them or not, unless you get up real close, could you? A No.

Q Because they are all plastered with borax? A Yes.

30

Q I undersand you to say, Captain, when you looked, you saw the body floating? A Yes.

Q That was before you pulled in? A That was before we pulled in.

Q Where was the body floating, how far from the dock? A About three feet away from the dock, it was eight feet away from the barge.

Q Eight feet and three feet? A Yes.

40

Otto Christensen, for Petitioner, Re-direct.

Q In other words, was the body nearer the empty borax company's barge or the filled one? A Near the empty one.

Q Near the empty one? A Yes.

10 Q That is, when you say empty one, you mean the one had not been up in the slip yet?

Mr. Gottko: I object to what he means.

A No, the one was in the slip, the empty one was over in the pier of the sulphur works.

Q That had been anchored up against the dock of the sulphur company? A Yes, sir, eight feet over above the sulphur works is where the body went down.

Q And the body was laying in the water? A Yes.

20 Q Could you see it? A Yes, for a minute or so until I turned the boat around, that's how I got my bearings where he was laying.

Q After you saw the body, the body sunk? A Yes.

Q Then you came over and brought it up to the surface? A Yes, sir.

Q This man you saw weighed about two hundred pounds? Did he? A Yes, sir.

Mr. Turner: That's all.

30 *Re-direct examination by Mr. Gottko.*

Q This is the borax company dock and this is the National Sulphur dock? You testified that the loaded barge was against the dock of the borax company and the empty barge was against the dock of the National Sulphur Company, that is right, isn't it? A Yes.

Q Now, the barge attached to the dock of the National Sulphur Company, there was nothing in it? A Nothing in it.

40 Mr. Turner: I object to that, he said he couldn't see whether there was anything in it.

Otto Christensen, for Petitioner, Re-cross.

A No, it was empty.

Q Did you look in it? A Yes, I was on top of the barge, I tied on the barge when I came in.

Q In which barge was the borax that you speak of?

A In the one in on the borax works. 10

Q The barge attached to the borax works? A Yes, was getting filled up.

Q And the one attached to the National Sulphur was empty? A Was empty.

Q There was no borax in the barge attached to the National Sulphur Company? A No.

Mr. Turner: I object on the grounds it is leading. 20

Mr. Gottko: That's all.

Re-cross examination by Mr. Turner.

Q Captain, did you actually look into the barges, the body of it? A Yes, sir.

Q It was all full of the white stuff, wasn't it? A It was all full of white stuff. 30

Q The white stuff is borax? A What I mean it it was all white from borax, but there was nothing in it, because I was looking for a hook.

Q Would you say there wasn't any borax in it? A No, there was no borax in it, only just what is left in it after they dump the bottom out, they slide out on the bottom and then close it up.

Q You say there is borax would be left in there after they opened the bottom of the barge, what was left in? 40

Otto Christensen, for Petitioner, Re-cross.

Mr. Gottko: I object, he already answered the question.

The Court: I will allow the question.

10 Q Now, Captain, these barges, how close together were they, the borax company's barge? A About five feet apart, I think.

Q About five feet apart? A Yes.

Q So you could jump from one barge to the other if you wanted to? A Yes.

Q That is, you say you could jump from the full barge to the empty one and jump from the empty one to the dock, couldn't you? A Yes.

20 Q You could also jump from the full one to the dock, couldn't you? A Not to the dock—well, into the borax company's dock.

Q To the borax company's dock? Then, you would have to walk how many feet to get to the Sulphur company's dock? A That is about seven feet.

30 Q So you could jump from the loaded one to the dock and then walk about seven feet up on the sulphur company's dock? A Yes.

Q Just show us, Captain, you are a seaman and we are not, just show us, suppose this red line is the dock, now, we will say this is the Standard Oil place and this is the borax, this is the sulphur? A You got it wrong.

Q Have I got it twisted? A Yes, the Standard Oil is this way. (At this point the witness drew a diagram.) This is the Standard Oil.

40 Q How long would you say the Standard Oil was, a hundred feet? A About a hundred and fifty.

Otto Christensen, for Petitioner, Re-direct.

Q About the same as the borax? A Yes.

Q Now, will you just show us, just draw a little picture of the barges, the way they laid there? A Here comes our place, here we tied up in there, we came out this way. Here comes the borax dock, here is the slip with these barges at this end and there is the track, that goes up into the yard where the cars come down and dump the stuff. Then there comes the empty one.

10

Q This is the empty barge? A Yes, then there is a shanty here like that belongs to the sulphur works. This is the bulkhead of the sulphur company, the sulphur company has no barge at all, only a bulkhead.

Q Then the man was picked up about eight feet southeast of the empty barge? A No, east of the barge.

20

Q So, now when you have been talking about the dock for the sulphur company, the sulphur company didn't have any dock, it only had a bulkhead? A A bulkhead, yes.

Q But the borax company had the docks? A Yes, one dock.

Mr. Turner: That's all.

30

Re-direct examination by Mr. Gottko.

Q According to your sketch, this empty barge was against the bulkhead of the property belonging to the National Sulphur Company. A Yes, sir.

Mr. Turner: Of course, you don't know who actually owns the property, that is your designation of it?

A Yes, that is my designation of it.

40

Thomas Szewczak, for Petitioner, Direct.

Mr. Turner: You don't know who owns the property?

A No.

10 Mr. Gottko: That is your designation of everything you have explained to this Court?

A Yes.

(Witness excused.)

THOMAS SZEWCZAK, produced on behalf of the petitioner and sworn through Interpreter.

20 *Direct examination by Mr. Gottko (through Interpreter).*

Q Where do you live, Mr. Szewczak? A 68 Eighteenth street, West Bayonne.

Q Where do you work? A Sulphur works.

Q Working for the National Sulphur Company?
A Yes.

30 Q How long have you been working there? A Six months.

Q What do you do? A Laborer.

Q What do you do as a laborer? A Shovel sulphur around the yard.

Q You shovel sulphur? A Yes.

Q Where do you get the sulphur? A A truck brings it to the place there.

40 Q What kind of a truck? A A big truck, that's all he knows.

Thomas Szewczak, for Petitioner, Direct.

Q What is it, an automobile, or a freight car?

A An automobile.

Q What is the color of it? A He don't know the color.

Q This sulphur goes into your shovel, is that right? A Yes. 10

Q Is it white, or black, or brown? A It is a sort of yellow color.

Q Do you put this sulphur in the furnaces? A Yes.

Q After it comes out of the furnaces, what is the color of it? A Still yellow.

Q Now, where were you working on June 6, 1925?

A He was working at this place. 20

Q At the National Sulphur Company? A At the National Sulphur Company.

Q June 6th is a Saturday, is that right? A Yes.

Q How many men were working for the National Sulphur Company as far as you know? A Only three men were working there that day.

Q Who were the three men? A A man back here and this gentlemen, the witness, and Plaskon. 30

Q Was Plaskon working? A Yes, he was working there.

Q What is this man's name, in the court room? A Frank, I don't know his last name.

Q What time did you start work on Saturday, June 6, 1925? A About three o'clock.

Q About three o'clock, did Mr. Plaskon and this other man, who was known as Frank, start work with 40

Thomas Szewczak, for Petitioner, Direct.

you on Saturday, June 6, 1925, at three o'clock? A Yes, they all started at three o'clock.

Q How long had you been working that day? A He just came and worked at three o'clock that afternoon.

10 Q How long did you work with Mr. Plaskon and Frank after three o'clock? A They only worked about a half an hour, or two hours; he doesn't know just how long.

Q A half an hour to two hours after? A After three o'clock.

Q When was the last time that you saw Mr. Plaskon? A He saw him, about the last time he saw him, was between quarter after four and four-thirty; he isn't sure just what time.

20

Q Around that time? A Around that time.

Q Do you know what happened to Mr. Plaskon on June 6, 1925?

Mr. Turner: I object to that, unless he saw.

Mr. Gottko: That is what I want to know.

30 Mr. Turner: He said he didn't see him after that time, so he cannot very well know.

Mr. Gottko: I will press my question, because I think it can be answered by the witness.

The Court: You will have to lay a foundation; ask him whether he knows; ask him if he knows.

(Question repeated by the reporter.)

The Court: Answer it yes or no.

40 A No, he doesn't know.

Thomas Szewczak, for Petitioner, Cross.

Q Where was Mr. Plaskon working? A He was working together with him.

Q When did he leave you that afternoon, how long after he started work? A It wasn't quite four-thirty.

Q Did he see where he went? A No, he doesn't know. 10

Q Did you work there Saturday morning, June 6th? A No, he didn't work Saturday morning.

Q Do you know if Mr. Plaskon worked there Saturday morning, June 6, 1925?

Mr. Turner: I object to that, he doesn't know, how could he know?

A He doesn't know; he didn't see him. 20

Mr. Gottko: That's all.

Cross examination by Mr. Turner.

Q Now, Mr. Szewczak, after you and Mr. Plaskon had worked for a while, did you stop work and go and make yourself some coffee?

Mr. Gottko: I object to the question; I don't think it is material. 30

The Interpreter: He said at about a quarter of four that he went out, Mr. Plaskon went out and made some coffee, but he doesn't know whether he drank any of it or not.

Q He went out to make coffee. After you made the coffee, did you and Mr. Plaskon and Frank go somewhere where you could get cooled off? A He says the three of them went out to the bridge there to cool off. 40

Thomas Szewczak, for Petitioner, Cross.

Q The three of them went out to the bridge to cool off; this bridge is not over the water, is it? A No.

Q How far from the water is the bridge? A About ten feet.

10 Q You call it a bridge because it connects the sulphur kiln with the plant, do you? A Yes.

Q That is the bridge you run the sulphur trucks over, is it? A Yes.

Q When you were out there with Mr. Plaskon getting cooled off, was that the time that you missed him? A When he came out on this bridge, he missed Mr. Plaskon; he didn't know where he had gone.

20 Q But at the time you missed Mr. Plaskon, you and he were getting cooled off, weren't you? A Yes.

Q That is this place where you were getting cooled off, that is three hundred feet from the dock, was it? A About three hundred feet from the water.

Q Did you or Mr. Plaskon have any work that took you down to the dock? A No, nothing that would—

Q Was all of your work and Mr. Plaskon's work in the plant three hundred feet from the dock? A Yes.

30 Q This was a very hot day, wasn't it? A A very hot day.

Q Did you ever go down to the dock to the water to get cooled off— I will withdraw the question.

Q Was there any other place where you could get cooled off without going to the dock? A Yes, on the bridge.

40 Q On the bridge, was cooler than it was on the dock, was it? A Yes, about the same.

Thomas Szewczak, for Petitioner, Cross.

Q When Mr. Plaskon disappeared from off the bridge, did he say anything to you before he started?

Mr. Gottko: I object to that.

The Court: He can answer the question whether he said anything or not. I will allow it as far as it goes, just if he said anything. 10

Q My question is only, when Mr. Plaskon disappeared, from that bridge, did he say anything?

Mr. Gottko: Yes or no.

Q Yes or no, don't tell what he said. A No.

Q You didn't know that he had gone until you looked around and saw he wasn't there, did you? A He looked around and missed him but he didn't know where he had gone. 20

Q From this bridge where you were, could you see the dock? A Yes.

Q When you looked around, did you see anything of Mr. Plaskon on the dock or around the plant? A No, I didn't see him.

Q You can see from the bridge all of the sulphur works dock, couldn't you? A Yes. 30

Q Was that bridge up high enough so if the man had been over in the borax company barge, you could have seen him? A Yes, I can see him.

Q Did you see, when you looked over that way, did you see anything of Mr. Plaskon over there at all? A No, I didn't.

Q Now, if Mr. Plaskon were going to go from the bridge over to the borax company's barge, would he 40

Thomas Szewczak, for Petitioner, Cross.

have to go along the sulphur company dock or could he go on the borax company's property? A He could get over there very easily.

Q On the borax company's property? A Yes.

10 Mr. Gottko: Ask him that (addressing Interpreter).

The Interpreter: He said that. Do you want me to ask him that again?

Mr. Gottko: Yes.

The Interpreter: Yes, he could.

20 Q Now, if he went from your place over on the borax company's property, you wouldn't be able to see him would you? A No, I couldn't see him.

Q And you are sure, that when you looked down there, he wasn't on the sulphur company's dock or on the sulphur company's plant? A No.

Q Now, when Mr. Plaskon was with you, he had a shovel with him, didn't he? A Yes, he had a shovel with him.

30 Q When he disappeared and left the bridge, he left the shovel behind him, didn't he? A He left the shovel in the shop.

Q He left the shovel in the shop, so that when he left the bridge and went away, he didn't have his shovel with him? A No.

Q And his shovel was the tool that you and he used to shovel the sulphur, wasn't it? A Yes, we both used shovels.

40 Mr. Turner: I think that's all.

Thomas Szewczak, for Petitioner, Re-direct.

Re-direct examination by Mr. Gottko.

Q Who made the coffee? A Mr. Plaskon made the coffee.

Q How often did you make coffee during this eight hour working day? A We used to make it once, he would make it at three o'clock and have it for the following eight hours. 10

Q How do you know that the distance between the place where you were resting as you say, and the dock, is three hundred feet? A When anybody looks you can just about tell it is about that distance, that is the way he knows.

Q Did you ever walk to the end of the dock? A No, he never went there, he claims. 20

Q Did you ever see anybody ever go to the end of the dock? A No, he never saw anybody go on the dock.

Q Did you ever see any boat tied to the dock? A One other time, you can see it from the barge.

Q Did your boss ever go to the dock?

Mr. Turner: I object to that, because they hadn't any boss there that day. I object to what he did some other time. He said they were working without a boss. 30

Mr. Gottko: I didn't hear it.

Mr. Turner: Did you have any boss there that day?

The Court: He said only the three of them were there.

A The boss wasn't there that day. 40

Thomas Szewczak, for Petitioner, Re-direct.

Mr. Turner: Just you three men?

A Yes.

The Court: It is irrelevant, then.

10 Q Who is your boss? A That man Frank there is the boss when the three men are working, the fireman.

Q When the three men and the other men are there, who is the boss?

Mr. Turner: I object to that, because there were only three men there that day and I don't think we ought to go into some other day, what they do.

20 The Court: I think he has a right to know who his boss is.

A He knows his name is Mike, but he doesn't know his last name.

Q Is it Mike Mathis? A I don't know, I know his name is Mike.

Q Who is the yard foreman of the National Sulphur Company?

30 Mr. Turner: Is that material? I don't want to object if it is, but it doesn't seem to be so.

The Court: It may be for the purpose of bringing notice, or something.

A Sam, I don't know his last name.

Q Do you know Chris Hemal? A Yes, I know him.

40 Q Was he there, Saturday, June 6, 1925? A I didn't see him that day.

Thomas Szewczak, for Petitioner, Re-direct.

Q You didn't see him that day? A No.

Q You testified that you are sure that Mr. Plaskon was not on the sulphur company's plant as you could see from the bridge? A I couldn't see him.

Q You don't know whether Mr. Plaskon was on the National Sulphur Company's property or the borax company's property? 10

Mr. Turner: I object to that, this is his own witness, if the Court please, he is leading, he has already answered the question, he said he wasn't on the sulphur company's plant, as far as he could see.

The Court: You can't lead the witness, Mr. Gottko. 20

(Discussion between counsel.)

Q What time was it when you made this coffee? A He says he didn't make the coffee, Mr. Plaskon made it.

Q What time did Mr. Plaskon make it? A He said as soon as they got there at three o'clock that is the first thing he made was the coffee, that day.

Q You made coffee before you started to work, is that true, or not? 30

Mr. Turner: I object to that, he just said Mr. Plaskon made the coffee.

Q Did you ever make coffee while you were employed for the National Sulphur Company?

Mr. Turner: I object on the ground it is immaterial, it is his own witness, it is not cross examination. 40

Frank Zaworski, for Petitioner, Direct.

The Court: How is this material?

Mr. Gottko: To show not only Mr. Plaskon but other men employed by the National Sulphur Company made coffee.

10 The Court: How is that material to this issue? Whether he made the coffee or not, is that material?

Mr. Gottko: I will withdraw the question.

Mr. Turner: That's all.

20 FRANK ZAWORSKI, a witness on behalf of the petitioner, being duly sworn on his oath according to law, testified as follows:

Direct examination by Mr. Gottko.

Q Where do you live, Mr. Zaworski? A 440 Broadway, Bayonne, New Jersey.

Q Where do you work? A The sulphur, National Sulphur Company.

Q How long have you worked there? A Nineteen years.

30 Q Did you know Mr. Plaskon, John Plaskon? A Yes, I knew him.

Q Who did Mr. Plaskon work for? A He worked at the National Sulphur Company.

Q Were you working on June 6, 1925? A Yes.

Q Where were you working at that time? A At the National Sulphur Company.

40 Q What time did you start working on that day?
A Three o'clock.

Frank Zaworski, for Petitioner, Cross.

Q Who was working with you? A That man and Plaskon.

Q Who told you to come in to work on that day?

Mr. Turner: I object to that on the ground who told this man would be immaterial. 10

Mr. Gottko: Withdraw that.

Q What were your hours of employment? A From three to eleven.

Q Is that your regular shift? A Regular shift.

Q How long was Mr. Plaskon working with you on Saturday, June 6, after three o'clock? A From three to about a quarter after four, between a quarter after four and four-thirty, he is not sure of the right hours. 20

Q Do you know what happened to Mr. Plaskon on that day? A He doesn't know what happened to him.

Mr. Gottko: That's all.

Cross examination by Mr. Turner.

Q Now, Mr. Plaskon worked with a shovel in his work, didn't he? A Yes. 30

Q This day was a very warm day, wasn't it? A Yes.

Q The temperature was nearly a hundred degrees, wasn't it? A He just doesn't know what temperature it was, but he knows it was very hot.

Q It had been hot all that week, hadn't it? A Yes, it was a very hot week. 40

Frank Zaworski, for Petitioner, Cross.

Q After Mr. Plaskon came back from his lunch at home, did he make some coffee? A Yes, he made some coffee.

Q Then did Mr. Plaskon go out on the bridge to get cooled off?

10

Mr. Gottko: I object to the question, he doesn't know whether Mr. Plaskon went out on the bridge to get cooled off.

Mr. Turner: He asked him what happened to him. I am going to prove all the man knows about what happened to him.

The Court: If he had knowledge. You are leading, Mr. Turner.

20

Mr. Turner: This is cross examination now, if the Court please.

The Court: I know, but it is still leading.

Mr. Turner: Well, I will put the question this way: Do you know whether Mr. Plaskon went out on the bridge to get cooled off?

30

Mr. Gottko: I object to the question, I don't know how this man can know what Mr. Plaskon's intentions were when he goes outside.

The Court: If he knows.

Mr. Turner: I am just asking him if he knows.

A Yes, he went out on this bridge to get cooled off the three of them went out.

Q Oh, the three of you went out there to get cooled off, didn't you? A Yes.

Q Then, did Mr. Plaskon disappear while he was out on this bridge? A He just told me that the three

40

Frank Zaworski, for Petitioner, Cross.

of them, after being on this bridge for a few minutes, the three of them went inside, each of these men took their shovels and started in working.

Q Then, after that, did Mr. Plaskon disappear?

A Another fireman—some man from another shop hollered over to him is there a man working with him that came on at three o'clock and he said he was sure that he was working, but when he went in to see, he couldn't find him.

10

Q This witness told another man Plaskon had come to work and was working and then this witness went in to find Plaskon in the shop, but couldn't find him? A He said a man from another shop asked him if Plaskon was there.

Q Then this witness went in to find Plaskon and he had gone, he wasn't there? A Yes, he had gone.

20

Q When he went in to find Plaskon that time, was his shovel still there? A Yes, his shovel was still there.

Q Did Mr. Plaskon tell you that he was going to go? A This man, after leaving Plaskon and this other man at work upstairs, went downstairs to his place and then he didn't know what happened until this other fireman told him about it.

30

Q Then when you went to look for Plaskon, you went up on the bridge to look for him, didn't you?

Mr. Gottko: I object to the question; I think Mr. Turner is leading quite a lot.

Mr. Turner: I want to get the facts out, because this is either the shop or the bridge; I want to find out what it is.

40

Frank Zaworski, for Petitioner, Cross.

A He said that when he came up to look around for Plaskon, he asked the other man where he had gone and this other man said—

Mr. Gottko: I object to that.

10 Q When he went up to look for him, Plaskon had gone, had he? A Plaskon had gone.

Q So at that time Plaskon was not at his work in the shop and he wasn't on the bridge, was he? A No, he wasn't there.

Q And you were the boss in charge of these three men, were you? That is, yourself, and the two men? A Yes.

20 Q Now this bridge that you speak of, that is not a bridge over water, is it? A No.

Q Does it connect the sulphur kiln with the plant, with the shop? A Yes.

Q How far from the water, that is, how far from the dock is this bridge that you speak of, where the men went to get cool? A It is right by the shop.

30 Q How far is the bridge from the water? A He said just about three hundred feet.

Q About three hundred feet? A Yes.

Q Did Mr. Plaskon have any work that day that took him down to the dock? A No.

Q Was all of this work in this plant that was three hundred feet from the dock? Was all Plaskon's work in this shop, which was three hundred feet from the dock? A Just in the shop, his work.

40 Mr. Turner: I think that's all.

Frank Zaworski, for Petitioner, Re-direct.

Re-direct examination by Mr. Gottko.

Q What time did you go out to get cooled off? A
Between twenty minutes after three and three-thirty.

Q You started work that day at three o'clock? A
Yes. 10

Q Mr. Plaskon made the coffee before he started
to work? A Yes.

Q What are your duties when you work for the
Sulphur Company?

Mr. Turner: I object to that on the ground it
is immaterial; I don't think his duties are mater-
ial in this case.

The Court: I will allow that; he testified he 20
was boss. I will allow that question.

(Question repeated by the reporter.)

A He is a fireman and mixes sulphur.

Q There are red hot furnaces where you work,
aren't there? A Yes, downstairs.

Q And it is always hot where you work? A Yes,
where he works it is very hot.

Q How often do you go out to get cooled off? 30

Mr. Turner: Now, if the Court please, that re-
lates to this man entirely; I don't see how that is
material.

The Court: I don't see how it is material.

Q How often do you go, and Mr. Plaskon and
Frank go out to get cooled off when you work?

Mr. Turner: I object to that; he doesn't work
with Mr. Plaskon every day, as far as the record
goes. 40

Motion to Dismiss Petition.

The Court: He testified Plaskon worked upstairs and he worked downstairs, as I understood his testimony. You can straighten it out if you want to; that is my understanding of the testimony.

10 Mr. Gottko: That's all. That is the petitioner's case.

Mr. Turner: Now, if the Court please, I think at this time I move to dismiss this petition before I offer any testimony at all, on the ground that the Court is without jurisdiction to hear and determine this case because there is no proof of an accident arising out of the course of the employment of this man, because there is no proof in this case that this man was at his work at the time of the accident, but on the contrary,
 20 the proof is that, without permission, he had left his job and he had gone to a barge owned by the Borax Company, and he left that barge of the Borax Company with something white in his hand, and that something white would correspond to borax, because borax is white, a witness testified that sulphur is yellow and that this substance this man had in his hand was white, and he was carrying this borax from the Borax Company barge, whatever his motive was going out, whatever he intended to do with it, nobody knows and probably no one ever will know; but it evidently was
 30 something taken from the barge of the American Borax Company and while in the act of carrying that borax from that barge away to the scene of his employment, he stumbled and fell in the water.

I submit that shows he was not engaged in his employment at that time, but on the contrary, doing something quite out of his line of employment. He was at a place where he had no business to be; he had left the tools of his trade in the plant and left the plant; the proof of one of the witnesses shows that
 40 he could have only left the plant by going on the pro-

Motion to Dismiss Petition.

perty of the American Borax Company and going over the barge, and I say, whatever his motive was in going to that barge, and taking that white substance, we don't know, but it was while within the line of his conduct in leaving the property of the Sulphur Company and going to the Borax Company's property where he could not be seen from the plant. It seems to me, therefore, on the petitioner's case, there should be a dismissal. 10

(Discussion between counsel.)

The Court: I have followed the testimony as you have produced it, very carefully. There is no doubt in this case, as in the common law cases, the burden is on the petitioner to make out his case, prove his case. In this case the burden is not only to prove the man had an accident, arising out of and in the course of employment, not only to prove the man had an accident, but it arose out of and in the course of employment. I have followed this case and there is no testimony at all that shows when he was down on the dock he was there in the course of his employment. I don't feel you have made out a case and I am going to grant a dismissal. 20

I HEREBY CERTIFY the foregoing is a true and correct transcript of the above-entitled matter as taken stenographically before me at the time, place and date hereinbefore set forth. 30

.....
Deputy Compensation Commissioner.

I HEREBY CERTIFY the foregoing is a true and correct transcript of the above-entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

.....
Court Reporter. 40

Motion to Dismiss Order.

NEW JERSEY DEPARTMENT OF LABOR.
 Workmen's Compensation Bureau,
 Jersey City, Hudson County, District.

| | | |
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| 10 | <p>Julia Plaskon, <i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>National Sulphur Company, <i>Respondent.</i></p> | } |
|----|--|---|

July 21, 1932

Before Honorable Charles E. Corbin, Deputy Compensation Commissioner.

20 Appearances:

John C. Grimshaw, Esq., by Richard W. Baker, Esq., for the petitioner.

Chester Rothfuss, Esq., and John J. Francis, Esq., for the respondent.

Mr. Francis: If your Honor please, before we begin the taking of testimony I would like to put a motion on the record directed to the order which brings us in court today.

30 The Court: Very well.

Mr. Francis: On behalf of the respondent I move to dismiss the order under the terms of which we are brought into court today on the following grounds: One, that the evidence appearing in the affidavit on which the order is based is clearly not newly discovered evidence within the meaning of the decisions.

40 Two, a reading of the affidavit indicates clearly that the testimony suggested therein was available to the petitioner at the time of the original trial

Motion to Dismiss Order.

Three, on the ground that the exercise of reasonable diligence in the preparation of the case for trial originally would have resulted in the production of the evidence disclosed by the affidavit.

Four, the evidence disclosed by the affidavit is not such evidence as would not or could not have been produced by the exercise of ordinary diligence at the original trial. 10

Five, the petitioner's affidavit offers no legally satisfactory reason for the failure to produce the alleged newly discovered evidence at the trial.

Six, the petitioner's affidavit offers no legally satisfactory explanation of the delay in the making of this application.

Seven, the facts indicate that the petitioner did not embrace the first opportunity to present this alleged newly discovered evidence. 20

Eight, this Court no longer has control of the cause.

Nine, this Court has no jurisdiction over the subject matter of the present application.

Ten, this Court has no authority to grant the present order since the original case was not tried before him—(I am not sure whether that is so or not). 30

The Court: It was tried before me.

Mr. Francis: Then strike out that last ground.

Ten, the affidavits do not make it clear that the evidence contained therein would in all probability require a different result in a new trial.

Eleven, the order that brings the respondent into court at this time is defective in that it does not order a new trial, it merely permits the petitioner to put in 40

Motion to Dismiss Order.

the record the alleged newly discovered evidence, to augment the testimony taken at the original trial almost seven years ago.

10 Twelve, these proceedings are irregular and defective because the alleged evidence set up in the affidavit was adjudicated newly discovered evidence on the affidavit and not after examination and cross examination of the deponents in open court.

Thirteen, this proceeding is not a new trial within the established practice.

Fourteen, the affidavits on which this order was granted are based in whole or in part on hearsay testimony and contain improper legal conclusions of the affiants.

20 Fifteen, the entire matter is improperly before the Court, an original petition being required.

Sixteen, the matter is barred by the time limitation set forth in the Workmen's Compensation Act.

30 Mr. Baker: I don't know whether your Honor desires an argument on those points or not. I might state at this time, your Honor, that this motion, or whatever it is, that the attorney for the respondent is making now, I don't know what the nature of this proceeding is right now. This statement (he is certainly not in court, if it is a motion to strike out the order, he is not at court at this time). Your Honor set it down for a hearing on the petition for a reopening of the case, a hearing was held and an argument was held at the time of the hearing and you permitted the attorney for the respondent, if he so desired, to submit a memoranda on the law and submit any counter affidavits that he so desired and so chose. He did not argue that day nor did he argue beyond certain decisions of the law, he did not submit any mem-

40

Motion to Dismiss Order.

oranda or care to submit any counter affidavit. His time has now gone by and he cannot come in today, when he had the chance to argue that, and decision has been rendered by the Court, he cannot come in here today and object to the reopening on the same grounds that were available to him at the time of the hearing on the order, and of which he did not avail himself. 10

The Court: I am denying your motion and my ground is that section of the law that holds that a judgment found is final unless reopened by the Deputy Commissioner. I interpret that section of the law to hold that a Deputy Commissioner has the right at any time to reopen his own judgment.

Mr. Francis: I ask an exception.

I think, if your Honor please, that one statement of Mr. Baker's should be cleared so that there be no misconception of what Mr. Baker meant when he used the expression, he said a hearing had been held on these affidavits. The record should make it clear, I think, that there was an argument and the affidavits submitted and that is what Mr. Baker meant when he said a hearing was held, and that no testimony was taken at that time. 20

The Court: That is correct; I heard arguments.

We will now proceed and in order we may understand I will say the testimony has already been presented on the case, I am allowing the petitioner to put in additional testimony. The Section I referred to before is Section 11, Chapter 149, Laws of 1918. 30

That means that the petitioner has not to start from the beginning to prove his case, that the record stands but he is allowed to put in further evidence.

Mr. Francis: Then I understand that the proceeding is now to add— 40

Joseph Plaskon, for Petitioner, Direct.

The Court: Then, if I feel at that time in accordance with the order they have made out a prima facie case, I shall give you time to present your testimony, unless you are ready today, to meet it.

10 Mr. Francis: Then the proceedings today, in these proceedings your Honor is accepting as already part of the record, the testimony which was introduced at the original trial and merely augmenting it by these witnesses?

The Court: I am not augmenting it, I am allowing the petitioner—

Mr. Francis: Allowing it to be augmented by these witnesses, whatever witnesses the petitioner produces.

20 The Court: Yes.

Mr. Francis: May I except to that on the ground that if this is a new trial on the basis of newly discovered evidence, it should be an entire new trial.

The Court: This is not a new trial; this is an application for a reopening of my own judgment.

30 Mr. Baker: I think the attorney is mixed up between the proceeding in a common law court and the compensation court.

JOSEPH PLASKON, called as a witness on behalf of the petitioner, being first duly sworn, testifies as follows:

Direct examination by Mr. Grimshaw.

Q What is your name? A Joseph Plaskon.

Q Where do you live? A 220 Prospect avenue.

40 Q You are a son of Julia Plaskon? A Yes.

Joseph Plaskon, for Petitioner, Direct.

Q On the original case which was tried what lawyer represented you? A Anthony Gottko.

Q After that trial what took place, so far as you were concerned, with Mr. Gottko?

Mr. Francis: Objected to as hearsay. 10

The Court: Objection sustained.

By Mr. Grimshaw.

Q Did your mother go to Mr. Gottko's office after the original trial? A No.

Mr. Francis: I object to that unless the witness—withdraw the objection.

By Mr. Grimshaw. 20

Q Did you go to Mr. Gottko's office after the original trial? A After I received a letter from him.

Q Did your mother accompany you? A No.

Q What took place at Mr. Gottko's office when you went there in answer to his letter?

Mr. Francis: Objected to as hearsay.

The Court: Objection sustained. 30

Mr. Grimshaw: It is a question of using due diligence on the part of the petitioner's case.

The Court: You can bring out the evidence but not hearsay evidence, and I assume that will be hearsay evidence.

By Mr. Grimshaw.

Q Did you make any investigation on the behalf of your mother's case? A I did. 40

Joseph Plaskon, for Petitioner, Direct.

Q Did you try to locate the witnesses? A I did.

Mr. Francis: I object to that as leading; that goes right to the merit of the thing.

The Court: Objection sustained You are leading.

10

By Mr. Grimshaw.

Q What did you do, if anything toward the trial of the original case in 1925? A Tried to locate some witnesses.

Q After the trial of the original case in 1925, what did you do, if anything? A For a short time after I didn't do anything.

20

Q At any time after the original trial, what did you do, if anything? A I tried to go and see some more lawyers and see what they had to say.

Q What lawyers did you see? A Mehllich and Roberson.

Q Did you discuss the case with those lawyers?
A I did.

Q Did you ask them to handle the case? A I did.

30

Mr. Francis: I object as hearsay and the further ground it is self serving, and leading.

The Court: Objection sustained.

By Mr. Grimshaw.

Q Did you call on these lawyers at the request of your mother? A Yes.

Q Did you ask these lawyers to handle the case, at
40 the request of your mother?

Joseph Plaskon, for Petitioner, Direct.

Mr. Francis: Objected to as leading.

The Court: Objection sustained.

By Mr. Grimshaw.

Q As a result of your interviewing these lawyers, did they do anything? A No. 10

Q Did they advise you about what to do?

Mr. Francis: Objected to as leading.

The Court: Objection sustained, you are leading right straight along, Mr. Grimshaw.

By Mr. Grimshaw.

Q Did you try to locate the witnesses? A I did.

Mr. Francis: I object and ask that it be stricken out. 20

The Court: Strike it out.

By Mr. Grimshaw.

Q After you interviewed these lawyers what did you do, if anything? A I didn't do anything, just simply forgot about the case.

Q Did you see anyone else after you saw those two lawyers? A Five years later.

Q Who did you see? A Mr. Sloan of Bayonne. 30

The Court: A Bayonne lawyer?

The Witness: No, he is not a lawyer, just a friend.

By Mr. Grimshaw.

Q After you saw Mr. Sloan, what did you do? A I explained the case to him, told him what happened, how we lost the case and he said he didn't—

Mr. Francis: Objected to.

The Court: Objection sustained. 40

Joseph Plaskon, for Petitioner, Direct.

By Mr. Grimshaw.

Q What did you do after you saw Mr. Sloan? A After I explained the case to him I said come on down to the house—

10 Mr. Francis: I object.

The Court: Objection sustained.

By Mr. Grimshaw.

Q Not what he said to you; what did he do, what did he do? A I asked him to come down my house and after he came down to the house then I told him about the case.

20 Q Then what was done— A He said—

Mr. Francis: Objected to.

The Court: Objection sustained.

By Mr. Grimshaw.

Q What was done? A Then he took my mother and I over to see you.

Q Where was that, Newark? A Newark, yes.

30 Q You gave me all the information that you had on the case?

Mr. Francis: Objected to as leading.

The Court: Objection sustained.

By Mr. Grimshaw.

Q When did you call at my office; do you recall the approximate date? A January 14, 1930.

40 Q Your mother was present at that time? A Yes.

Joseph Plaskon, for Petitioner, Direct.

Q What did you do when you called at my office?

A Explained the case to you, gave you—

Mr. Francis: I object to that as hearsay, that cannot be binding on the respondent what the witness said to Mr. Grimshaw.

10

Mr. Grimshaw: He is not saying what he said, he said he explained the case to me.

The Court: I will allow it.

Mr. Francis: I ask an exception, please.

By Mr. Grimshaw.

Q Between June, 1925, and January, 1930, when you called at my office, with the exception of the times that you went to the two lawyers that you named, did you do anything else with the case?

20

Mr. Francis: Object to that on the ground it is leading, and secondly on the ground it has already been answered, the witness said that for five years he forgot about the case and did nothing more.

The Court: Objection sustained.

By Mr. Grimshaw.

30

Q Before the first trial and after your father's death, did you go to the plant of the National Sulphur Company? A Yes.

Q And did you talk to anyone there? A The foreman.

Q Do you know what his name was? A Michael Beck.

Q Did you make inquiries regarding your father's death?

40

Joseph Plaskon, for Petitioner, Direct.

Mr. Francis: I object to that as leading.

The Court: Objection sustained.

By Mr. Grimshaw.

10 Q What discussion did you have with Michael Beck?

Mr. Francis: I object to that as hearsay.

Mr. Grimshaw: Michael Beck is the foreman of the company and any statements made by him in regard to this matter would be binding upon the respondent.

Mr. Francis: Oh, no.

20 The Court: I will allow it; I believe it is part of the record that he is foreman of the company.

Mr. Francis: My objection to it is first on the ground it is leading and second, hearsay, and third any statements made by any supposed or alleged agents of the respondent would not bind the respondent. Fourthly, that the testimony which is sought to be elicited from this witness does not involve a statement by an employee or foreman of the company, but a statement to such employee by the witness. And on the last ground
30 that the testimony is self serving.

The Court: I will allow the question.

Mr. Francis: I ask an exception, please.

(Question repeated by the reporter.)

A I asked him if he was on duty at the time of my father's death; whether he was at the yard and what happened, and he told me that he wasn't working at
40 that time.

Joseph Plaskon, for Petitioner, Direct.

Q He was not there at that time? A Not at that time, he worked there during the morning hours when father worked, he done two shifts at the time.

Q Did you go around the premises of the plant at that time?

10

Mr. Francis: Objected to as leading.

The Court: Objection sustained, you are leading right straight along.

By Mr. Grimshaw.

Q What did you do after talking to Mr. Beck? A I walked over the waterfront and two of the shops, to see just about where the spot was.

Q Were you alone at the time? A With my brother.

20

Q What is his name? A John.

Q Was there anyone else with you at the time? A No, sir.

Q Did you at that time have an opportunity, or did you talk with anyone else at the plant at that time? A No, sir.

Mr. Francis: I object to that as leading. If your Honor please, this is the crux of the case and every question is very leading.

30

The Court: Objection sustained, you are leading right straight along.

Mr. Grimshaw: I ask an exception.

By Mr. Grimshaw.

Q After your father's death did you go to an attorney? A My mother did, yes.

40

Julia Plaskon, for Petitioner, Direct.

Q Did you go with her? A I don't remember that I went with her, I think my brother, John, went.

Q Your brother, John, went? A Yes.

Mr. Grimshaw: That's all, cross examine.

10

Mr. Francis: No questions.

(Witness excused.)

JULIA PLASKON, the petitioner, recalled for further direct examination, having been previously duly sworn, testified as follows:

Direct examination by Mr. Grimshaw.

20

Q What is your full name? A Julia Plaskon.

Q Where do you reside at this time? A I can't speak good English.

Q Where do you live? A 220 Prospect avenue.

Q Bayonne? A Yes.

Q You originally had Mr. Gottko represent you?
A Yes.

30

Q In the compensation case? A Yes.

Q After that case was over what did you do? A I can't talk good.

Q Did you do anything further in that case after the original trial? (No answer.)

(At this point Alfred Kopycinski was sworn in to act as interpreter.)

40 *Direct examination (resumed).*

Julia Plaskon, for Petitioner, Direct.

By Mr. Grimshaw (through interpreter).

Mr. Baker: If your Honor please, are the affidavits part of the case? If they are we will not examine the witnesses but simply produce them for cross examination.

10

The Court: The affidavits are part of the record insofar as my granting the rule, when I allowed you the right to present further testimony. Of course, the affidavits are not testimony as to the proof of your case. At that time I believe, if my memory is correct, I allowed Mr. Rothfuss to produce cross-affidavits and that was as to the rule which I allowed. It seems to me that that is the history now in this case. It is not testimony for the proving of your fact case.

20

Mr. Baker: The petitioner, Mrs. Julia Plaskon, is presented here today not for any bearing that it has on the happening of the accident or its arising out of the course of his employment, but she is presented here in court today in case the respondent cares to examine her on the affidavit made by her as to what she did in attempting to go on with, or what steps she took in the case.

Mr. Francis: Do I understand from what your Honor stated that you have accepted as uncontradicted the affidavit of this witness, the petitioner, as to the efforts she made in the preparation of the case and as to the excuse she offers for the lapse of seven years in making this application, and that you are not requiring the petitioner to put in, at this proceeding any direct testimony which will be either the same as that appearing in the affidavit or that testimony of some further or some new testimony the purpose of which is to explain the delay and explain whether or not she exercised diligence in the preparation of her case

30

40

Julia Plaskon, for Petitioner, Direct.

for trial and diligence in the making of this application?

The Court: As I say I have already granted the rule.

10 Mr. Francis: Then you are not giving us any right to cross examine any of the affiants of these affidavits as to the delay?

The Court: Oh, yes, Mr. Baker has already presented them and you may go ahead and cross examine.

Mr. Francis: Then you are accepting the statements in those affidavits as part of the record?

20 The Court: No.

Mr. Francis: I just want the record clear.

The Court: They may be part of the record in the proof of the case. It is my right, I believe, and I granted the petitioner's right to present further evidence as to their case, the fact case. The affidavits were presented in the furtherance of their motion, it was heard by me and I granted them the right to present further evidence. Of course, this evidence was not part of the fact case, in proving the case. In other words if they presented these affidavits now they would put in no further testimony. They were simply on the order and I granted the order.

30

Mr. Francis: Then I take it that the petitioner be required as a prerequisite to the granting of this new trial or reopening of this judgment on the ground of newly discovered evidence, that the petitioner be required to explain first, the efforts that she made, or that her son made in the preparation of the original case for trial and in the

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Julia Plaskon, for Petitioner, Direct.

investigation of the case for trial and further that the petitioner put in the record the testimony established, or tending to establish that reasonable diligence was exercised in the preparation of the original case for trial, testimony tending to show reason for the delay of seven years in making this application, tending to show that she embraced the first opportunity that was presented to her in making this application to reopen the judgment on the ground of newly discovered evidence or for the granting of a new trial on the ground of newly discovered evidence, and further that she be required to show by the testimony in the record that the alleged newly discovered evidence will establish that in all reasonable probability, the newly discovered evidence would change the result if the original trial were continued or if the judgment were reopened. 10
20

Mr. Baker: Pardon me, your Honor, this is merely a repetition of what he said before when he opened the case.

Mr. Francis: Just a minute, I want to complete my statement.

Mr. Baker: Let me finish what I am saying.

The Court: What is your motion? I cannot hear you both. 30

Mr. Baker: I move that the demand made by the attorney here be entirely stricken from the record as it is exactly what he demanded at the beginning of the case today, and was ruled upon by your Honor.

Mr. Francis: What is this, a man cannot put his reasons for objection on the record?

The Court: As I understand it your reasons now you are giving are the requests you previous- 40

Julia Plaskon, for Petitioner, Direct.

ly made by requesting that the petitioner prove so and so—

Mr. Francis: Then I will amend it by saying I request and I move that the petitioner be required to—

10

The Court: Go ahead.

Mr. Francis: And that the respondent be given an opportunity to cross examine these witnesses on the matters above referred to.

The Court: My ruling on that is that if the petitioner desires to present that evidence, of course I will allow the petitioner to do it. I am not requiring it to do it.

20

Mr. Francis: May I have an exception?

The Court: That is up to the petitioner to present his case. What do you want to do?

30

Mr. Baker: I will let it stand on the record that the petitioner, Mrs. Julia Plaskon, has been submitted here in court in case the respondent cares to ask her any questions relating to the affidavit as presented by her and which is in the record in this case. The same thing applies to John Plaskon, the son and the same thing applies to Mr. John Grimshaw, the attorney, who made no affidavit in the case, but who made a statement on the record at the time of this particular motion.

40

This attorney is now rearguing or attempting to reargue that which was argued in full by the attorney for the respondent, with the opportunity given him to submit counter affidavits and a memorandum of law. It was fully discussed, fully argued and fully decided and I am merely pre-

Julia Plaskon, for Petitioner, Cross.

sending Mrs. Plaskon, Mr. John Plaskon and Attorney John Grimshaw in case they desire to cross examine them in regard to their affidavits or cross examine Mr. Grimshaw in connection with his statement given in court.

Mr. Francis: In answer to that statement let the respondent put on the record its contention that the burden of proof on the application to reopen the judgment or for a new trial on the ground of newly discovered evidence, rests upon the petitioner, to establish all the facts which were laid down in the decisions as essential to permit the reopening on the ground of newly discovered evidence. 10

The Court: The point of the thing is I have already reopened the matter. 20

Mr. Francis: I ask an exception.

By Mr. Grimshaw.

Q Mrs. Plaskon, have you remarried since June, 1925? A I did remarry.

Q What was the date? A The fourth of September, 1929.

Q The fourth of September, 1929. What is your name now? A Julia Siberry. 30

Mr. Grimshaw: That's all.

Cross examination by Mr. Francis.

Q Do any of your children live with you now?

Mr. Grimshaw: I object as immaterial.

The Court: Objection sustained.

Mr. Francis: I ask an exception, please. 40

John C. Grimshaw, for Petitioner, Direct.

By Mr. Francis.

Q Have any of your children died since 1925? A
No, all living.

Q Are they all working now?

10

Mr. Grimshaw: I object to that as immaterial.

The Court: Objection sustained.

Mr. Francis: I ask an exception, please.

By Mr. Francis.

Q Are all these children at the present time self-
supporting?

20

Mr. Grimshaw: I object as immaterial.

The Court: Objection sustained.

Mr. Francis: I ask an exception, please.

No further questions.

JOHN C. GRIMSHAW, being duly sworn upon his
oath, testified as follows:

30

Mr. Baker: I will say for the purpose of the
record, your Honor, that attorney John Grim-
shaw has been sworn and placed on the stand in
case the respondent cares to cross examine him
on the statement as to what he did in regard to
the case after the time when the petitioner and
her son came to him in July, 1930, and up to the
time, between that time and the filing of the
petition.

40

Mr. Francis: The respondent repeats the con-
tention that the burden is on the petitioner to

John C. Grimshaw, for Petitioner, Direct.

explain all of the matters which are required under the law for the granting of a new trial or the reopening of a judgment on the ground of newly discovered evidence, and that the petitioner is required to establish all those prerequisites before a judgment can be reopened or a new trial had on the ground of newly discovered evidence. 10

Mr. Baker: All I want is to make sure this is a part of the record. Does your Honor's record show whether that was taken down stenographically at the time attorney Grimshaw made the statement at the preliminary trial?

The Court: This matter came on for argument after the affidavits had been filed, in the usual way and the rule granted. From the argument I granted the petitioner the right to reopen the case. The point is that I have already granted that order and I have granted the petitioner the right to present further evidence in this case and that is the position we are in now. As far as those affidavits being a part of the record, they are not a part of the record as far as proving the case; they are simply produced on the rule to reopen the case. I think you understand me. 20

Mr. Baker: I understand you perfectly, your Honor. 30

The Court: Of course, it is up to you to prove your case.

Mr. Baker: That motion has been argued and then put in, but I wanted to make sure that this case, this will probably be appealed on the question of law as to your right to reopen, and I am not going into the question of the trial again, on its merits at all today, but I want to be sure, as a matter of record that, as a matter of record, on 40

John C. Grimshaw, for Petitioner, Direct.

the rule your Honor allowed, that attorney Grimshaw's statement which was not in the form of an affidavit produced, it was in the form of a statement in open court, and that that is a matter of record so that it will be before the upper court.

10 Mr. Francis: There is no question but that that petition will be a part of the record on appeal.

Mr. Baker: I would like to present at this time the death certificate which I note, from the record of the former case, was not introduced in the testimony before. I don't think there is any question raised that the man did die but it is a part of the record and I would like to offer it at this time.

20 Mr. Francis: If your Honor please, I have no objection to so much of the death certificate as tends to establish that the man died, and on that date, but I object to the self-serving statement appearing on the certificate that: "I have investigated the circumstances attending the death of the deceased and that in my opinion the cause was—" I think that that was established in that record at the last trial.

30 Mr. Baker: No, it was not, as I understand it, your Honor. This death certificate is prima facie evidence for what it is worth and it is admissible for that purpose. That portion is certainly a hearsay proposition, which is in no way binding upon your Honor, but I offer the certificate.

The Court: I will allow it in evidence.

Mr. Francis: I ask an exception.

40 (Received in evidence and marked Exhibit P.
1.)

John C. Grimshaw, for Petitioner, Direct.

Direct examination by Mr. Baker.

Q Mr. Grimshaw, did you at any time take any pictures of the waterfront in Bayonne? A I did.

Q If so, when did you take them and what portion of the waterfront were the pictures taken of? A I 10
took these pictures on Tuesday, July 19.

Mr. Francis: The year, please.

The Witness: That is in 1932 and they are of the waterfront, Bayonne, which shows the Borax Company plant and the National Sulphur Company plant.

Mr. Francis: I object to the statement as to what the pictures show; I think the pictures 20
speak for themselves.

The Court: Objection sustained.

By Mr. Baker.

Q What portion of the waterfront did you take the pictures of? A That portion of the National Sulphur Company and of the Borax Company.

Q What positions were those pictures taken from, from the land side or the water side or where? A 30
Taken from the water side looking inland.

Q I show you a series of pictures, six pictures, and ask you if those are the pictures you took of the waterfront of Bayonne, July 19, 1932? A They are.

Mr. Baker: I offer those pictures in evidence.

Mr. Francis: Objected to on the ground the time of the taking of the pictures was too remote from the time of the accident and on the further 40
ground that there is nothing in the record to

John C. Grimshaw, for Petitioner, Cross—Re-direct.

establish the condition in 1932 was the same as it existed in 1925 or that the pictures themselves, the locations depicted therein have any relation to the accident or the scene of the accident.

10 Mr. Baker: Your Honor, I will show from witnesses that the conditions as shown in these pictures are the same conditions that existed in 1925 and I am merely producing them so that your Honor and the witnesses may have something before them where they can show where the body was found and where the man fell into the water.

The Court: I will allow them subject to being connected up. They are not good evidence as they are. If you do not connect them up, I will strike them out.

20 Mr. Francis: I ask an exception, please.

The Court: On the ground there is no proof it is the same condition today as existed there in 1925.

(Pictures above referred to entered in evidence and marked "P. 2, P. 3, P. 4, P. 5, P. 6 and P. 7," respectively.)

Mr. Baker: That's all; cross examine.

30 *Cross examination by Mr. Francis.*

Q Did you take these yourself? A I did.

Q Did you develop them yourself? A No, I did not do that.

Mr. Francis: That's all.

Re-direct examination by Mr. Baker.

40 Q After the pictures were developed and you looked at the pictures, did those pictures show the

Otto Christensen, for Petitioner, Direct.

portions of the waterfront of which you took the pictures with the camera? A Yes, sir.

Mr. Baker: That's all.

Mr. Francis: That's all.

10

OTTO CHRISTENSEN, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Grimshaw.

Q Mr. Christensen, by whom are you employed—I think that is on the record. Are you still employed by the Standard Oil Company? A No, it was taken over by the Dalzell Company.

20

Q You testified in this case, did you, in November, 1925? A Yes, sir.

Q Now, I show you these pictures that have been marked in evidence and ask you if you recognize the scene as depicted and portrayed in those pictures? A Yes, here is the sulphur works and right from there—

Mr. Francis: I ask the witness to be required to answer the question, please.

30

The Court: Answer the question, please.

Mr. Grimshaw: He did say yes.

By Mr. Grimshaw.

Q Will you point out on these pictures what these various places are along the waterfront; taking the picture marked "P. 7," will you show us on that picture what the various places are along that waterfront, to your knowledge? A Yes, over here is the

40

Otto Christensen, for Petitioner, Direct.

chemical works, next to that is the sulphur works and then comes the borax (indicating).

Q Then comes the borax? A Yes.

10 Q You are beginning at the right-hand end of this picture? A Yes.

Q And the chemical works, the sulphur works and the borax works? A Yes. Next to that is the Standard.

20 Q When you were driving your launch along this waterfront in June, 1925, was the condition of the waterfront the same as shown in that picture there before you? A Yes, the same only there was a barge tied up here by the boathouse, by the borax works.

Q Only there was a barge tied up by the boathouse, by the borax works? A Yes, one of those mud barges that they load the mud in and take out to sea.

Q Was this tug there at that time, do you know? A No, he wasn't there; there was nothing on the waterfront but that borax barge.

Q There was nothing on that waterfront but the borax barge? A Yes.

30 Q Where was the borax barge? A He was tied up alongside of the boathouse here, on the east side of the boathouse.

Q On the east side of the boathouse? A Yes.

Q In front of what plant? A In front of the borax plant.

40 Q Do you recognize that; can you tell us if that is familiar to you? A Yes, here is where the barge was tied up, this is the boathouse here.

Otto Christensen, for Petitioner, Direct.

The Court: What are these pictures? Are they enlargements?

Mr. Grimshaw: No, these are other pictures that have not been presented yet.

The Witness: Here was the barge tied up alongside of this bulkhead. 10

By Mr. Grimshaw.

Q Who did this bulkhead belong to? A Belonged to the borax.

Q And the barge was tied up alongside was lengthwise to the shoreline or pointing in to the shore? A No, endwise, like this, the front up against here (indicating).

Q In front of whose property was that barge? A On the borax. 20

Q How far did the borax company's property extend there? A That extends about forty-five feet.

Mr. Francis: I object to that, if your Honor please, on the ground that is a matter of public record and the best evidence of the extent of the borax company's property is the deed.

The Court: Objection sustained. 30

By Mr. Grimshaw.

Q How much of that property along there was occupied by the borax company?

Mr. Francis: I object to that on the ground that the witness could only know through hearsay.

Mr. Baker: Your Honor, he could know from his own knowledge having been along that waterfront for many years. 40

Otto Christensen, for Petitioner, Direct.

The Court: I will allow it.

Mr. Francis: I ask an exception.

The Witness: They only occupied about forty to forty-five feet.

10 *By Mr. Grimshaw.*

Q From the boathouse? A Yes, sir, from here; here is where the sulphur works started, and this is the sulphur works shanty right here (indicating).

Mr. Baker: I ask to have this marked for identification.

(The photograph above referred to was marked "P. 8 for identification.")

20 *By Mr. Grimshaw.*

Q Now, referring to this picture, marked for identification, "P. 8" you say that this shed starting out in the middle of the dock and going right along the picture, was occupied by what company? A The sulphur works.

Q The sulphur works? A Yes.

30 Q Where was it that you first saw Plaskon in the water? A About five hundred feet off this bulkhead, out at midstream.

Q That is where you were? A Yes.

Q Where was he when you first saw him? A That's where I was.

Q That's where you were, you were out here in a boat about a hundred feet off? A Yes.

40 Q When did you see something in the water? A I seen his head sticking out of the water when I was notified by one of the passengers.

Otto Christensen, for Petitioner, Cross.

Q Where did you see that head sticking out of the water? A Right here (indicating on photograph).

Q Mark with an X about where you saw the head sticking out of the water?

(Witness does so.)

10

Q Was that in front of the property occupied by the borax company or in front of the property occupied by the sulphur company you saw the head? A The sulphur company.

Q You didn't see him until you saw his head in the water when you came up from the Standard Oil? A Yes.

Q When you came in with the boat, as you testified before; where was the body lying at that time, when you came in with the boat? A Lying on my right side.

20

Q Lying on your right side, but wherein relation to the picture, where was the body? A The body was down the bottom at the time.

Q Was it near the point where you first saw the head in the water? A Yes, right here. His cap was floating on top of the water. I came in on the left-hand side of him and got my boat hook and went down for him.

30

Q The body was beneath the spot you have marked on this picture, is that correct? A Yes.

Mr. Grimshaw: Your witness.

Cross examination by Mr. Francis.

Q How many barges were there tied up to the dock? A One.

40

Mike Matus, for Petitioner, Direct.

Q You are sure about that? A Yes.

Q No question in your mind but that there was one barge tied up there? A Only one barge, that was a mud barge.

10 Q And you have said that that was a borax company mud barge? A Yes.

Mr. Francis: That's all.

Mr. Baker: That's all.

MIKE MATUS, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Baker.

20 Q Mr. Matus, by whom are you employed, who do you work for? A Sulphur works.

Q Do you work for the sulphur works now? A No, not now but at that time I was working there.

Q On June, 1925, who did you work for? A Yes, I worked there at that time.

Q Who did you work for in June, 1925? A Down the sulphur.

Q Is that the National Sulphur Company? A Yes.

30 Q How long have you worked for them? A I worked, I started work with them in 1912.

Q You started working there in 1912? A Yes.

Q Now, what was your work; what was your position; what was your job? A I worked in the chamber inside, over here by this picture.

Q In the chamber, inside? A Yes.

40 Q What were you called; were you a bricklayer or foreman or worker or what? A No, I am a shopman.

Mike Matus, for Petitioner, Direct.

Q You were a shopman? A Yes.

Q As a shopman what did you do; what was your job? A I worked inside making sulphur, they got kettles, four kettles on a side.

Q Four kettles on a side? A Yes, I worked only 10
the one side, one man.

Q You worked only on one side? A Yes.

Q Yes. A We were making flour and making hard stuff up there—

Q Did you work on June 6, 1925? A Yes, I work at that time.

Q On June 6, did you work that day? A That day and John Plaskon fall overboard. I am blind at 20
that time; I got a sore eye.

Q Just a minute, did you work that day that Mr. Plaskon fell into the water, did you work that day?
A No, I no work that day.

Mr. Francis: If your Honor please, I object to the form of the question on the ground it contains counsel's conclusion as to what happened to Mr. Plaskon, that he fell into the water.

Mr. Baker: No, that is not a contention, that 30
is the testimony in the case.

Mr. Francis: I object to the question on the ground that it contains a conclusion of fact which may or may not be justifiably inferred from the testimony and secondly on the ground it is leading.

The Court: Objection sustained.

Mr. Baker: I ask an exception as it is already 40
in the testimony of the case by the witnesses that

Mike Matus, for Petitioner, Direct.

they saw Plaskon fall into the water, therefore I am asking whether or not he worked on that day and I take an exception to the exclusion of that question as not being leading or not based on facts in the case.

10 The Court: I will allow it subject to being in the record, I don't recall the record.

Mr. Francis: I ask an exception.

By Mr. Baker.

Q Answer the question, were you working on that day that Mr. Plaskon fell into the water?

20 Mr. Francis: The same objection and exception, please.

A I am sick on that day.

Q You were sick that day? A Yes.

Q Did you work the day before that? A Friday, three to eleven.

Q Friday, three to eleven? A Yes.

30 Q Three in the afternoon to eleven at night, is that right? A Eleven o'clock, yes.

Mr. Baker: That last portion was on page fourteen of the record.

The Court: I will allow it in evidence.

Mr. Francis: Now your Honor is allowing the question on the ground you have looked in the record and seen the testimony.

The Court: Yes.

40 Mr. Francis: I ask an exception.

Mike Matus, for Petitioner, Direct.

By Mr. Baker.

Q What was your regular time starting to work?

A Three to eleven.

Q Did you work from three to eleven, Saturday, the day Mr. Plaskon fell in the water?

10

Mr. Francis: I object on the same ground.

The Court: I will allow it.

Mr. Francis: I ask an exception.

A No, I sent my wife that day, I am sick in my eye, I sent my wife to the drugstore to call them on the phone.

Q You were sick in the eye at that time? A Yes.

20

Q What do you mean by sick in the eye; what was the matter with your eye? A Too much gas.

Mr. Francis: I object to that as immaterial.

Mr. Baker: It is material on the ground that the deceased took this man's place on the next shift that day.

The Court: I will allow it.

Mr. Francis: I ask an exception.

30

By Mr. Baker.

Q Too much gas? A Yes, big gas making the hard stuff, making the flour out at that time.

Q Where did the gas come from? A Inside near the place where I worked.

Q Inside near the place where you worked? A Yes.

40

Mike Matus, for Petitioner, Direct.

Q Was that hot weather then, do you remember?

A It was hot weather, a very hot day.

Q Did you go to the plant to work on that Saturday or didn't you go to the plant to work? A No, I sent by the drugstore to the foreman to tell the boss
10 can't come out, I got a sore eye.

Q You sent word to the foreman that you couldn't come down, that you had a sore eye, is that right? A Yes, that's right.

Q Where did this gas that you speak about, where did that come from, this gas you say was there, where did it come from? A From the kettles.

Q From the kettles? A Yes.

20 Q Are the kettles enclosed in anything? A Yes, the kettles is enclosed and it has got a fire box on the bottom, got a fire up there, the fireman put the fire in there and that stuff is burning, that gas all comes down the shop where the men are working.

Q Does this gas come out of the pipe or a hole or the furnace door or where does it come from? A It got pipe inside, they fix stuff from inside.

30 Q Are those pipes in one solid piece or are they joined? A Every kettle has got one pipe.

Q The pipes join on to each other as they go along then? A Yes.

Q Did any gas come out that you noticed from these places where they were joined along? A Yes.

Q When the gas was coming out in these cracks where the pipes are joined together what, if anything, did you do about the gas coming out?

40 Mr. Francis: I object as immaterial.

Mike Matus, for Petitioner, Direct.

The Court: I will allow it.

Mr. Francis: I ask an exception, please.

A I got white stuff, I call mud.

Q Where did you get this white stuff? A On the borax place. 10

Q On the borax place? A Yes.

Q What part of the borax place did you get it from? A If it is in the yard, I get it in the yard; if there is not any in the yard, then I go on the boat.

Q If there is none in the yard, you go on the boat?

A Yes.

Q Did you ever go on the boat to take any of this mud from the boat? A Yes. 20

Mr. Francis: I object as leading.

The Court: Objection sustained.

Mr. Francis: I move the answer be stricken out.

Mr. Baker: I note an exception that the answer is stricken out because he testified he went on the boat; it is not leading if I ask him again that same question. 30

The Court: Objection sustained.

Mr. Baker: I ask an exception.

By Mr. Baker.

Q You said that if there wasn't any mud in the yard you went on the boat? A Yes.

Mr. Francis: Objected to as leading.

Mr. Baker: I said, "you said so," which he did do; it is part of the testimony. 40

Mike Matus, for Petitioner, Direct.

Mr. Francis: There is not need of asking it again then.

By Mr. Baker.

10 Q You say if there wasn't any mud in the yard you went on the boat to get it. Now, how many times—

Mr. Francis: Objected to.

Mr. Baker: I haven't finished the question.

Mr. Francis: You cannot put two questions in one; I object to that question as leading.

The Court: Finish the question.

By Mr. Baker.

20 Q (Concluding.)—how many times did you go on the boat to get mud?

Mr. Francis: I object to the first part of the question on the ground that it is a statement by counsel and not a question—

The Court: I will allow it.

Mr. Francis: I ask an exception.

By Mr. Baker.

30 Q How many times did you go on the boat to get mud? A One day I go four times; I got a pail; I go.

Q On one day you went four times? A Yes.

Q Did you go on any other day? A I go another day again.

40 Q What did you do with this mud when you got it? A As the gas came down like the pipe gas inside of the chambers, it makes a crack there at the stove. I smeared the pipe all the way around.

Mike Matus, for Petitioner, Direct.

Q You smeared the pipes all the way around? A Yes.

Q Was this mud in lumps or in liquid form? A Sometimes in the yard it is too soft, you know, to stay long time. You go down to the boat for hard stuff.

Q Sometimes in the yard it stays soft for a long time and the stuff on the boat is hard, is that right? A Yes.

Q What does it look like, the hard stuff on the boat, what is the color of the hard stuff you got inside the boat? A It is white.

Q How many years, if any, had you been using this mud? A How many years I am using that stuff?

Q Yes. A Maybe ten years using that stuff.

Q Maybe ten years using that stuff? A Yes, I think so, ten years.

Q Do you know Mike Beck? A Yes, I know Mike Beck.

Q Who is he? A He was the boss at that time.

Q He was the boss at that time? A Yes.

Q Was Mike Beck ever around when you used this mud and when you went to get the mud?

Mr. Francis: I object as leading—withdraw the objection.

By Mr. Baker.

Q Was he ever around when you went to get this mud from the borax plant? A Yes, Mike Beck said, "That stuff is good for that, that's all right."

Mike Matus, for Petitioner, Cross.

Q Mike Beck said, "That stuff is good for that, that's all right"? A Yes.

10 Q Did you ever see anybody else working for the sulphur company use this mud? A That is the reason we use the mud, nobody used it only the sulphur, they dumped it in the water.

Q Did you ever see anybody else from the sulphur company, besides yourself, use this mud out of this plant? A Other fellows use that in another factory; they got some chambers, other chambers.

Q Other fellows have other chambers and they use the mud? A Yes.

20 Q You say one day you went over four times and got it; what time of the day did you go over, do you know? A Well, what time I got time.

Q Whatever time you had time? A Yes.

Q Was there any particular time you went over, any particular hour of the day, or was it any time in the day? A Any time when I got time for mud, I go.

Q What was the color of the sulphur that you worked with? A Yellow.

30 Mr. Baker: Your witness.

Cross examination by Mr. Francis.

Q Did you know John Plaskon? A Yes.

Q In 1925? A Yes.

Q How long have you known him? A Oh, I know him around the factory.

40 Q No, how long had you known him before June 6, 1925? A I know him for twenty years.

Mike Matus, for Petitioner, Cross.

Q You were a good friend of his, were you? A Huh?

Q You were a good friend of his? A Yes.

Q What kind of work did you do? A What kind of job I do? 10

Q Yes. A I am shopman at the the time.

Q Sharkman? A Yes, they call them shopmen, yes.

Q Did you have charge of the repairing of these pipes or boilers? A Yes, I do that job, not charge; I ain't in charge of that; when that stuff comes inside, I put some on top. The fireman charge that, when I get too many parts in the stuff, I got tubes, I put them on the tubes. 20

Q I mean was it your particular work to repair all the cracks in the pipes and boilers? A Yes, I go smear them up with mud.

Q Will you say yes or no to that question, whether it was your work to repair the pipes and boilers; yes or no, please? A Yes, I work on the furnace.

Q Did you ever work on the same shift that Plaskon worked on? A He worked on the day shift, John Plaskon; I was working three to eleven. 30

Q Then he was not working on the same shift that you were at any time, was he? A No, he was working with Mike, not with me, no, not one time.

Q How far away from the borax company property was the place where you usually work? A From the boat, you mean?

Q No, how far away from the property itself, from the property line of the borax company was the place where you worked? A Three hundred feet. 40

Mike Matus, for Petitioner, Cross.

Q And how far from that property line was the dock or wharf where the borax company barges were tied. A I says three hundred feet.

Q Three hundred feet from where you worked, or from the beginning of the property line to the wharf?
10 A The property line is forty-five feet one place, fifty feet. Another place it has got the wharf thirteen hundred feet.

Q This borax mud you have spoken of, is it all over the borax company's ground? A Yes.

Q And it was nearer for you to pick up the borax mud on the ground than go out on the barge to get it, wasn't it? A Yes, I go get the borax.

20 The Court: I don't think he understands it.

By Mr. Francis.

Q The places on the ground of the borax company's property where the mud was on the ground were nearer to you than the barge was? A Sometimes you get it on the ground—

Q No, just a minute.

30 Mr. Baker: Oh, no, that is an answer to the question; let him answer it first and then you may object to it if it is not responsive.

A Sometimes you get it on the ground and other times you pick up from the ground, you go on the boat. Sometimes you cannot use it on the ground, I go on the boat.

40 Q Did you go on the boat to get the borax mud because it was softer there, because the borax mud was softer than you got on the ground? A It is a long time stay in the yard, it is dry.

Mike Matus, for Petitioner, Cross.

Q And when it was dry in the yard you went on the boat and got it because it was softer and better on the boat, is that right? A No, make no difference, it is not so far away, I take it from the ground, I take any kind what I get.

Q Was there any reason for you to take the borax that was on the boat instead of the borax that was on the ground? 10

Mr. Baker: I object; he has already stated he took the borax from the ground when it there there and when it was on the barge he went to the barge to get it.

The Court: I will allow it.

Mr. Baker: I ask an exception.

(Question repeated by the reporter.) 20

The Witness: If they got mud on the ground I don't go to the boat, I take it from the ground. This mud is picked up after, they take it off the ground and put it on the boat. If I can get it from the ground, I don't go on the boat and any other man if he wants the mud don't get it on the ground he goes on the boat.

By Mr. Francis.

Q When you want borax for the pipes or boilers, is it hard or soft then? A It is hard, I put some water on and mix it up. 30

Q Was the mud that you got on the barge harder than the mud you got on the borax company's ground? A It is all mixed up, any kind, I don't pick it up, I take any kind if it is hard or soft, it makes no difference.

Q Did you use any borax mud on June 6, 1925, during the day? A Yes. 40

Mike Matus, for Petitioner, Cross.

Q Where did you get that from? A That day I no working, I am home blind.

Q Did you work at all on June 6, 1925? A I was sick that day, that time.

10 Q When was the last time that you worked before June 6, 1925? A I worked Friday, three to eleven.

Q That is June 4, was it? A June 4.

Q And did you use any borax that day? A Used it all the time, borax.

Q You used it every day, did you? A Every day, every shift, too.

20 Q Then there were always cracks in these pipes? A Always cracks.

Q You were always repairing the pipes with borax mud? A Yes.

Q You did that every day that you worked? A Every day.

Q Was there ever a day that you worked that there wasn't a leak in these sulphur pipes? A Pipes come down, make cracks all the time.

30 Q You worked eight hours a day, didn't you? A Eight hours.

Q How much time of that eight hours did you spend repairing the pipes with borax mud? A How many times it makes a crack; I smear up four or five times out of eight hours.

Q You say you worked there twelve years? A Yes.

40 Q All that twelve years you used this borax mud, didn't you? A No, I used it only ten years.

Mike Matus, for Petitioner, Cross.

Q Were new pipes and boilers in this part of the sulphur company, where you worked, at any time within those ten years? A Well, I used other stuff before.

Q Withdraw the question. Were the same pipes and the same boilers in the sulphur company plant where you worked when you first went to work there, that were there in 1925? A The same pipes, yes. 10

Q Were they new when you went there, from your observation, were they new when you went there, do you know? A New pipes? No, all the time the same pipes, same pipes, don't break it, it is all the time the same thing.

Q Did you repair the same cracks all the time over that ten-year period or did new cracks appear all the time? A You know, the pipes go inside of the chambers, it is not cracks in the pipes, it is inside where the pipes go inside. 20

Q When you put some borax on these cracks you have talked about, did they crack again? A Yes, then they get cracked again.

Q Did any new ones appear? A Yes, some new ones, and I smear it again.

Q So that new ones kept appearing all the time, did they? A All the time. 30

Q How many cracks would you say were in those pipes in 1925? A Too many cracks, because I smear them up, and in half an hour they get cracked again.

Q Were there anything but cracks in the pipes in 1925?

Mr. Baker: I object, he has testified the cracks were where the joints were, where they went into the furnace. 40

Mike Matus, for Petitioner, Cross.

Mr. Francis: Withdraw the question.

By Mr. Francis.

Q Then before you used the borax mud did you ever do anything with it? A What am I going to do?

10 Q I don't know, I never used it. A I do the same thing that I do before.

Q How did you put it on the pipe? A How many I put on the pipe?

Q No, how did you put it on the pipe? A I smear it on with a neck, you know, they call it a neck.

Q Was the borax mud hard and powdery when you put it on? A No, it is not hard. At that time, I used some water from the stove; I make it soft; I can't use hard stuff up there.

20

Q Did you get hard stuff from the ground, around the ground around the place? A Yes.

Q How long after the twenty-fifth did you continue to work for the sulphur company on the same job? A How long I do the same job?

30 Q Yes. A After I no work any more, I quit the job.

Q When did you quit? A 1925.

Q Do you remember what month in 1925? A The same month that John Plaskon died.

Q And are you married? A Sure.

Q You knew Mrs. Plaskon too, did you? A Oh, yes.

40 Q And your wife knew Mrs. Plaskon? A Yes.

Mike Matus, for Petitioner, Cross.

Q You knew all Mr. Plaskon's and Mrs. Plaskon's children, did you? A Yes.

Q And your wife knew them? A Yes.

Q How far away from them did you live? A We lived far away, maybe ten or twelve blocks. 10

Q Did you both live in the same city, Bayonne? A Same city.

Q Did you visit each other, go to each other's houses? A No, no.

Q How often did you see Mr. and Mrs. Plaskon before June 6, 1925? A I no see them maybe one time, sometimes down in the city.

Q Did you ever go out to the barge during this hot spell sit there and cool off? A Sit down? 20

Q Sit down there on the waterfront and cool off. A If I got time I sit down a little bit.

Q Did you leave your work and go up to the barge? A I go to the barge to take mud.

Q Did you go to the barge to cool off? A I no go to cool off, because I go for mud, I got no time to sit down on the barge. 30

Q It was very hot where you were working, wasn't it? A It was pretty hot all the time.

Q It was cooler out on the barge, wasn't it? A I no go to the barge to take air, I no got time.

Q Didn't you go out to the barge because it was cooler and because it would take you a little longer to get the borax? A I no got time because I got another man in my place, take it quick and then go right away inside. 40

Mike Matus, for Petitioner, Cross.

Q Then you never went down to the barge to get this borax in order that you could get some fresh air to cool off at the same time? A No, I no go to the barge to get some fresh air, I no got time.

10 Q Now you signed an affidavit, didn't you for Mr. Grimshaw, the man sitting over here at the table (indicating)? A Who?

Q Did you sign an affidavit for Mr. Grimshaw?

Mr. Baker: I don't think he knows what affidavit is.

By Mr. Francis.

Q Did you sign a paper for anybody? A No, I no sign a paper for nothing at all, I no sign for no one.

20 Q Is that your signature (handing paper to witness)? A That is my name.

Q Did you write that name on there? A I no write my name, for him?

Q Did you write your name on this affidavit and swear to it before Michael Jewasiak? A I don't know who Michael Jewasiak is, I no sign it no time, before nobody.

30 Q So what you say now is that this is not your signature, and that you never made the affidavit before Michael Jewasiak?

Mr. Baker: I object, he is characterizing what he said. He didn't say any such thing.

The Court: Objection sustained.

Mr. Francis: I ask an exception.

By Mr. Francis.

40 Q Did you sign this paper before Michael Jewasiak or before anyone who asked you to swear

Mike Matus, for Petitioner, Cross.

that this statement was the truth? A Jewasiak? I don't understand that.

Q Did you write your name on this paper that I am showing you? (No answer.)

Q Is this your signature I am pointing to on this paper, which purports to be an affidavit? A I signed by name with Mr. Plaskon, with that fellow (indicating). 10

Q You signed your name for him, did you? A (Pointing to Mr. Grimshaw.) Yes.

Q Where was it that you signed your name for him? A On the letter I signed the name.

Q Is this the paper that you signed for him? (Handing paper to witness.) A That is my name and my handwriting, I should say. 20

Q That is your name and your handwriting? A Yes.

Q Where did you sign this paper? A Where did I sign this paper?

Mr. Baker: May I interrupt, your Honor, he says where and points to the paper. I don't think he understands what he means by where, whether he means where the paper was, in what city— 30

By Mr. Francis.

Q Where did you sign this paper, in whose office?

The Court: Where were you when you signed the paper?

A I signed the paper down in Bayonne.

Q Did you read it before you signed it? A No. 40

Mike Matus, for Petitioner, Cross.

Q You never read it? A No.

Q Did you ever talk to Mr. Grimshaw before this paper was given to you to be signed, did you have a talk with him before you signed this paper? A No, I see him before in Bayonne.

10

Q Did you talk to him about this case before you signed this paper? A Yes, I talked with him, sure.

Q Where were you when you talked with him? A In Bayonne.

Q Where in Bayonne? A In Mr. Plaskon's place.

Q In Mr. Plaskon's home? A Yes.

Q At his house? A Yes.

20

Q Had you ever been to Mr. Plaskon's home before, with Mr. Grimshaw? A Mr. Plaskon's home?

Q Had you ever been to Mr. Plaskon's home before that time with Mr. Grimshaw? A With Mr. Plaskon?

Q Anyone. A No, I no see Mr. Plaskon in his home.

Q How many times were you at Mr. Plaskon's home when Mr. Grimshaw was there? A I see him one time.

30

Q No more than once, just that one time? A Yes.

Q Was that the time that you signed this paper? A Yes.

Q And was this paper all ready for you to sign when you came there that day? A I don't know; I don't understand what you mean.

40 Q Was this paper given to you to be signed that day when Mr. Grimshaw was there? A It has got my name; I signed my name.

Mike Matus, for Petitioner, Cross.

Q Did you know what was in here when you signed it? A No.

Q Did anybody read it to you before you signed it? A No.

Q Did anybody tell you what was in here before you signed it? A No. 10

Q So you just signed this without having any idea what was in it, was that right? A I know what before I sign my name.

Q Did Mr. Grimshaw tell you to sign it? A No.

Q Did he ask you to sign it? A Sign my name, you see my name, I sign it.

Q Who asked you to sign? A Who asked me? Mr. Grimshaw asked me. 20

Q You are pointing to this gentleman here, he asked you to sign it (indicating)? A Yes.

Q And you never saw the paper before that day, did you? A I no see that paper? Yes, I see that paper.

Q Where did you see it? A I see it in Bayonne.

Q Did you see it for the first time the day you signed it? A Yes. 30

Q Had you ever talked with Mr. Grimshaw before that day? A Was I talking before that day with him that I was to sign my name?

Q Yes. A No, I no see him.

Q Is this true, "I would go to the barge to obtain same as this would give me an opportunity of being in the fresh air a few minutes longer than if I obtained 40

Mike Matus, for Petitioner, Cross.

it from the premises of the borax company." Is that true? A Well?

Q Is that true or is it not? A What.

10 Q What I just read to you? A It takes me time to go in the boat, ten minutes.

Q Tell me if this statement is true or not. "I would go to the barge," do you understand that? A Yes.

Q "—to obtain same as this would give me an opportunity of being in the fresh air for a few minutes longer than if I obtained it from the premises of the borax company," is that true? A Yes.

20 Q So that you did go to the barge to get a little more fresh air? A No, I no go to the barge; I no need fresh air, I go for mud. If I don't need mud, I don't go to the barge.

Q Can you read English? A I am not so good, I can read English, I no had school in this country.

Q Can you read these paragraphs? A No.

Q Can you read any of this affidavit? A I can't read only my language.

30 Q Take hold of that a minute, will you (handing paper to witness)? A I no hold it because I don't understand it.

Q Look at that affidavit or look at that paper and tell me whether or not you can read anything in that affidavit. A I told you I can't read anything.

Q Can't you read any part of that affidavit? A I can read from things what I know.

40 Q Can you read any part of that affidavit to us? A No, I can't read.

Mike Matus, for Petitioner, Cross.

Q Is it because you cannot read English that you cannot read that affidavit to us? A I can't read English all right because I ain't got any school.

Q Then you can't read the English language, can you? A No, only a little bit.

10

Q Well, exercise your little bit and see if you can read anything in that affidavit to us. A No, I can't read anything.

Q Did anybody tell you what to say when you came up to the witness stand today? A Nobody told me nothing because I know myself what I am going to say.

Q Did you talk to Mr. Grimshaw today before you took the witness stand? A I no see him today, I no had a talk to him.

20

Q You didn't say a word to him today before you got on the witness stand? A No.

Q Weren't you talking to both Mr. Grimshaw and Mr. Baker this morning right at this table before you took the witness stand? A I was here.

Q Did you talk over with them what you were going to state on the witness stand? A No, they no tell me nothing, I had to say as a witness.

30

Q What did you talk to them when you set here with them? A What do I talk about? I know what I am going to say on the witness stand.

Q How long do you know? A Eight years already.

Q Did you know eight years ago what you were going to testify when you were called as a witness? A Yes.

40

Mike Matus, for Petitioner, Cross.

Q Did you ever tell anybody that before? A Sure.

Q To what person did you tell that you were going to say just what you are saying now if you were called as a witness? A I don't understand that talk.

10 Q Do you know what a person is? A No.

Q Do you know what I mean when I say a person?
A No.

Q People? A Yes, I know what people is, sure.

Q To what people did you tell—withdraw it.

Q What people did you tell eight years ago that you were going to testify to just what you are telling us now?
20

Mr. Baker: I object on the ground that he didn't say at any time that he told anybody eight years ago. He said he knew eight years ago what he would testify to.

The Court: Objection sustained.

Mr. Francis: I ask an exception.

30 *By Mr. Francis.*

Q Did you tell anybody eight years ago about this mud? A Yes.

Q What people did you tell about the mud? A No people told me nothing.

Q What people did you tell about the mud, that you took mud from the barge and from the property?
A Nobody said nothing to me.

40 Mr. Francis: That's all.

Mike Matus, for Petitioner, Re-direct.

Re-direct examination by Mr. Baker.

Q Do you know an undertaker, Jewasiak, the undertaker? A No.

Q You don't know any Jewasiak? A Oh, Yurishka, yes. 10

Q Is he an undertaker? Yes, an undertaker.

Q Does he speak your language? A He speaks Polish and Slavish, anything.

Q Was he the man that was with you at the time that you signed this paper, this undertaker? A Yes, the undertaker see me at the time.

Q Did he read this to you before you signed the paper, in Slavish? 20

Mr. Francis: I object on the ground the witness has already said no.

The Court: I will allow it.

Mr. Francis: I ask an exception.

A I no see him before now that time I sign my name, when I go up there.

Q Who went with you; was Mr. Plaskon there? 30

A Joe Plaskon.

Q Joe Plaskon was there? A Yes.

Mr. Baker: That's all.

Mr. Francis: That's all.

John C. Grimshaw, for Petitioner, Direct.

JOHN C. GRIMSHAW, called as a witness on behalf of the petitioner, being first duly sworn testified as follows:

Direct examination by Mr. Baker.

10 Q Mr. Grimshaw, did you talk at any time with the witness, Mike Matus, who was just on the stand?
A I did.

Q Where did you see him? A At his home.

Q Did you ask him about his work at the National Sulphur Company? A I did.

Q Did you make any notes at the time as to what he told you? A I did.

20 Mr. Francis: I object to this as leading.

The Court: Objection sustained, you are leading.

By Mr. Baker.

Q What did you do at the time you questioned him, Mr. Grimshaw, as to his work at the National Sulphur Company? A I questioned Mr. Matus as to what the workings were at the plant.

30 Mr. Francis: I object to that as hearsay, he questioned him as to the workings of the plant.

The Court: I will allow it.

Mr. Francis: I ask an exception.

The Witness: (Continuing.) —and made notes of his statements that he told me regarding the work that he did and the method in which he did his work. Also questioned him as to what he knew regarding Mr. Plaskon's accident. As a result of my questioning I prepared an affidavit

40

John C. Grimshaw, for Petitioner, Direct.

from the facts that he gave me and forwarded the same to—I don't recall whether it was Mr. Sloan or Mr. Plaskon—but, requested that the affidavit be taken before a notary and properly executed there and read to him before he signed it.

Mr. Francis: I move that that be stricken out as hearsay as to what he requested. 10

The Court: Strike out the last part.

Mr. Baker: Just a minute, your Honor, I would like to argue on that; that is not hearsay as to what he requests as to the form of taking the affidavit, they are instructions given by the attorney as to how to take the affidavit which is certainly not hearsay in any way as to the taking of this affidavit or the method in which the affidavit was instructed to be taken. 20

The Court: I will sustain the objection.

Mr. Baker: Note my exception, please.

The Witness: Shall I continue?

By Mr. Baker.

Q Did you receive the affidavit back again? A I did. 30

Q And what did you do with that? A I held it in my file and continued the investigation on the case, on the facts that I had been able to learn up to that time.

Q Now, will you refer to the other affidavits in the file, since you are on the stand, and tell us how and in what manner they were taken?

Mr. Francis: I object as immaterial; the witnesses are apparently produced for the purpose 40

John C. Grimshaw, for Petitioner, Cross.

of testifying now, at this time; it has no materiality.

The Court: Objection sustained.

Mr. Baker: Very well; that's all.

10

Cross examination by Mr Francis.

Q So you were not present when this affidavit was signed by Matus? A No, I was not.

Q It was not signed at Joe Plaskon's home in your presence? A I was not present when it was signed.

20 Q It was not signed at Plaskon's home in your presence, was it? A No.

Q What was the date your interview with Matus took place? A I was there approximately two to ten days prior to the date of the affidavit, and to the best of my recollection that was in 1931, the early part of 1931. I can't recall the exact date.

Q You said that you made some notes at the time of your conversation with Matus as to what he told you— A Yes.

30 Q (Concluding.) —during that interview? A Yes.

Q Did you make a note of the date, on the note? A The date that I interviewed him?

Q Yes, on the notes. A That I don't remember.

Q Have you got the notes? A I may have them in my office, I can't say.

40 Q You didn't bring them to court with you? A No, I didn't.

Joseph Plaskon (recalled), for Petitioner, Direct.

Q You don't know whether those notes will show the date or not? A No, I couldn't say.

Q Do you have your file in this case in court with you today? A I have the pleadings and affidavits, copy of the original affidavits, with the file memorandums of the law. 10

Q Do you have more than one file related to this case? A It is rather a bulky file, as it is, I believe I have another folder.

Q Could you produce that folder? A Yes.

Q But you didn't think it was necessary to have your complete file in court with you today?

Mr. Baker: Just a minute, your Honor; I object to this. In fact the affidavits taken in this case were not in question today on the testimony in this case. 20

The Court: I will allow it.

The Witness: I brought what I thought was necessary.

Mr. Francis: That's all.

30

JOSEPH PLASKON, recalled on behalf of the petitioner, having been previously duly sworn, testified as follows:

Direct examination by Mr. Baker.

Q Mr. Plaskon, I show you an affidavit signed by Mr. Michael Matus in front of a notary public by the name of Michael Jewasiak; were you present when that was signed? A Yes, sir. 40

Joseph Plaskon (recalled), for Petitioner, Direct.

Q Where was that signed? A East Twenty-fifth street, Bayonne, at the undertaker's office.

Q Is that a notary? A Yes, he has a notary's office there, too.

10 Q You were present when that was signed? A Yes.

Q Did the notary read over—

Mr. Francis: Objected to as leading.

Mr. Baker: Just a minute until I finish my question.

Mr. Francis: Don't suggest it to him; I object to it right now before it is finished. It is designed to put information into the witness' head.

20 (Discussion between Court and counsel.)

The Court: It is leading.

Mr. Baker: If your Honor please, this is just exactly in line with what the other witness said on the stand. The other witness said it was read for him in Slavish.

The Court: Objection sustained. Don't lead the witness.

30 Mr. Francis: It is perfectly simple to ask questions without leading.

(Discussion between counsel.)

(At this point the Court adjourned.)

2:15 P. M. AFTERNOON SESSION.

JOSEPH PLASKON, resumed the stand and testified further as follows:

40 *Direct examination* (resumed) by Mr. Baker.

Joseph Plaskon (recalled), for Petitioner, Cross.

Q Mr. Plaskon, will you tell us what happened, just what was done from the time you and Mike Matus went into the office of the undertaker, what was done and what happened in regard to his affidavit? A I took Mike Matus to Mike Jewasiak, the notary public, to have that statement stamped, or whatever it should be called, and Mike Jewasiak looked this thing over and asked a few questions and started to read the affidavit to Mike Matus and translated it to him in his language and then he signed a few papers and I paid the fee and that was all. 10

Mr. Baker: That's all.

Cross examination by Mr. Francis.

Q Was this undertaker's office in Bayonne? A 20
Yes, sir.

Q How far away from your house? A Six blocks.

Q It was signed in the undertaker's office and not at your home? A In the undertaker's office.

Q And it was not signed at your home? A In the home, oh, no.

Q What nationality is Matus? A Slavish.

Q Are you Slavish? A Russian. 30

Q What nationality is the undertaker? A He is both Slavish and Russian.

Q What language did the undertaker translate this affidavit into? A In Slavish.

Q You understand Slavish? A Yes, the languages are related very closely.

Q Can you take any one of these affidavits and read it in Slavish? A I could translate them. 40

Joseph Plaskon (recalled), for Petitioner, Cross.

Q Into Slavish? A Yes, sir.

Q Did you hear Matus say that no one had read this affidavit to him?

10 Mr. Baker: I object, your Honor, to what he heard him say.

The Court: Objection sustained.

By Mr. Francis.

Q Were you present when this affidavit was prepared? A Yes, sir.

Q Who prepared it? A Mr. Grimshaw.

Q Where? A At my mother's home.

20 Q Was that where it was written upon the paper that it now is on? A No, not on the paper; it was written in an affidavit, Mr. Grimshaw made that out, I testified.

Q That was at your home? A My mother's home.

Q And Mr. Matus was present at that time at your home? A Yes, sir.

30 Q And Mr. Grimshaw and Mr. Matus talked with each other and Mr. Grimshaw made notes? A He asked him questions, just what was going on.

Q And wrote down notes? A And as he answered it he wrote it down.

Q That was at your home, not at Mr. Matus' home? A At my mother's home.

Q You are sure about that? A Yes.

40 Q Did you hear Mr. Grimshaw say that that conversation and interview with the notes was at Mr. Matus' home?

John Hagan, for Petitioner, Direct.

Mr. Baker: I object to what he heard Mr. Grimshaw say.

The Court: Objection sustained.

Mr. Francis: I ask an exception. That's all.

Mr. Baker: That's all.

10

JOHN HAGAN, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Baker.

Q Mr. Hagan, where do you live? A 12 East Twenty-second street, Bayonne.

20

Q Who were you employed by in June, 1925? A The National Sulphur.

Q The National Sulphur, how long had you worked for the National Sulphur? A About five years.

Q About five years. What was your job with the National Sulphur Company? A Well, I was like a handy man there, do a little of everything.

Q You did a little of everything there? A Yes, pipe fitting, boilers.

30

Q Did you ever work in the room where these furnaces and these pipes were? A Yes, sir.

Q Did you know the deceased, John Plaskon; did you know Plaskon? A Knew him to see him.

Q Did he work for the National Sulphur Company at the same time you were working there? A Yes, sir.

40

John Hagan, for Petitioner, Direct.

Q Now, did you at any time see anybody use any of this mud that has been testified to today? A Yes, sir.

Q What was that mud, if you know? A Why, it was like the leavings of the borax.

10 Q Like the leavings of the borax? A Yes, they dumped it out at sea; it is like the leavings; they had no use for it, so they throw it on the scow and dumped it at sea.

Q Where were these leavings, this mud of borax where was it in relation to the sulphur company's plant? A In back of the building they had a pile sometimes fifty feet high, and maybe a couple of hundred feet long; sometimes that pile would run down and they would load it into the barges to sea. That is
20 when the barges would not be there in the yard they would put it there.

Q Were the barges there from time to time? A Yes.

Q Where were the barges? A Around the dock, down at the bulkhead.

Q Down at the bulkhead, was there any borax on these barges? A They loaded the barges with this refuse and they dumped it out at sea.

30 Q Now I show you some pictures here, marked "P. 2, 3, 4, 5, 6 and 7," and ask you if you recognize those pictures? A Yes, this is the borax building here (indicating).

Q Pointing to P. 2? A Here is that bulkhead in here. The sulphur plant would lay about in here (indicating).

Q Will you please examine those pictures, Mr. Hagan, all six of those pictures, you see, and try to tell us whether or not what is shown on those pic-
40 tures was the condition of those premises when you

John Hagan, for Petitioner, Direct.

worked there on or about June, 1925? A I don't see no difference; there ain't no building different; they haven't built anything different on them; it is about the same to me.

Q Now I show you a picture marked, "P. 8 for identification" and ask you if you recognize that picture as to what premises it is and if so what premises are they? A About up to this shed here is the sulphur yard and along down in this corner is your borax dock. This is the sulphur bulkhead here and this is the loading shed where they pack the packs and so on (indicating). 10

Q This is what (indicating)? A This is the borax dock; it is out on the water.

Q In relation to that dock, where were the barges? A Sometimes they laid around and sometimes they laid here (indicating). 20

Q Sometimes they were parallel with it and sometimes pointing into it? A Yes, sometimes.

Q What was this borax mud used for? A What do you mean, what they used it for in the sulphur works?

Q What was the borax mud used for in the sulphur works, if at all? A These kettles, you know the bricklayer would hook them up together; he would use fire clay and iron borings and mix salamonica to stick on these joints, and when the heat would get on these they would crack and they used the borax mud to patch up the cracks with. That is with a trowel, sometimes it leaked through the wall and they used it to patch up the wall. 30

Q What were the walls made of? A Brick.

Q How did they put it on; how did they apply this mud to the cracks? A With a trowel, that is a six-inch trowel, a small trowel. 40

John Hagan, for Petitioner, Direct.

Q Do you know who those trowels belonged to? A Yes, the company; the company furnished them.

Q Now, what was the form of this mud that these men used; you say you saw them use it from time to time? A Sometimes it would be soft, other times it
10 would be hard and brittle. If they got it hard and brittle they would wet it down to a paste and use it.

Q What is the color of that; what did it look like when it was hard and brittle? A A whitish color.

Q And you worked there for five years you say? A Yes.

Q Was that mud used during the five years you worked there or was it not? A Yes, it was used most
20 of the time I was there.

Q You say that cracks would appear from time to time in this stuff which they would seal up. What caused those cracks to appear, do you know? A The heat. The heat and the expansion of the kettles, you see.

Q Did they occur frequently or not, do you know? A Sir?

Q Did they occur frequently or not, do you know? A Oh, yes, that was continually happening.

30 Q It was continually happening? A Yes.

Q What have you to say as to the heat that went through these pipes, was it an intense heat or a mild heat? A It boiled this here sulphur, heavy stuff, it would go through a neck like and drop into a kettle. The vapor went out into the air by a chamber and formed into a flour and that would be closed for a week and they would open it and it would be formed into a flour. The heavy stuff went into the kettles and that formed a gas, the heat. The kettles would
40 last about five months, sometimes about six months.

John Hagan, for Petitioner, Direct.

Q A kettle would last five months and sometimes six months? A Sometimes.

Q Of what were those kettles made of? A Cast iron. Steel cast, I think.

Q The heat cracked this stuff around the cracks and around the joints, and then they plastered them up with this material? A With the clay, yes. 10

Q You know this Mike Beck? A Yes.

Q Who is he? A He was the yard foreman there.

Q Was Mike Beck ever around when you saw this mud being used, the borax mud being used in the filling of these cracks in the furnace? A Yes.

Q You have seen him around when that was being used? A Yes, I seen him there when the men would bring it from the borax and mix it there. 20

Q Where did this borax that they got come from in the borax plant, where was it taken from? A Well, it would be taken, the handiest place for it was outside of the building, they took it from there and if there was none there they would go down on the dock.

Q Where would they get it down on the dock? A They would get it down on the barge, the only place they could get it. Sometimes they would get it along the tracks. Sometimes it would spill out of the cars on the way down and harden and they would get it there. The handiest place they could get it they would pick it up. 30

Q Was there any other stuff used that you know of, during the time that you were there, to seal up these cracks, other than the mud? A No, just the mud is all I know of to seal up the cracks.

Q Just the mud is all you know of to seal up the cracks. That is the only thing was used during the 40

John Hagan, for Petitioner, Cross.

entire time you know of, that you were there? A Yes, sir.

Mr. Baker: Your witness.

Cross examination by Mr. Francis.

10 Q Where was the part on the sulphur company's property that these men worked on, the men who had work to do such as Matus did? A About the center of the plant, about the center of the plant.

Q Can you give us any idea of the frontage, the length of the frontage of the sulphur company's plant there? A The length of the bulkhead?

Q Yes. A Oh, I should say, three hundred feet.

20 Q How long? A Three hundred feet.

Q How far away from where the men were working, the men who had work to do such as Matus, were the borax company barges? A About three hundred feet.

Q And then the barge was a hundred and fifty feet beyond the sulphur company property line?

30 Mr. Baker: I object to that, your Honor. That is a conclusion on the part of this attorney, that is not warranted.

The Court: Objection sustained.

Mr. Francis: I ask an exception.

By Mr. Francis.

40 Q How far beyond the property line of the sulphur company plant did the barge tie up? A Why it was just, here is the sulphur company and here is the bow of the barge, like touching, touching the sulphur company bulkhead.

John Hagan, for Petitioner, Cross.

Q How far away from the place where the men were working was the barge tied up? A About three hundred feet, that is what I should judge, it might be more or it might be less.

Q Then where the barge was from where the men were working was a hundred and fifty feet, was it? 10

Mr. Baker: I object to that, if your Honor please.

The Court: Objection sustained.

By Mr. Francis.

Q Just a moment ago you said that the river front was three hundred feet? A Yes, but—

Q Just a minute, is that right or isn't it? A Yes, that's right, but— 20

Q Just a minute, and you said that the men who had work to do such as Matus worked about in the center of the sulphur company property, is that right or isn't it? A Yes, that's right.

Q Then from the point where the sulphur company men who had jobs to do such as Matus, to the end of the sulphur company's property line there was a hundred and fifty feet, wasn't there?

Mr. Baker: I object, your Honor, again to the conclusion on the part of the attorney. 30

The Court: I will allow it.

Mr. Baker: I ask an exception please, to the conclusion of the attorney, completely unwarranted by any question he has asked.

By Mr. Francis.

Q Just a minute there. A hundred and fifty feet away was the—

The Court: Let him explain it. 40

John Hagan, for Petitioner, Cross.

By Mr. Francis.

10 Q Go ahead, explain it. A The sulphur works property runs this way, the width, and the length runs this way. I am talking about the width on the dock about two hundred and fifty to three hundred feet from their work to where the barge would be, would be on an angle, right over on that angle, I should judge about three hundred feet. That has nothing to do with the width of the dock. The barge was on this side.

Q There was always a lot of borax over the borax company's ground, wasn't there? A Not always because they had men cleaning it up, over the tracks and everything.

20 Q Do you remember the time during your five year's experience of any shortness of borax mud on that property? A Yes, when the piles went back. There was a pile there and when the pile ran down they would run it down and take it to sea.

Q Did the piles of borax mud ever completely disappear from the grounds? A At times they would take it entirely, clean out.

30 Q At times they would entirely clean it out so there wouldn't be any on the ground at all? A Oh, no, I couldn't say that at all.

Q Was there ever a time when the men couldn't get enough borax mud on the ground of the borax company to patch up the cracks in the pipe? A I don't know.

Q Did you ever see the size of the cracks in one of the pipes, how large was the crack? A Sometimes it ran one-quarter inch, one-half inch, that long (indicating).

40 Mr. Baker: Indicating about a foot and a half or eighteen inches.

John Hagan, for Petitioner, Cross.

By Mr. Francis.

Q Did you ever see the men actually use the borax mud to patch up the pipe with it? A I worked in there, I used to hook the kettles up myself.

Q Did you ever see that? A No.

10

Q Did you ever see anybody patch up a crack?
A Yes.

Q How much borax mud was used to patch up the size crack you indicated? A Probably put it one-half inch thick, a half inch going all around.

Q Could a man gather enough borax mud in both hands to patch up the size crack you have indicated, yes or no? A That is according to the crack.

Q The size crack you have indicated, about a foot and a half long and a quarter inch wide? A No.

20

Q Would he require a foot square box of it? A No, he might have required a half a water bucket.

Q Was there ever a time during your five years' experience that a man could not get a half a water bucket of mud from the ground of the borax company?

A The yard and all along the ground it was always clean, he had to walk to the pile or the dock, which ever was nearest to him, because there is a man there all the time, especially along the tracks where the stuff is piled.

30

Q Was there ever a time when a man could not get a half a bucket of borax mud from the grounds of the company? A I seen times when he couldn't, when it was cleaned up.

Q How many times during your five years' experience would you say there was when a man couldn't get a half a bucket of borax from the grounds of the company? A I couldn't say, I seen times, I don't know how many times.

40

John Hagan, for Petitioner, Cross.

Q Often? A Not often.

Q Seldom? A Yes, seldom.

Q Two or three times in five years? A I couldn't say.

10 Q More than two or three times in five years? A Probably more.

Q Many more? A Probably many more.

Q Well, about how many? A It is according to how they cleaned it up; I couldn't say how many times. I was working in the sulphur company; I wasn't watching the grounds of the borax company.

20 Q Did you ever get any yourself? A No, my job didn't call for it.

Q Did you ever see anybody go to the barge and get it? A No, I never seen anybody go to the barge and get it; I seen them coming up from the barge with it, from the dock.

Q You mean you saw a man walking along the dock with a bucket? A Coming up from the dock.

Q Coming up from the direction of the barge, is that it? A Yes.

30 Q How long did Plaskon work there during the time that you were there? A Well, I wasn't acquainted with Mr. Plaskon very good; I only knew him to see and I couldn't say how long he worked there.

Q What is your business now? A I am out of a job.

Q How long have you been out of a job? A About three weeks.

40 Q Did you live in Bayonne on June 6, 1925? A Yes, sir.

John Hagan, for Petitioner, Re-direct.

Q You have lived in Bayonne ever since? A Yes, born and raised in Bayonne.

Mr. Francis: That's all.

Re-direct examination by Mr. Baker.

Q Where did you last work, two or three weeks ago? A The last place I worked? 10

Q Yes, till three weeks ago, you said you were out of a job? A Kellogg.

Q Kellogg, here in Jersey City? A Yes.

Q Referring to this last picture which you testified from before, Exhibit "P. 8 for identification," you said that this shed was on the corner of the sulphur company property; is that right? A Yes. 20

Q Now, beyond that is the borax place; is that right? A Yes.

Q Now, point out to the Commissioner as to where on the borax property this mud was dumped when they had piles of mud there. A The barge would lay in here and they would dump the mud down; there was a little electric car came down.

Q Is this one of the cars here (indicating)? A Yes, that is one of the cars. 30

Q Where did they dump the mud? A Around the corner, into the barge.

Q When the mud was dumped on the property, before it was dumped into the barge, or when it wasn't dumped directly in the barge, where was it dumped on the property of the borax company; can you point it out to where the piles were? A The pile I have reference to was at the other end of the building. 40

John Hagan, for Petitioner, Re-cross.

Q With reference to this picture where would it be? A This would be the building here; it was dumped back here; there was a pile about fifty feet here.

10 Q Where was it, with relation to that pile, where Plaskon worked? A On an angle here, around a corner of this building, about three hundred and fifty feet.

Q About three hundred and fifty feet; this is the corner of the sulphur company's property back here? A Yes.

20 Q Was it as near to where they worked, from where they worked to this barge as it was to where the mud was piled sometimes in the yard or the borax company? A The piles on the other end were probably twice the distance from here.

Q The piles on the other end were probably twice the distance from this barge? A Yes.

Mr. Baker: That's all.

Re-cross examination by Mr. Francis.

30 Q Just one more question. You said that you worked at one time during your five years' employment with the sulphur company at the same kind of work that Matus and Plaskon worked at; was that right? A No.

Mr. Baker: No, I object to that; he didn't say that.

The Court: Objection sustained; he said the same place.

Mr. Francis: Withdraw the question.

By Mr. Francis.

40 Q Did you work in the same part of the premises and in the same process as Plaskon did while he

Thomas Stberke, for Petitioner, Direct.

worked there? A No, my job called for all over the plant.

Q You weren't always a general utility man, were you? A Well, when I first went there I was rigger; they were putting in machinery and everything and then ever since my job is utility man.

10

Q Didn't you say during your direct examination that you worked in this particular melting process where Matus worked, at one time? A You say one time; I worked there when these kettles would be off; I would hook the kettles together; if they leaked I would go in and probably put a bolt on or put a clamp on, fill it up with pipe clay and iron borings, anything. We couldn't turn them down. Probably I would be working there an hour and a half or two hours, sometimes three hours, I would be in and out of there, but I didn't work there all the time, I was on day work and he was on shift work.

20

Mr. Francis: That's all.

Mr. Baker: That's all.

THOMAS STBERKE, a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Baker.

30

Q Mr. Stberke, where do you live? A Bayonne, Avenue E.

Q Where did you work in June, 1925? A In the National Sulphur Company.

Q National Sulphur Company; how long did you work for the National Sulphur Company? A Four years.

Q What was your job with the National Sulphur Company? A I was helping the bricklayers.

40

Thomas Stberke, for Petitioner, Direct.

Q As a bricklayer's helper, what was your work, what did your work consist of most of the time, what did you do most of the time? A Mixed up the mortar and carried the bricks for the bricklayer.

10 The Court: Is this testimony the same as the last?

Mr. Baker: The testimony is the same as the last as to the using of this borax at the plant and so forth.

The Court: Are you willing to stipulate this testimony will be the same as the last witness?

Mr. Baker: Also that he himself went and got the mud at times, otherwise it is the same as the other witness.

20 Mr. Francis: How long did he work at the company?

By Mr. Baker.

Q When did you first start to work for the National Sulphur Company? A I couldn't tell you exactly what year.

30 Q When did you get through working there, do you remember? A I was working there four years in there; I think I quit the job, I forget what month.

Q Did you quit there in 1927, do you remember? A Yes, I think so.

Q Do you remember how long it was after Mr. Plaskon died that you worked there? A I was working two years after that.

The Court: Is that satisfactory, to stipulate that?

40 Mr. Francis: I will stipulate that his testimony will be the same as the last witness'.

Thomas Stberke, for Petitioner, Direct.

Mr. Baker: I would like to add to that, your Honor, that this man was sent by his bricklayer to get borax to plaster up these places and did go and get it and that he also had seen Mr. Plaskon use borax on the furnaces at different times.

Mr. Francis: Oh, no, I will withdraw the whole stipulation. 10

The Court: Let the stipulation stand and bring that part out.

Mr. Francis: No, I will withdraw the whole stipulation.

By Mr. Baker.

Q Did you ever use this mud they talk about?

A Yes, sir.

20

Q What did you use the mud for? A I used it sometimes twice a month, sometimes once a month.

Q What did you use it for? A We use it for the damper; when the bricklayer blocks the damper off, I got to go to the barge and get some mud to press it over and put the damper down again; it lasts a couple of weeks or a month or two.

Q Who sent you for this mud? A Sometimes the bricklayer sent me over there and sometimes the foreman. 30

Q Who is the foreman? A Mike Beck.

Q Where did you get this borax from? A Always go on the barge.

Q The mud you got from the barge, was it soft or was it hard? A Sometimes it was pretty hard, sometimes it was soft.

Q Sometimes it was pretty hard and sometimes it was soft? A Yes. 40

Thomas Stberke, for Petitioner, Direct.

Q When it was pretty hard what did you do with it? A Break it up, put some water on it.

Q Break it up and put some water on it; how did you put it on? A With a trowel.

10 Q Did you know Mr. John Plaskon? A Yes; I don't know him much, just when I was working there.

Q Just when you were working there? A Yes.

Q Did he work the same time of day that you worked, did he? A No, I was working till twelve o'clock, it was on Saturday, and he was working from three to eleven, he was working in the yard to twelve and twelve o'clock go home and the boss told him to come up on the shop at three o'clock.

20 Q I am talking not only of this one day but any day. Did he on the general working day, the normal day, did he work the same time of day you worked? A Yes.

Q Did you from time to time see him working around? A Yes.

Q Did you ever see him use any of this mud? A Oh, yes, many times.

Mr. Francis: I object to that as leading.

The Court: That is leading.

30 Mr. Francis: I move the answer be stricken out.

The Court: Strike it out.

By Mr. Baker.

Q Do you know whether or not Mr. Plaskon ever used any of this mud? A Yes, sir.

Mr. Francis: I object to the leading.

The Court: I will allow it.

40 Mr. Francis: I ask an exception.

Thomas Stberke, for Petitioner, Cross.

By Mr. Baker.

Q Did he or didn't he use this mud? A Yes, indeed, always used it.

Q He always used it; did you ever see him use it?
A Sure.

10

Q What did he use it for, what did he do with it?
A He plastered up the cracks.

Q He plastered up the cracks? A Yes.

Q What would he use to paste it on the cracks?
A You know, the gas comes out from the chamber.

Q What did he use to paste this mud on the cracks? A Used a trowel.

Q What kind of a trowel? A About a six-inch, a small one.

20

Q Who supplied that trowel, do you know? A The company.

Q What did you use when you used this mud; what did you use? A I used a bricklayer's trowel, that was about an eight-inch.

Q Bricklayer's trowel, who was that supplied by?
A By the bricklayers.

Q What was the color of this mud when it was dry? A It looked a good deal like lime, white.

30

Mr. Baker: That's all; your witness.

Cross examination by Mr. Francis.

Q Plaskon wasn't a bricklayer, was he? A No.

Q Have you always lived in Bayonne? A Yes.

Q Still live at the same place you lived at when the accident happened—withdraw the question. Do you still live at the same place that you lived at in 1925? A Yes.

40

Thomas Stberke, for Petitioner, Cross.

Q Did you work on the same shift that Plaskon worked on? A No, I always worked in the daytime.

Q You never worked then on the same shift that Plaskon worked on? A Yes, we always go from one place to another, something to fix up, we go with the
10 bricklayers to fix them up.

Q You moved from one place to another all around this plant, did you? A Yes.

Q Did you work at the same time of the day that Plaskon worked? A Yes, I was working the same time, till twelve o'clock.

Q What were your hours? A My hours, twenty minutes after seven till twelve o'clock on Saturday,
20 and he was working in the yard.

Q What were his hours? A He was supposed to knock off at twelve o'clock too, but he got to knock off at twelve o'clock and three o'clock come back again on the job.

Q What time of the day did Plaskon come to work? A Three o'clock in the afternoon.

Q Three o'clock in the afternoon, by that time you were finished working, weren't you? A I was home already.
30

Q You were home already. Did he ever come to work at twenty minutes to seven in the morning with you? A No. You mean twenty minutes—

Q Twenty minutes to seven in the morning. A Yes, we always started the shift from seven to three, but I started twenty minutes after seven. I was day work and he was shift work.

Mr. Baker: I think the mixup here is that the
40 attorney is referring to the general hours and this man is referring to this particular day.

Thomas Stberke, for Petitioner, Cross.

Mr. Francis: I know what I am doing.

Mr. Baker: Very well.

By Mr. Francis.

Q Do you know how long Plaskon worked there?

A I don't know, I was working two years with him, that's all I know. 10

Q Were you at any time during those two years on the job at the same time of day when Plaskon was there? A Yes, sir.

Q How often did that happen? A Oh, we pretty near worked all week, they changed it, one week day, one week night, if I worked on the day we worked together.

Q So is it true whenever you worked days he would work days, is that right? 20

Mr. Baker: Now I object to that, if your Honor please, that was not his statement at all.

Mr. Francis: Let us have the witness tell us, we do not need your interruptions.

Mr. Baker: Just a minute, I am objecting to counsel's interpretation. He didn't say any such thing.

The Court: Objection sustained. 30

Mr. Francis: I ask an exception.

By Mr. Francis.

Q Did Plaskon always work in the same place?

A Yes.

Q What kind of work—withdraw that. A He was a fireman's helper.

Q What kind of work did he do? A Dip out the sulphur. 40

Thomas Stberke, for Petitioner, Cross.

Q How many men did that job of dipping out the sulphur, on one shift, on the same shift that Plaskon worked? A There was two helpers and one fireman between them.

10 Q Did you ever work in the same part of the building in the same part of the property that Plaskon worked? A Yes.

Q When you did that how long did you stay at that particular place? A Well sometimes it takes about a week before we finish a job and we go some different place.

Q How often during the six months before June 6, 1925 did you work in the same part of the factory as Plaskon? A Yes, sir.

20 Q No, how often during the six months did you work there in the same place? A Well, about three months.

Q What do you mean by about three months? A Sometimes it takes three weeks and then they change the shift you know.

Q Did Plaskon work indoors or outdoors? A Inside.

30 Q Was it in a separate building than the rest of the building or was it all one building? A There was two buildings, there were two places that make the sulphur but where he was working there was one building.

Q Where did you work? A I worked in the same place, fixing up the kettle.

Q You only worked in there occasionally? A Yes.

Q How often did you work there?

40 Mr. Baker: Your Honor, we had these before, exactly the same questions about two minutes ago and I object to it being repeated.

Thomas Stberke, for Petitioner, Cross.

The Court: I think we have gone into that pretty well, Mr. Francis.

Mr. Francis: I don't think it is clear in the record yet.

The Court: It is clear in my mind.

Mr. Francis: Well, that is all that is necessary. 10

By Mr. Francis.

Q You said you saw Plaskon use some of this mud?

A Yes.

Q When did you see him use it? A When he was working there.

Q How long before June 5th—how many times did you see him use it? A Oh sometimes I saw him three times a day sometimes twice, sometimes once. 20

Q You said you always went to the barge to get mud? A Yes.

Q Was the barge always there? A No, not all the time.

Q How often was the barge there? A Oh sometimes the barge was there for about two weeks.

Q And when it was back how long did it remain there? A Well I don't know, I couldn't tell you exactly. 30

Q Did it only remain there long enough to have a load of this borax mud put on it and then it pulled out to sea and dumped the mud? A If the barges went out, they dumped the dirt on the ground, that mud.

Q Did you ever see them put the borax mud on the barge? A Oh yes.

Q How long did it take to fill a barge up? A Sometimes it takes two or three weeks. 40

Thomas Stberke, for Petitioner, Re-direct.

Q How long was the barge? A It is pretty long, I couldn't tell you exactly.

Q It took two or three weeks to put the borax mud on that barge and fill it up? A Yes.

10 Q There was always a lot of borax mud on the grounds of the Borax Company wasn't there? A No, not so much they always cleaned it up, put it in the barge.

Mr. Francis: That's all.

Re-direct examination by Mr. Baker.

Q Was there more than one barge? A Sometimes there was two barges.

20 Q Sometimes there were two barges. You said that Mike told Mr. Plaskon to come back for the 3 o'clock shift? A Yes.

Q On what date was that? A That was on Saturday.

Q Saturday the 6th of June, 1925? A Yes, sir.

Q The day that Plaskon was drowned? A Yes, sir.

30 Mr. Baker: That's all.

Mr. Francis: That's all.

Patrick L. Joyce, for Petitioner, Direct.

PATRICK L. JOYCE, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Baker.

Q Mr. Joyce where do you live? A 384 Boulevard, Bayonne. 10

Q Did you ever work for the Pacific Coast Borax Company? A Yes, sir.

Q How long did you work for them? A Oh about 6 or 7 years on and off.

Q Six or seven years on and off, about what time did you work for them do you remember? A Around 1917, and the latter part of 1923.

Q What was your job with the Pacific Coast Borax Company? A I was helping the pipe fitters down there. 20

Q You were helping the pipe fitters down there, was there any of this so-called mud around the plant of the borax company?

Mr. Francis: Objected to as too remote from the time of this alleged accident. He discontinued work there according to his testimony in 1923 two years before this accident.

Mr. Baker: Your Honor he testified that he worked there 6 or 7 years on and off, he worked there from about 1917 to 1923. I don't understand whether he finished or not but regardless of whether he finished or not but regardless of whether he did quit in 1923 he still can testify as to where the borax was and as to the custom of the men from the Sulphur Company who would take this mud. 30

The Court: The point is would that be material as to this case, this was in 1925. 40

Patrick L. Joyce, for Petitioner, Direct.

Mr. Baker: Exactly, but I have to connect it up beyond that, in 1925, I can show it went back beyond that, it was a custom of long standing at the plant, that is what I am trying to show.

(Discussion off the record.)

10 The Court: I will allow it for what it is worth.

Mr. Francis: Exception please.

(Question repeated by the Reporter.)

The Witness: Well, there was a little bit, they always had a man clean it up along the track where it used to spill, they always cleared up a pile and got it away to the boat.

By Mr. Baker.

20 Q Where was the stuff put when it was cleaned up? A Right down in the barge.

Q Did you ever see any men from the National Sulphur Company come over and get any of that mud from the Borax Company?

Mr. Francis: Objected to as leading and calling for the witness' conclusion.

The Court: Objection sustained.

30 Mr. Baker: I ask an exception on the ground there is not any leading about it, I asked him whether he ever saw any men from the National Sulphur Company come over, I don't see how that could be asked in any other way and I ask an exception. No more questions.

Mr. Francis: That's all. No questions.

Frank Fernau, for Petitioner, Direct.

FRANK FERNAU, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Baker.

Q Where do you reside, Mr. Fernau? A 632 10
Boulevard.

Q Bayonne? A Bayonne.

Q Who did you work for in June, 1925? A The
Pacific Coast Borax Company.

Q How long did you work for them? A 18 years.

Q When did you last work for them? A 1930,
the first part of the year, the plant shut down and
moved to California and we were all laid off.

Q What was your position in that company? A 20
Assistant Yard Foreman.

Q Assistant Yard Foreman? A Shipper, checker,
everything; handy man, utility man, they call it.

Q What was this mud that has been referred to
today, can you tell us what that mud was? A Refuse
from the borax.

Q Refuse from the borax? A Couldn't be used
any more; there was a certain percentage of borax
that we couldn't get out; it cost too much money to
get out, and we dumped it on scows to dump out at
sea. 30

Q Then what was done with it? A Dumped it
out there.

Q Were you ever on the barge when that was done?
A Yes, a number of times; took it out to sea and
dumped it.

Q Was there one barge or more than one barge?
A Two barges. 40

Frank Fernau, for Petitioner, Direct.

Q Where were those barges moored or tied up? A One was in the slip at a time being loaded and one was outside the boathouse waiting, tied up waiting for the other scow to be loaded. When that scow was loaded it was pulled out and this empty one placed where it had been.

10 Q Referring to the exhibit marked for identification, P. 8, will you tell us, referring to the shed about in the center of the picture, what that corner of the shed there is, where that was in relation to the Sulphur Company plant and the Borax Company plant? A That is on the Sulphur plant here.

Q On which side? A This pole here, coming this way.

20 Q From that pole to the right? A Yes.

Q From there to the left is what? A That is the Borax Works.

Q That is the Borax Works? A Yes.

Q What is this house here to the left on this picture? A That is the boathouse here.

Q That is the boathouse; who did that belong to? A To the Borax people.

30 Q The Borax people. In relation to that boathouse there, will you tell us whether the scows were on the near side or the far side of that boathouse? A Why, here is the bridge here to the scow. There is a scow here being loaded; the mud comes down this track here; it comes down from the pressers on this track here and switches off here and goes down this track to here; there is a bridge here. It goes down to the scow, it is dumped there. When that scow is loaded—when the plant is busy we load one a week; when the plant was not busy, it took about two or
40 three weeks to load them. When it was loaded we

Frank Fernau, for Petitioner, Direct.

took it out and put an empty scow in its place. Sometimes it would lay two or three days there with that scow loaded with mud waiting for the other one to go with it to sea.

Q How long would the empty one lay there? A 'Til the other one was loaded.

10

Q When, after you dumped the scows at sea, was there any borax left in the scows? A Sometimes we brought back a bottom full, sometimes two bottoms full. We had trouble out there and the Supervisor of the Harbor would not let us lay there any longer, we would pull the chains up and come in with it.

Q Was there any trouble about having it dumped? A Lots of times it sticks, you know. The bottoms are in a V shape and it hardens in there. If you had rough weather it would dump easier. In calm weather it wasn't as easy. Sometimes we would bring back a whole bottom full.

20

Q Did anybody ever use this refuse mud while you were there? A Lots of men from the Sulphur Works.

Q Lots of men from the Sulphur Works; did you ever see men from the Sulphur Works use it? A Yes, I did; all hours of the day and night. I worked shift work there at times.

Q Do you know Michael Beck? A I do.

30

Q Who is he? A He was the foreman of the chambers there around us.

Q Was Mr. Beck ever around within your eyesight at the time the sulphur men were getting this borax mud? A Yes.

Q Was this borax mud soft or hard or both? A Sometimes it came out of the pressers soft, in liquid form, like all water and other times it came out like gum, all hard, according to the ore.

40

Frank Fernau, for Petitioner, Direct.

Q What is the appearance of this borax when it is hard, what was its appearance? A You mean the refuse, the mud?

10 Q What was the appearance of the refuse, the mud when it is in hard gum, what was its appearance? A The same as a big piece of clay.

Q The same as a big piece of clay. What color was it? A White.

20 Q Now, referring to that picture there, if there is a scow as you say moored on the one side of this boat-house, referring to picture P. 8, is that scow nearer to the plant of the Sulphur Company or the pile of borax mud that you say is dumped there from these cars? A Well, there was no pile of mud, the pile of mud was taken out of the yard I think in 1922, we carted it all to sea.

Q It was taken out of the yard in 1922 and carted out to sea? A Yes, when the mud was dumped in the yard. At one time we used to dump it there for the Sulphur people; we had time, we weren't very busy, we dumped it. If it was busy they had to go to the scow for it.

Q When was that? A During the time I worked there.

30 Q You say in 1922 you cleaned the whole pile up? A Yes, in 1922 or 1921 we cleaned the whole pile up; about a thousand tons of it was away back of the building there. If they wanted mud they had to go into the scow. If this scow had any mud in it they would go on the one here.

Q Did you know Mr. Plaskon when he worked for the Sulphur Company? A I knew a lot of the men, yes.

40 Q Did you ever see Mr. Plaskon get any of this mud? A I know a lot.

Frank Fernau, for Petitioner, Direct.

Mr. Francis: I object as leading.

The Court: I will allow it.

The Witness: (Continuing.)—of them. I saw this gentleman over here get it (indicating). I seen him there 2 or 3 o'clock in the morning when I was on the night shift.

10

By Mr. Baker.

Q How often would you say in a normal day these men from the Sulphur Company came and got this borax mud? All times of the day.

Q I say how many times would you say in the course of an ordinary normal day, how many times would this mud be gotten by some of the men of the Sulphur Company? A Sometimes once or twice. I suppose I would be all around this plant here; I would see a number of the men going down there two or three times a day. Sometimes in one day five or six times; I couldn't tell you just how many times.

20

Q Does that picture marked P. 8 there, does that show the condition of the waterfront and the plant of the Sulphur Company and the Borax Company as it was in 1925? A Yes, it is exactly.

Q It is exactly? A Yes, where the point of the scow used to come here there was a partition so the prow of the scow would not rip the dock.

30

Q Pointing to boards on a piling? A Yes.

Q Referring to P. 2, 3, 4, 5, 6 and 7, do those pictures portray the condition of that waterfront along that section as it was in 1925? A It does, but the scow isn't there; the slip is empty; everything is the same way.

Q You say the Borax Company is or it not in business any more? A They are in business in California, not here in Bayonne.

40

Frank Fernau, for Petitioner, Cross.

Q They are in business in California. That's all. Your witness.

Cross examination by Mr. Francis.

10 Q You say you saw men from the Sulphur Company come over on your company's property and take this mud away? A Yes, I have seen them, yes.

Q What did they carry it away in? A Any way they could handle it, pails or any way at all; pick up a lump of it and carry it. If he had a pail full the man would pick up a big chunk and carry it.

Q When he picked up a big lump of it, did you ever see anybody pick up a big lump of it and carry it away? A Yes, lots of men carry it away.

20 Q How large a lump? A Well, according to the size of it from the way it lay in the scow. When you get it at the top it is about this big, and about 6 inches thick. It is round and sometimes they drop it and break it in pieces and pick up a lump of it.

Q You don't know how much of this borax was required to patch up a crack in a pipe, do you? A No, I know there was a pile of it carted away.

Q You say you knew Plaskon? A Yes.

30 Q How long did he work there? A Yes, I saw him going on and off, going out of the shift. We would meet on the jitney bus and say "Hello" and so on.

Q Do you live in Bayonne, too? A Yes, all my life.

Q What does Plaskon look like? A He was a man about my size, a little stouter, a sandy mustache.

Q What is your occupation now? A Working for Babcock and Wilcox, the boiler makers.

40 Q How long have you been working there? A Two years.

Frank Fernau, for Petitioner, Cross.

Q Did you ever see any of the Sulphur Company men on hot days come over and sit on those scows to cool off? A No, sir; we didn't allow them to sit on the scows.

Q Did you ever see any of them sitting on the scows? A No.

10

Ever seen any of them walking around the wharf there on hot days? A No, the only men I saw walking around the wharf were men working around the yard, waiting for the boat to come in to be loaded, on their own property, the yardmen.

Q Did you ever go out to sea on this scow to dump it? A Yes, sir; hundreds of times, and I helped the men fill the pails on the scows, the Sulphur men.

Q How far from the scow was the building where the men worked in? A The building? The center of the yard, as Mr. Hagen said before, up in the center of the yard, about the center maybe of this shed here straight up from the waterfront, in the center of the yard.

20

Q About how far away? A About 250 to 300 feet from the waterfront up to the building, close to 300 feet.

Q Would you say it wasn't 800 feet from where they worked to the dock? A I didn't say it was 800 feet.

30

Q Would it surprise you to know that it is 800 feet to the scow?

Mr. Baker: I object to that; just a minute.

The Court: Objection sustained.

Mr. Francis: I ask an exception. That's all.

Mr. Baker: That's all. Your Honor, that picture marked for identification, P. 8, I think has been sufficiently identified, and I would like to offer it in evidence as being a true representation of the premises as they were in 1925.

40

Frank Fernau, for Petitioner, Cross.

The Court: Any objection?

Mr. Francis: No objection.

(Picture above referred to and previously marked P. 8 for identification entered in evidence and marked Exhibit P. 8.)

10

The Court: Is that your case?

Mr. Baker: That is my case. If your Honor please, I have a policeman in New York, a Mr. O'Neill, saw him fall off, get out of the barge and walk along and fall off. He can indicate the point. If your Honor feels after considering the evidence that we have established a prima facie case, I would like to have the opportunity of having Mr. O'Neill up here to testify to the exact location he saw him fall into the water.

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The Court: I don't think there will be any objection to that.

I will have to reserve decision on this case now because the first part of the record was taken about five years ago.

(At this point the hearing was adjourned.)

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I HEREBY CERTIFY that the foregoing is a true and correct transcript of the proceedings in the above-entitled matter as taken before me at the time, place and date hereinbefore set forth.

.....
Deputy Compensation Commissioner.

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the proceedings in the above-entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

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WILLIAM C. O'BRIEN,
Official Court Stenographer,
Workmen's Compensation Bureau.

Motion to Dismiss Petition.

NEW JERSEY DEPARTMENT OF LABOR,
Workmen's Compensation Bureau,
Jersey City, Hudson County, District.

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| Julia Plaskon, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> National Sulphur Company, <div style="text-align: right;"><i>Respondent.</i></div> | } | 10 |
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Transcript of stenographic notes of the proceedings as taken before the Honorable Charles E. Corbin, Deputy Compensation Commissioner, at the Department of Labor Building, 571 Jersey avenue, Jersey City, New Jersey on the 6th day of October, A. D. 1932.

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Appearances:

Richard W. Baker, Esq., John C. Grimshaw, Esq., for the petitioner.

John J. Francis, Esq., (Coult, Satz & Tomlinson, Esqs.) for Chester E. Rothfuss, Esq., for the respondent.

The Court: The status of the case now as I recall it is the petitioner rested at the last hearing and the matter was then adjourned until today to give the respondent an opportunity to prepare the defense.

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Mr. Francis: If the Court please, this accident which is the subject of this petition occurred over seven years ago. The respondent's plant has been closed down for a long time, the witnesses who might be in a position to enable the respondent to present a defense are no longer available. The respondent therefore rests.

At this time on behalf of the respondent I would like to move to dismiss the petition filed.

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Motion to Dismiss Petition.

First on the ground that this Court has no jurisdiction over the entire case.

Secondly on the ground that this Court has no jurisdiction over this proceeding in its present form.

10 Third on the ground that the proceeding is improper and illegal in that it is not a new trial, and on the ground that no facts have been submitted to the Court which justify reopening of this matter.

On the ground that the petitioner's case following the order directing the additional testimony to be taken, has failed to prove any accident sustained by the deceased.

20 That the petitioner's case has failed to prove any accident arising out of and in the course of the employment.

On the ground that the case as it now stands, subsequent to the order reopening it and permitting the taking of additional testimony, is barren of any proof of dependency, that is, proof of any dependency either by the present petitioner or any other person or persons, and

30 On the further ground in connection with the reopening of the case to permit the furnishing of the additional testimony by the petitioner, that the respondent was not allowed to have a day in court.

40 Mr. Baker: I will not reply to that your Honor, in the order in which the various objections are made, but I will state first in regard to the contention that the respondent was deprived of his day in court, because certain witnesses might be available to prove the respondent's case are not available at this time because of the lapse of the period of time, I would like to call the Court's attention to the fact that Mr. Michael Beck, the foreman of the company at the time of this accident, and at present still the foreman of the company, and Mr. Francis Zwarsky, employed by the

Motion to Dismiss Petition.

company at the time of this accident and still employed by the company, were both in the court the last time when this case was heard, at the request of the respondent—

Mr. Francis: If your Honor please, I move that counsel's statement be stricken from the record on the ground it is not made in the form of testimony.

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Mr. Baker: If your Honor please, the statement was made by this attorney in his opening that testimony is not available to them because of the lapse of time. I don't have to have testimony in answering that statement of counsel on the record. Those witnesses were there in court, they were not used by them, they were not called here today by them. That answers his contention on the fact the evidence was not available. We have a signed statement from both of them.

20

Now on the contention that the Court has no jurisdiction that is a perfectly specious argument at this time. That was all gone into on the request to reopen the case on the grounds of newly discovered testimony. It was argued, and attorney Rothfuss was present, and had the opportunity to produce evidence if he wished to, and he didn't do so. He had the chance to cross examine the witnesses, and in spite of this, this attorney here in this case brought this in—

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Mr. Francis: My name is Francis, Mr. Baker.

Mr. Baker: I know your name perfectly well (continuing)—this attorney came here the last time and argued about twelve different motions in regard to the lack of jurisdiction of the Court and so forth although it was completely out of order because it had already been decided by the Court. Again the Court denied the motion and ordered the case reopened and tried and it was tried and it was decided by your Honor that a prima facie case was made out and

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Motion to Dismiss Petition.

10 The mud was procured wherever it was available, sometimes from a pile on the dock, sometimes from a full scow, sometimes from an empty scow where pieces were sticking in the corners of the barge. It was sometimes taken dry and put in water and made damp so it could be applied with a trowel. Sometimes they found it in a wet place and it was brought up in a pail and used for that purpose. The petitioner proved the deceased had done this on several occasions before this and that the natural and inevitable inference was that this man had gone in the course of his employment to the scow to get a piece of borax mud which he was carrying in his arms for the purpose of sealing up the cracks, which was the only purpose for which this stuff was used for, and while in the course of his doing that, on his way back he slipped and fell into the water.

20 It seems very conclusive as to proving an accident arising out of and in the course of the employment, that there is absolutely no rebuttal of this claim in the slightest degree.

30 On the question of dependency the petition speaks for itself. It alleges dependency and it has not been denied. No proof to the contrary has been shown. The ages of the children and the fact the wife was living had been shown in court on the previous trial when the question of the dependency was gone into, as to the ages of the children, how many children there were and the fact that the wife of the deceased and the children were living together, and were dependents. The fact of the actual dependency of the family does not have to be proved, it is conclusively presumed as to the members of the household, minor children, and the widow. So there does not have to be any proof upon that other than the fact there were children living and their ages. That is proved without any rebuttal in view of the fact the respondent has put in no proof whatever in defense of the petitioner's claim. I

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Motion to Dismiss Petition.

therefore the respondent was given the chance to have the case adjourned to put their testimony in.

Now the fact that the Court decided that a prima facie case was made out also answers the other objection as to the fact there was no accident proven and no injury by an accident arising out of and in the course of his employment. If a prima facia case had not been made out on that there would be no reason to order the case to proceed further, but merely to touch upon that, if falling off a dock into the water and drowning is not an accident it is rather hard to say what is an accident. Petitioner has proved, by witnesses she has produced that the deceased was on the scow anchored next to the plant, or tied up next to the plant of the respondent, that he was trying to get off the scow on to the wharf with a lump of some material in his arms. The lump being grayish white in color. That he was seen to walk along on the wharf towards the respondent's plant, that he was seen to tumble off into the water, that they went over to pick him up and finally fished him out and the man died by drowning. Now there is your injury by accident, without a question. The question is whether it arose out of and in the course of his employment, and that was established by the fact that is was the regular custom of the employees of the respondent to go and get from the Pacific Borax Company what was called borax mud or borax refuse, which was dumped sometimes on the dock for the purposes of the respondent, and indirectly into the scows by an electric car that ran down there on the tracks. It was found by the employees of the respondent, by the foreman formerly employed by the Borax Company, and employees of the respondent, that it was the regular custom of the employees to get it. The company knew they got this mud, not only knew they got it but sent the employees to get this mud for the purpose of sealing up cracks in the pipes, and thus preventing the sulphur gas from coming out and blinding and affecting the health of the employees.

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Motion to Dismiss Petition.

contend that an award must be made on behalf of the petitioner, that it has been established it was an injury by accident arising out of and in the course of his employment, that as the result of the injury by the accident Mr. Plaskon died and he left as dependents the various dependents stated in the petition.

10

I ask therefore for an award in favor of the petitioner and for the number of weeks provided by the statute for such cases.

The Court: I will find from the evidence presented by the petitioner's deceased husband death was the result of an accident arising out of and in the course of his employment and I will sign a judgment for the petitioner in her behalf and in behalf of the dependent children.

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As far as fixing the damages in my judgment I will fix them, I note from the evidence as submitted that since the accident the petitioner has remarried and I will therefore take a little time to prepare the exact figures in accordance with the compensation act as to the dependency and the amount of damage.

I will now hear you on the question of costs.

Mr. Francis: May I have an exception, please?

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The Court: Surely.

(Discussion as to costs.)

The Court: I will fix the costs in the judgment which I render after going over the entire file.

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Motion to Dismiss Petition.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above-entitled matter as taken stenographically by me, at the time, place and date hereinbefore set forth.

WILLIAM C. O'BRIEN,
Official Court Reporter. 10

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above-entitled matter as taken before me at the time, place and date hereinbefore set forth.

.....
Deputy Commissioner.

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NEW JERSEY COURT OF ERRORS AND APPEALS

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|------------------------------|---|--|
| Julia Plaskon, | } | <i>On Appeal from New Jersey Supreme Court</i> |
| <i>Petitioner-Appellee,</i> | | |
| <i>vs.</i> | | |
| National Sulphur Co., | } | |
| <i>Prosecutor-Appellant.</i> | | |

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BRIEF OF PROSECUTOR-APPELLANT

This matter is before the court on appeal from the judgment of the Supreme Court which affirmed an award to petitioner-appellee of compensation amounting to over \$9,000 under the Compensation Act. The cause was reviewed in the Supreme Court on a Writ of Certiorari granted by Part Three of that court after Chief Justice Brogan, sitting alone had denied the application for such writ.

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A previous application for a Writ of Certiorari had been made to the late Chief Justice Gummere prior to the appeal from the Compensation Bureau to the Hudson County Court of Common Pleas. The writ was refused on the ground that an appeal had to be made to the Common Pleas before a request for the Writ was in order. At this time the merits of the cause were neither discussed nor considered.

Statement of Facts

On July 8, 1925, petitioner filed a formal petition for compensation in the Workmen's Compensation Bureau alleging that on June 6, 1925, her husband met his death as the result of an accident arising out of and during the course of his employment with respondent, and praying that she be allowed compensation for herself and the deceased's dependent children as provided by the Workmen's Compensation Act. Respondent filed an answer denying that any accident suffered by deceased arose out of and during the course of his employment.

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Hearing was had on the petition and answer on November 20, 1925 and at the conclusion of petitioner's case judgment was entered in favor of respondent on the ground that she had failed to establish that deceased died as the result of an accident arising out of and during the course of his employment (~~C-11~~).(C19)

- 10 On April 30, 1932, over six years later, petitioner obtained a rule from Deputy Commissioner Corbin (who had heard the case originally) requiring respondent to show cause on the 9th day of March 1932 "why the determination and rule for judgment heretofore entered should not be set aside and for nothing holden and the case reopened for the purpose of taking newly discovered evidence". This rule was granted on the *ex parte* affidavits of the alleged newly discovered witnesses and on the *unverified* petition of petitioner's new counsel.
- 20 These affidavits and the petition were attached to and made part of the rule.

- The matter was subsequently argued and decision was reserved pending the submission of memoranda of law and also any counter affidavits the respondent might wish to offer. On the argument of the rule no testimony was taken for the purpose of establishing that the alleged newly discovered evidence set forth in the affidavits was not available at the original trial, nor was testimony taken to establish that the newly discovered evidence could not have been secured by the exercise of due diligence for the original trial, nor was testimony taken to establish that petitioner had embraced the first opportunity which presented itself for making the application, nor was any testimony taken to establish the facts alleged to have been newly discovered nor to establish that the said facts if produced at the original trial would in all probability have resulted in a conclusion different from that reached by the court.
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The matter was considered entirely on the ex parte affidavits and unverified petition submitted by petitioner.

Respondent submitted no counter affidavits believing that proper procedure did not require them. On June 10, 1932, an order was entered by Commissioner Corbin adjudging that petitioner had in fact discovered new evidence; that she had been reasonably diligent in the preparation of her case for the original trial; that she had moved to present the newly discovered evidence at the earliest opportunity and further that the evidence was materially important to the issue. It further ordered—*not a new trial*—but that the *judgment of 1925* be opened and petitioner given an opportunity to present the new evidence, and further ordered that if the said newly discovered evidence coupled with the testimony already taken in 1925, were sufficient to make out a *prima facie* case, then respondent would be given the opportunity to present its defense (~~C 32-33~~). (C 40-41)

On the return day of the said order, respondent appeared in the Workmen's Compensation Bureau and moved to dismiss the order on a number of grounds which generally are as follows:

- (1) "The evidence appearing in the affidavits on which the order is based is clearly not newly discovered within the meaning of the decisions." 30
- (2) "A reading of the affidavits indicates clearly that the testimony suggested therein was available to petitioner at the time of the original trial."
- (3) "On the ground that the exercise of reasonable diligence in the preparation of the case for trial originally would have resulted in the production of the evidence disclosed by the affidavits." 40

- (4) "The evidence disclosed by the affidavits is not such evidence as could not have been produced by the exercise of ordinary diligence at the original trial."
- 10 (5) "The petitioner's affidavit offers no legally satisfactory reason for the failure to produce the alleged newly discovered evidence at the trial."
- (6) "The petitioner's affidavit offers no legally satisfactory explanation of the delay in making the application."
- (7) "The facts indicate that petitioner did not embrace the first opportunity to present the alleged newly discovered evidence."
- (8) "This court no longer has control of the cause."
- 20 (9) "This court has no jurisdiction over the subject matter of the present application."
- (11) "The order which brings respondent into court at this time is defective in that it does not order a new trial it merely permits the petitioner to put in the record the alleged newly discovered evidence, to augment the testimony taken at the original trial almost seven years ago."
- 30 (12) "These proceedings are irregular and defective because the alleged evidence set up in the affidavits was adjudicated newly discovered evidence on the affidavits and not after examination and cross-examination of the deponents in open court."
- (13) "This proceeding is not a new trial within the established practice."
- 40 (14) "The affidavits on which this order was granted are based in whole or in part on hearsay testimony and contain improper legal conclusions of the affiants."

(e139)

(e139-142)

- (15) "The entire matter is improperly before the court, an original petition being required."
- (16) "The matter is barred by the time limitation set forth in the Workmen's Compensation Act" (~~C 91-94~~). (C126-128)

This motion was denied and an exception allowed (~~C 95~~). (C129)

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Petitioner then began to prove the elements necessary to establish that the evidence set forth in the affidavits was in fact newly discovered. She called her son, Joseph Plaskon who testified that for a short time after the original trial he did nothing about the case, then later he visited two lawyers and after interviewing them "just simply forgot about the case" for five years (~~C 99-100~~). (C133)

The petitioner, Julia Plaskon, then took the stand and after some preliminary questioning, her counsel apparently somewhat concerned about the course her son's testimony had taken, asked the court if the affidavits were part of the record because if so he would not examine the witnesses but merely produce them for cross-examination (~~C 105~~). The Commissioner declared they were part of the record and denied the respondent's request and motion that petitioner be required to put in the record by oral testimony all the facts necessary to establish that the evidence set up in the affidavits and unverified petition was in fact newly discovered and that respondent be given an opportunity to cross-examine on those matters. Exception was taken to the refusal

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(C139-142) (~~C 105-109~~). Following this discussion no further questions were put to petitioner for the purpose of proving that she had exercised due diligence in the preparation of the case for the original trial, or that this so-called new evidence was not available to her at that time, or that it could not have been discovered by a reasonable investigation or to explain the delay of almost seven years

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in seeking a new trial. That part of the case was permitted to rest, over respondent's objection and exception, on her *ex parte* affidavit which was filed for the purpose of obtaining the rule to show cause. Respondent declined to cross-examine petitioner on the facts disclosed by the affidavit contending that the burden of proving such facts rested on her and that she should be required to testify to those facts orally and respondent should be given the right to cross-examine on that oral testimony.

Petitioner's attorney, John C. Grimshaw, then took the stand and offered himself for cross-examination on the facts set up in the *unverified petition* filed by him on the *ex parte* application for the rule to show cause (C 144). Respondent again declined to cross-examine, believing that the petition was worthless on the return of the rule and that the facts contained therein should be testified to orally for the record and cross-examination then allowed (C 144).

The case then proceeded and petitioner confined herself to proof of the facts and circumstances (alleged to be newly discovered) which she contended established that the deceased had met his death as the result of an accident arising out of and in the course of his employment. This hearing *was not a new trial* but in accordance with the order the evidence was permitted to go into the record for the purpose of augmenting that which was received in 1925 when the cause was originally tried.

At the conclusion of this testimony and proof of some incidental matters such as the re-marriage of petitioner since the original trial, petitioner rested her case. After reserving decision, the court decided that with the testimony thus taken augmenting that produced at the former trial in 1925, petitioner had made out a *prima facie* case. Respondent was then ordered to proceed with its defense. However it rested its case and moved for

dismissal of the petition. The motion was denied and exception allowed (~~C-190~~).(C222)

Subsequently and on October 25, 1932, a determination and award were made in favor of petitioner. An appeal was thereafter taken by respondent to the Hudson County Court of Common Pleas which on October 25, 1933, entered a determination and award, affirming the determination and award of the Deputy Commissioner with one modification. 10

Thereafter respondent applied to Chief Justice Brogan for a Writ of Certiorari to review this affirmance. After listening to argument and considering the matter the application was denied. Then respondent moved before Part Three of this court for such a writ and it was allowed. The Supreme Court then sustained the award.

POINT ONE.

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The Court erred in sustaining the Bureau's finding that the evidence disclosed by the ex parte affidavits and the unverified petition was newly discovered within the contemplation of law.

In order for evidence to be adjudged newly discovered, a number of very definite requisites must appear. It must appear (1) that the moving party exercised due diligence in the investigation of the case for the original trial, (2) that the alleged new facts were not discoverable at that time through a diligent investigation, (3) that the evidence is not merely cumulative, (4) that it would probably have changed the result of the original trial, (5) that the cause is still within the control of the court, and (6) that the petitioner embraced the first possible opportunity to make the application. 30

A few expressions of judicial opinion on the subject may make clear the attitude of the courts 40

towards the granting of new trials in such cases. Justice Katzenbach in *Christie v. Petrullo*, 101 L. 492; 128 A. 853, said:

10 “New trials on the ground of newly discovered evidence are not favored. Not only must a court feel that the evidence would probably have changed the result, but it must be satisfied that due diligence was exercised by the party applying for a new trial to obtain the evidence for use at the former trial, and that the evidence discovered is not merely cumulative”.

The language of the court in *Long v. Karp*, 8 Misc. 26, 148 A. 1 is particularly applicable here. The following is said:

20 “The manner in which Karp left his car was one of the issues of the case, and the alleged newly discovered evidence is, for the most part, the testimony of persons *who lived in the neighborhood at the time of the occurrence, and who might with reasonable diligence have been interviewed before the trial*”.

Also

Katz v. Zapela, *supra*;

Deacon v. Allen, 4 L. 386 (*338);

Servis v. Cooper, 33 L. 68;

Fish v. Stoll, 4 M. 547; 134 A. 123;

Hoff v. White, 5 M. 194; 135 A. 879.

30 The Court of Chancery, in speaking of the same rule said:

“To warrant a re-hearing on the ground of newly discovered evidence, it must be shown that the evidence could not have been discovered by due diligence. *Unrevealed but discoverable evidence is not newly discovered evidence.*”

Schroeder v. Schroeder, 111 Eq. 244.

40 Examination of the affidavits of the five alleged newly discovered witnesses submitted by petitioner indicates that three of the affiants, Mike Matus,

Thomas Stberke, and John Hagan, were fellow employees of the deceased at the time of his death and that the other two, Joyce and Fernan, were employed at the time by the Pacific Coast Borax Company which was located next door to respondent's plant. Four of them, Matus, Stberke, Hagan and Fernan, knew Plaskon in his lifetime. All of them knew of the alleged custom of respondent's employees of using the waste borax in connection with their work. All of them, except Joyce, knew Plaskon and knew of his death. Fernan had been employed by the Borax Company for eighteen years and worked there for five years after Plaskon's death, until some time in 1930. Hagan worked for respondent for over four years and continued to do so, for four months after Plaskon's death. Stberke worked for respondent for four years and remained so employed for two years after Plaskon's drowning. Matus worked for respondent for thirteen years but discontinued shortly after Plaskon's death. However he had known Plaskon for twenty years, was a good friend of his, knew his wife and children, knew where they lived and lived only a few blocks away from their home himself. (~~C 121~~, (C154, 168, 169) 135). All of the men who made these affidavits resided in Bayonne, the same city as Plaskon.

Unquestionably any reasonably diligent investigation in 1925 would have discovered these men. Petitioner had an attorney of her own selection representing her less than a month after the accident. The petition for compensation was sworn to by her on July 6, 1925. If Mr. Gottko and her son did not make an efficient investigation they cannot be permitted to take advantage now of that which vigilance would have produced them. (*Gulear v. Bodone* 116 Eq. 431).

Joseph Plaskon in his affidavit says he talked to a number of respondent's employees after the alleged accident and was unable to learn anything other than that testified to by Thomas Szwczak and Frank Zaworski who worked with Plaskon on the day of his death and who testified at the original

trial. Isn't it significant that none of these persons knew anything of the practice asserted to be so prevalent and of such long standing by the present newly discovered witnesses? (c13)

10 How were these new witnesses located? Who discovered them? By what means? Whatever the means, wasn't the failure to use it prior to the original trial lack of diligence? The *ex parte* affidavits and unverified petition do not describe how they were located. They do not explain any of the elements so necessary under the law to make out justification for a new trial on account of newly discovered evidence. The very crux of the matter—the explanation of the circumstances which produced them now and the reason why the same circumstances were not present in 1925—is ignored. There was absolutely nothing before the Commissioner which would form the basis of a finding that the evidence was newly discovered.

20 On the other hand, the only bit of testimony offered by petitioner by way of explanation was so unfortunate for her case that she rested thereafter on the *ex parte* affidavits and unverified petition. This testimony was given by Joseph Plaskon, her son. He said that prior to the original trial he had tried to locate some witnesses. He failed entirely to describe his efforts in this connection so that the record is barren of any facts from which the nature or reasonableness of the investigation can be determined (~~C-98~~). For a short time after (c132) the 1925 trial which resulted in the judgment for respondent, he did nothing (~~C-98~~). Then he inter- (c132) viewed two other lawyers. Following this statement he was asked:

“Q. After you interviewed these lawyers, what did you do if anything? A I didn't do anything, just simply forgot about the case” (~~C-99~~). (c133)

40 “Q. Did you see anyone else after you saw these two lawyers? A. Five years later (~~C-100~~)”. (c133)

Mr. Grimshaw was retained on January 14, 1930
 (c/34) (~~C-101~~), yet *no application was made for a new
 trial until April 30, 1932 over two years later* (~~C~~
 (c21) ~~12a~~). The *ex parte* affidavits of petitioner and her
 son were not taken until May 6, 1932 (~~C-10-20~~) (c24-28)
 The others were sworn to on January 30, 1932,
 February 17, 1932, February 27, 1932 and June 8,
 1931 (~~C-23-30~~). (c29-39)

The record therefore shows that the case was
 forgotten for about five years after the original trial
 and until January 14, 1930. Mr. Grimshaw had it
 for over two years before moving to re-open the
 judgment and the only explanation of his conduct
 in the interim appears, not under oath, but in his
 unsworn petition wherein he says he succeeded in
 "locating" these additional witnesses (~~C-14~~). He (c23)
 does not say how he located them or when nor does
 he describe at all the nature of his investigation.
 Can this court say that the record before it, even
 assuming that the *ex parte* affidavits and unverified
 petition can be considered, establishes the requisites
 to the re-opening of a judgment in this kind of
 case?

Can it be successfully urged on these facts that
 petitioner embraced the first opportunity to pre-
 sent her motion? Even after Mr. Grimshaw's re-
 tention, wasn't she guilty of laches? Matus' affi-
 davit outlining the alleged custom on the strength
 of which the judgment was re-opened was sworn
 to June 8, 1931, yet the petition for the re-opening
 was not filed until over ten months later. Is that
 diligence? Is that embracing the first opportunity
 for presenting the case? Especially in view of the
 action of the Supreme Court in condemning a de-
 lay of six months in the same kind of situation.
 (*Hoff v. White*, 5 Misc. 194, 135 A 879). The only
 reasonable conclusion that can be drawn from the
 state of the record is that there is no proof of a
 diligent investigation either before or after the
 former trial or after the matter came into the
 hands of the petitioner's present counsel, and that

there is certainly no proof that the motion to re-open was made at the first available opportunity. These elements of proof being lacking, the Deputy Commissioner clearly erred in re-opening the judgment and the Court of Common pleas erred in sustaining him.

10 Furthermore, there is no justification for a finding that the evidence disclosed by the affidavits would require a different result at a new trial. These new facts merely tended to establish an alleged practice followed by respondent's employees of using waste borax which they obtained either from the yard or from the dump barges of the Borax Company, for the purpose of patching cracks in pipes in the Sulphur Co. plant. None of these men was working at the time of Plaskon's death; none of them either saw him that day or had any idea what he was doing off respondent's property,
20 away from his work and on the barge of the Borax Company at the time.

The evidence at the original trial established that only three men were on duty at the time of the mishap. They were Plaskon, Thomas Szewczak and Frank Zaworksi. These men made no mention of this alleged custom. They said that after working a while Plaskon made some coffee. Then they all went on the bridge to cool off (~~C 85~~). (C 120)
30 After staying there for a few minutes they returned to work. Later some one from another shop inquired about the man who had come to work at three o'clock. Zaworski then looked for Plaskon and was unable to find him. Both of these men testified that Plaskon had no work that day which would take him down to the dock from which he fell into the water (~~C 77, 87~~). (C 127/22)

40 Plaskon's boss this day was Zaworski. This is his positive evidence as to whether or not Plaskon had any right to go out on the barge, not respondent's, but that of the adjoining company, the Borax Company, from which he fell:

"Q. Did Mr. Plaskon have any work that day that took him down to the dock? A. No.

Q. Was all of this work in this plant that was three hundred feet from the dock? Was all Plaskon's work in this shop which was three hundred feet from the dock? A. Just in the shop, his work" (~~C 87, H. 20-40~~). (C122, H. 30-40)

These witnesses were produced by the petitioner in 1925 and of course their testimony is binding on her. How can evidence of a general custom, justify re-opening the judgment and a finding that Plaskon met his death as the result of an accident arising out of and during the course of his employment in the face of binding and positive evidence by the only fellow employee working with him at the time of his death and by his superior to the effect that he had no work that day which would take him down to the dock or to the barge belonging to the neighboring company? On a rule for a new trial can it be said reasonably that general proof of a custom is sufficient to require a different judgment at a new trial in the face of proof positive of men working with deceased, one of them his superior, that his employment with respondent did not require his presence on the Borax Company's barge?

There is a wealth of authority in this state and throughout the country to the effect that testimony which is positive and specific in substance is entitled to more weight in arriving at a judgment than testimony which is merely general in form.

Boylan v. Meeker, 28 L. 274-281;

Rausch v. Glazer, 74 Atl. 39-41;

Holmes v. Pennsylvania R. R. Co., 74 L. 469;

Vinczi v. N. Y. Central R. R. Co., 9 Misc. 1089.

This consideration leads inevitably to the opinion that so far as the element of a different result at a new trial is concerned, the Court of Common

Pleas again erred in affirming the holding that petitioner was entitled to a new trial because of newly discovered evidence. For this reason there should have been a reversal.

POINT TWO.

10 **There was no evidence reasonably tending to support the finding that deceased met his death as the result of an accident arising out of and in the course of his employment.**

20 The argument under this contention has been presented almost entirely in the last portion of point one, immediately above. Briefly, however the evidence for petitioner at the original trial established that during working hours Plaskon for some reason, not in connection with his work, left his employer's plant, walked down to its dock, climbed on a barge of the American Borax Company, tripped in getting back on the dock and fell into the water (~~C-60-61~~). He had something (C94-95) white in his hands (~~C-54~~) which may have been (C90) either sulphur or borax (~~C-54~~). The only two men (C90-93) working with him at the time in testifying for petitioner say he had no work which would take him there *that day*.

30 The new proof merely tends to establish the practice of some of respondent's employees of going on the adjoining property and sometimes on the dock and barge of the owner of that property and taking therefrom waste borax to patch up pipes. The Court of Common Pleas affirmed the Deputy Commissioner's holding that proof of this general practice, coupled with the evidence that when Plaskon fell he had something white in his hand established by the greater weight of evidence that Plaskon died as the result of an accident out of and in the course of his employment.

40 Petitioner's own case proved specifically and positively that deceased had no business down on

the dock or Borax Company barge that day. The most that can be said for the new evidence is that it may give rise to an inference, in view of the alleged practice, that he had gone on the barge to get waste borax for use in connection with his work. This possible inference ought not to make out a complete case against respondent in the face of petitioner's uncontradicted, uncontroverted and binding evidence to the contrary. 10

These facts make it clear that the finding of an accident within contemplation of the Compensation Act is without evidence reasonably tending to support it.

POINT THREE.

The Court erred in finding that the hearing before the Bureau after the opening of the judgment was proper and regular when it should have found that it was not a new trial within the established practice and therefore improper and irregular. 20

The order entered by the Deputy Commissioner was rather unusual and unique. It did not order a new trial, because of newly discovered evidence. It adjudged that the evidence disclosed by the *ex parte* affidavits was in fact newly discovered; then it ordered that the judgment for respondent be opened and that petitioner be given an opportunity to present her new evidence, and further that if such new evidence *coupled with that taken at the 1925 trial* be sufficient to make out a *prima facie* case, then respondent would be given an opportunity to present its defense. 30

While the order speaks of an application for a new trial and a rule to show cause why a new trial should not be granted (C-32) it does not require a (C40) new trial. There is no case in this state where such procedure has been followed and research has 40

failed to reveal any precedent for such action. If this sort of practice is sanctioned, a petitioner can put in part of his case at one time, have it re-opened later; even years later as here; add a little more evidence to that already in the record in the hope of making out a *prima facie* case and if successful after a piecemeal trial over a period of years expect the court to call upon respondent to produce his defense. It would seem that when a case is re-opened for newly discovered evidence a complete new trial should be required just as in common law procedure. All petitioner had to do here was tack the new testimony on to that of 1925 in an effort to make out a case. That 1925 testimony remained binding on respondent but not on petitioner. She was permitted to add proof of an alleged practice of respondent's employees for the purpose of negating if possible her own fitnesses' account of Plaskon's duty on the day of his death. She did so and was allowed an award. But respondent had to stand by all the 1925 record, watch the court take the parts of it which were favorable to petitioner, discard those which were not, tack on the new evidence and finally conclude that she was entitled to an award.

There is no authority either in the law or in the Compensation Act for such practice. There are certain legal formalities which have grown up as integral parts of our judicial system as the result of universal judicial opinion that they provide the best means of safeguarding rights and property of individuals. Departure from procedure so established is not only unjust and prejudicial but tends towards the ultimate destruction of the system.

Common law procedure in this kind of case requires an entire new trial. The theory back of the application for a new trial here is derived from the common law and in the absence of specific regulation on the subject in the Compensation Act, the common law practice should be followed. Fairness and justice to both sides require it.

It is consequently submitted that the affirmance of the failure to order an entire new trial after re-opening the 1925 judgment in favor of respondent was error.

POINT FOUR.

The Court erred in finding that the Bureau had not (a) abused its discretion, or (b) erred in re-opening the judgment on the ex parte affidavits and unverified petition presented by petitioner. 10

Plaskon died June 6, 1925. The original trial took place November 20, 1925 and resulted in judgment for respondent. On April 30, 1932, over six years later, the rule to show cause why the judgment "should not be set aside" and "the case re-opened for the purpose of taking newly discovered evidence" was allowed. The basis for granting the rule was (1) the unverified petition of petitioner's attorney John C. Grimshaw, and (2) the *ex parte* affidavits of Joseph Plaskon, Julia Plaskon, Mike Matus, Frank Fernau, Thomas Stberke, Patrick L. Joyce and John Hagan. (~~C-13-30~~). (C 22-38) 20

No depositions of these affiants were taken before the return day of the rule nor was their testimony taken on the return day of the rule. The matter was considered entirely on these *ex parte* affidavits and unverified petition. At no time prior to or on the return of the rule was the testimony of these persons given orally and the respondent permitted to cross-examine on that testimony. 30

After the judgment had been re-opened and the 1925 trial continued, these affidavits and unverified petition were permitted to substitute for oral testimony over the objection and exception of respondent who insisted that all the elements necessary to establish that the proffered evidence was in fact newly discovered be proved by oral testimony and subject to cross-examination. 40

It is apparent from this outline that on the application to re-open the judgment because of newly discovered evidence, the established common law procedure in such cases was disregarded, that the provisions and intent of the Workmen's Compensation Act were ignored and that respondent was unconscionably deprived of its day in court.

10 It is true that the Compensation Act provides no specific procedure to be followed in re-opening a judgment. As a matter of fact no reference is made anywhere to the re-opening of a judgment on the ground of newly discovered evidence. Without discussing at this time the question of the power of the Compensation Bureau to do so in a case such as this and assuming at this juncture that, as petitioner asserts, it has the general power to do so under the 1918 supplement to the act, Chapter 149, section 11, and assuming that the language of the Supreme Court in *Katz v. Zapela*, 159 Atl. 306, 10 Misc. 258, is applicable here, proper and constitutional procedure was not followed in re-opening this judgment.

20 In *Katz v. Zapela*, the Supreme Court said *inter alia*:

30 "The effect of this decision (*Rose v. Wagner Const. Co.*, 2 Misc. 118) would seem to be to give the Bureau the same control over its judgments that the common law courts have, and the rule there is that the power may be exercised at any time that the cause remains under the court's control, provided the moving party embraces the first opportunity he has of presenting the case."

40 If therefore, the Bureau has the same control over its judgments as the common law courts have, since the Act prescribes no method of procedure to be followed in such cases, it would seem only reasonable to say that the same system of procedure should be pursued there as in the common law courts. The system in the common law courts does not exist because of statutory fiat. It has grown

up as part of the common law through many years of judicial experience and its design is to secure to persons affected by applications for new trials on the ground of newly discovered evidence reasonable protection, an opportunity to hear and cross-examine the witnesses for the moving party and generally to have a day in court. The right of a person to be confronted by the witnesses against him and to hear and cross-examine them is his inherent right under any constitutional system. To deprive him of that inalienable right is to destroy the very bulwarks of our system of justice. Why should anyone be permitted to say that the safeguards recognized for many years by the common law courts should not control the function of a statutory tribunal when the act creating that tribunal is silent upon the question? 10

The common law method of procedure on an application for a new trial is simple and adequate. The decision of *Katz v. Zapela*, the language and intent of the Act (which will be adverted to later) and common justice, all seem to require that it be followed by the Bureau. The application for the rule is usually made *ex parte* and is supported by *ex parte* affidavits outlining the newly discovered matters, and establishing that the petitioner exercised due diligence in the investigation and preparation of the case originally, that the newly found facts could not have been discovered by ordinary diligence prior to the original trial, that the first opportunity for presenting the new facts was seized upon and that they would in all probability have changed the result of the original trial. *Katz v. Zapela*, supra. 20 30

Long v. Karp, 8 Misc. 26; 148 A. 1;

Hoff v. White, 5 Misc. 194; 135 A. 879;

Fish v. Stoll, 4 Misc. 547; 134 A. 123;

Christie v. Petrullo, 101 L. 492; 128 A. 853;

Servis v. Cooper, 33 L. 68;

Deacon v. Allen, 4 L. 386 (*338). 40

When the rule to show cause has been obtained the force of the *ex parte* affidavits is spent. They can no longer be used for any purpose. On the return of the rule the court has nothing before it but the naked rule unless depositions of the witnesses who made the affidavits have been taken. The affidavits cannot be read; they cannot be considered; the record stands as if they had never existed. Unless the matters set forth in the affidavits are presented in the form of depositions made under direct and cross-examination, the court has no alternative but to dismiss the rule.

That this is the settled law is beyond dispute. In *Baldwin v. Flagg*, 43 L. 495, it was held that *ex parte* affidavits may be used for the purpose of obtaining a rule to show cause, but that they are not competent to prove the facts necessary to support a motion not of course, or to be read on the hearing of the rule to show cause depending on facts extrinsic to the record; such facts can only be brought before the court by depositions taken on notice.

In *Peer v. Bloxham*, 86 L. 288, 81 A. 659, the same rule was announced. The Supreme Court held that affidavits on which a rule to show cause was founded cannot be used after the rule is made, to support a motion not of course, or be read on the hearing of the rule to show cause depending upon extrinsic facts; proof of depositions taken on notice to parties in interest being necessary after the granting of the rule to show cause.

Klein v. Express Co., 61 L. 530, 40 A. 445, is in accord with this principle. It was there said that *ex parte* affidavits upon which a rule to show cause has been allowed cannot be used in the argument of the rule. The character of the depositions taken must be such as to show the facts necessary to a proper judicial determination of the questions arising upon the rule.

See also :

Dare v. Ogden, 1 L. 91;

Cooper v. Galbraith, 24 L. 219;

Layton v. Cooper, 2 L. 65.

These decisions make it manifest that the Court of Common Pleas erred in finding that the Deputy Commissioner committed no error in re-opening the judgment in the present case. No depositions were taken on notice, no testimony was introduced on the return of the rule nor even on the full hearing after respondent had demanded that proper procedure be followed. The *ex parte* affidavits and unverified petition were considered part of the record and the matter decided on them alone when under the decisions they were legally dead and of no efficacy whatever. On the return of this rule there was nothing before the Commissioner except the rule itself and in the absence of depositions he was required to deny the motion for a new trial.

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Petitioner urges that respondent was sufficiently allowed its day in court because she and her attorney offered themselves for cross-examination on the affidavit and petition. Under the decisions these instruments were legally dead on the return of the rule and when the offer was made. Why should respondent take petitioner's affidavit which is full of hearsay and legal conclusions and which had spent its legal force and examine her on it when the law has provided a perfectly simple method of procedure which she refused to follow? Also, why should respondent take the attorney's unverified petition and examine him as to statements not even made in solemn form? The reason for the course adopted by petitioner is obvious when the disastrous testimony of Joseph Plaskon is examined.

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The suggestion was made during the argument of the appeal to the Court of Common Pleas that since the Compensation Act provided that the Bureau "shall not be bound by the rules of evidence"

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the same solemnity of procedure required by law courts might not be demanded of the Compensation Court. Such an argument is specious because the very act of the commissioner here in accepting the affidavits and unverified petition as part of the record and deciding the application to re-open the judgment thereon is condemned by the specific language of the Act.

10 Section 9, Chapter 149 of the laws of 1918 supplementing the original Workmen's Compensation Act provides as follows:

"At such hearing evidence, *exclusive of ex parte affidavits*, may be produced by both parties, but the official conducting such hearing shall not be bound by the rules of evidence."

20 While this ban on *ex parte* affidavits does not specifically refer to hearings or motions for a new trial on the ground of newly discovered evidence, it most certainly indicates a legislative intent to preserve the right of direct and cross-examination of witnesses in instances where the formality of common law procedure requires such examination.

There is no case in this state where the precise question here involved has been adjudicated. However there are decisions in other jurisdictions where similar matters have been in dispute.

30 In *Gould Construction Company v. Industrial Commission*, 143 N. E. 73 (Supreme Court, Indiana) it was decided that

40 "on a trial de novo the stenographic report of the evidence before the arbitrator would not be competent evidence except by consent. On such a trial the parties have the right to require the production of the witnesses and their testimony by word of mouth, subject to cross-examination, and are not limited to what they testify to at any former hearing, or the evidence produced at any former hearing."

In *Breeda v. Industrial Board*, 114 N. E. 225 (Illinois) the appellate court said:

“The Industrial Board states in its findings and award that its decision is based upon statements of witnesses taken *ex parte* and reported by the special investigator appointed for that purpose. No matter what the character of the evidence so taken was, the Board did not act within its powers in making it the basis of the finding and award.” 10

In *Shoffer v. D’Arcy Spring Company*, 165 N. W. (Mich.) the court said:

“After the first application (for rehearing) was denied, and before the second one was filed, the plaintiff gave defendant notice to take depositions in Kalamazoo on a day certain but omitted the hour at which they were to be taken. The depositions were taken, but defendants were not present. Subsequently plaintiff’s counsel wrote to defendant’s counsel: ‘It is not intended that these depositions shall present any case on the merits, but simply go to the question of whether I am entitled to an order re-opening the case. If it is re-opened I will then take other depositions to be used in the argument on the merits.’” 20

“When plaintiff’s application was heard on its merits the depositions were received in evidence against defendant’s objection. The notice was clearly irregular, and the letter clearly misled them into the belief that the depositions so taken would not be used upon the hearing upon the merits. We cannot say that this was not prejudicial to defendant’s case and therefore must hold it error.” 30

In *McCauley v. Imperial Woolen Company*, 104 Atl. 617 (S. C. Pa.) it was said (at pp. 621, 622):

“Section 428 (P. L. 755) of the act of 1915 provides that ‘neither the board nor any ref- 40

eree shall be bound by the technical rules of evidence in conducting any hearing or investigation.'

10 "These provisions do not mean however that either the referee or board has the right to find material facts on hearsay alone, whether such evidence is developed in the course of formal hearings or in less formal investigation; for in the first place the rule which forbids the making of material findings on hearsay alone, is more than a technical rule of evidence, and next there is nothing in the act before us which justifies the conclusion that the Legislature intended any such loose method for determining material facts. The act permits liberal investigation, by hearing and otherwise, but after all the data have been gathered without regard to technical rules, the proof must be examined, and that which is not evidence must be excluded from consideration; that is to say, when all the irrelevant and incompetent testimony has been put aside, the findings must rest upon such relevant and competent evidence of sound probative character as may be left, be this either circumstantial or direct."

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30 In New York where the act is more liberally drawn the common law right of examination of witnesses is upheld. Physicians' reports received without opportunity for cross-examination are insufficient upon which to base an award. (*Strinal v. Jewett & Co.*, 198 App. Div. 427; *Ganuzzi v. Fox Wood Construction Co.*, 207 N. Y. S. 363). Certificates certified by the "Mayor" and another by the "Official" stating the dependency of the deceased's parents are inadmissible as legal evidence. (*Phifume v. Rheinstein and Hass*, 175 N. Y. S. 848).

40 The appellate courts throughout the country generally have refused to waive the common law rules of evidence, and their formalities in passing

upon the validity of compensation awards in spite of the definite language of the act that "the person conducting the hearing shall not be bound by the technical rules of evidence."

McCauley v. Imperial Woolen Co., 104 Atl. 617 (Pa.);

Indiana Bell Tel. Co. v. Hawfe, 144 N. E. 844 (Ind.).

In our own state Justice Kalisch, commenting upon this section of the Act in *Scalise v. Uvalde Asphalt Paving Co.*, 98 L. 696, said:

"But as to the probative force of testimony condemned by the generally accepted rules of evidence to be incompetent or improper or valueless, an entirely different legal situation is presented."

In *Indiana Bell Telephone Co. v. Hawfe*, *supra*, the court made this significant statement:

"It is true that the Industrial Board is not a court. It is an administrative body, charged with the administration of the Workmen's Compensation Law. Upon it rests the duty and responsibility of determining, within its special jurisdiction, the rights of men, women and children. If those rights were suffered to depend on hearsay none would be secure."

Recently Justice Bodine, speaking for the Court of Errors and Appeals, definitely stated the law on the subject. In the case of *Friese v. Nagle Packing Co.*, 110 L. 588, he said:

"The substantial rights of the parties must be settled by such evidence as has always been regarded as competent in courts of law. Since the Bureau is not liable to be misled by testimony which is not evidential, the observance of the technical rules is of less importance than at a trial in the courts of law. The Bureau cannot, however, disregard the fundamental rules of judicial proof in making awards. Its finding must be sustained by competent evidence."

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10 These opinions make it clear that while the legislatures of the various states intended to allow a certain amount of freedom of method in administering the Compensation Law, they never intended to permit the radical departure from the common law which was allowed in the present case. This is especially manifest in New Jersey where *ex parte* affidavits are expressly condemned as evidence.

20 Petitioner suggests that the practice of using *ex parte* affidavits in such matters has been sanctioned in the case of *Katz v. Zapela*, 110 L. 14, and the Supreme Court seems to agree. However, there is nothing in the *Katz* case to indicate that the legal propriety of their use was ever challenged. That being so their presence in the printed record most certainly cannot be said to support the contention that their use is proper. Such affidavits might appear in a thousand records unquestioned and yet lend no strength to the assertion that it is legally correct to use them.

30 It is therefore urged that the Deputy Commissioner and the Court of Common Pleas erred in declaring the evidence to be newly discovered, and in re-opening the judgment on the *ex parte* affidavits and unverified petition submitted by petitioner and he further erred in continuing the trial thereafter without requiring petitioner to prove her right to re-open for newly discovered evidence by oral testimony subject to cross-examination.

40 Whether a party to an action is entitled to a re-opening of a judgment and a new trial because of newly discovered evidence as a strict matter of law or whether the granting of such an order is discretionary with the court, is of no material consequence here. Assuming the act of re-opening to be a discretionary one it must be remembered that the discretion to be exercised is not an arbitrary nor a "capricious one or one in violation of settled legal principles of equity or law." (*State v. Potter*, 83 L. 428; *Patterson v. Surplless*,

8 Adv. Rep. 589—151 Atl. 754) but a judicial one guided and controlled by settled legal principles of right and procedure. The legal principles of right and procedure above outlined were disregarded by the Deputy Commissioner. Whether his conduct is called legal error or abuse of discretion is immaterial. The fact is he acted contrary to law to the prejudice of the respondent. Accordingly the judgment for petitioner should have been reversed. 10

POINT FIVE.

The Court (a) erred or (b) abused its discretion in ordering respondent to pay counsel fees on appeal in the sum of one thousand dollars in that the said sum was grossly excessive and in that it should have been apportioned between the petitioner and respondent. 20

Respondent further contends that the counsel fee on appeal allowed by the Court of Common Pleas was grossly excessive. On the appeal counsel made two appearances, at the first there was no argument and the matter was adjourned, on the second there was argument lasting perhaps an hour and at that time the court suggested that memoranda be submitted. Counsel thereupon prepared and filed their memoranda which required very little labor inasmuch as all of the material contained therein had been previously collected for use in the hearings before the Bureau. For these services the Court of Common Pleas allowed a counsel fee of \$1,000.00, assessed *against respondent alone*. When it is borne in mind that counsel had already been allowed a fee of \$900.00 for services in the original proceedings which required greater expenditure of time in preparation for the hearings, more time in court and in the preparation of memoranda, that this fee was assessed against both petitioner and respondent and that the total award 40

approximates only nine thousand dollars, it seems obvious that an additional fee of \$1,000.00 is greatly out of reason.

10 It is true that the Compensation Act provides that the counsel fee may be assessed in the nature of a penalty for failure to pay an award justly due, but when there is as here a close question of law and of fact which any reasonable respondent would be justified in litigating (see ~~C 41a~~); there (250) is no necessity nor reason for penalizing the respondent. Moreover the Court of Common Pleas did in paragraph 8 of its award (~~C 41e~~) find that the (253) Bureau had erred in computing a portion of the award. Respondent would have been justified in taking its appeal on this point alone.

20 The court below therefore erred (or abused its discretion) in awarding such a grossly excessive counsel fee and assessing it against respondent alone.

It is therefore respectfully urged for all of the above reasons that the judgment for petitioner should be reversed.

COULT, SATZ & TOMLINSON,
Attorneys for Prosecutor-Appellant.

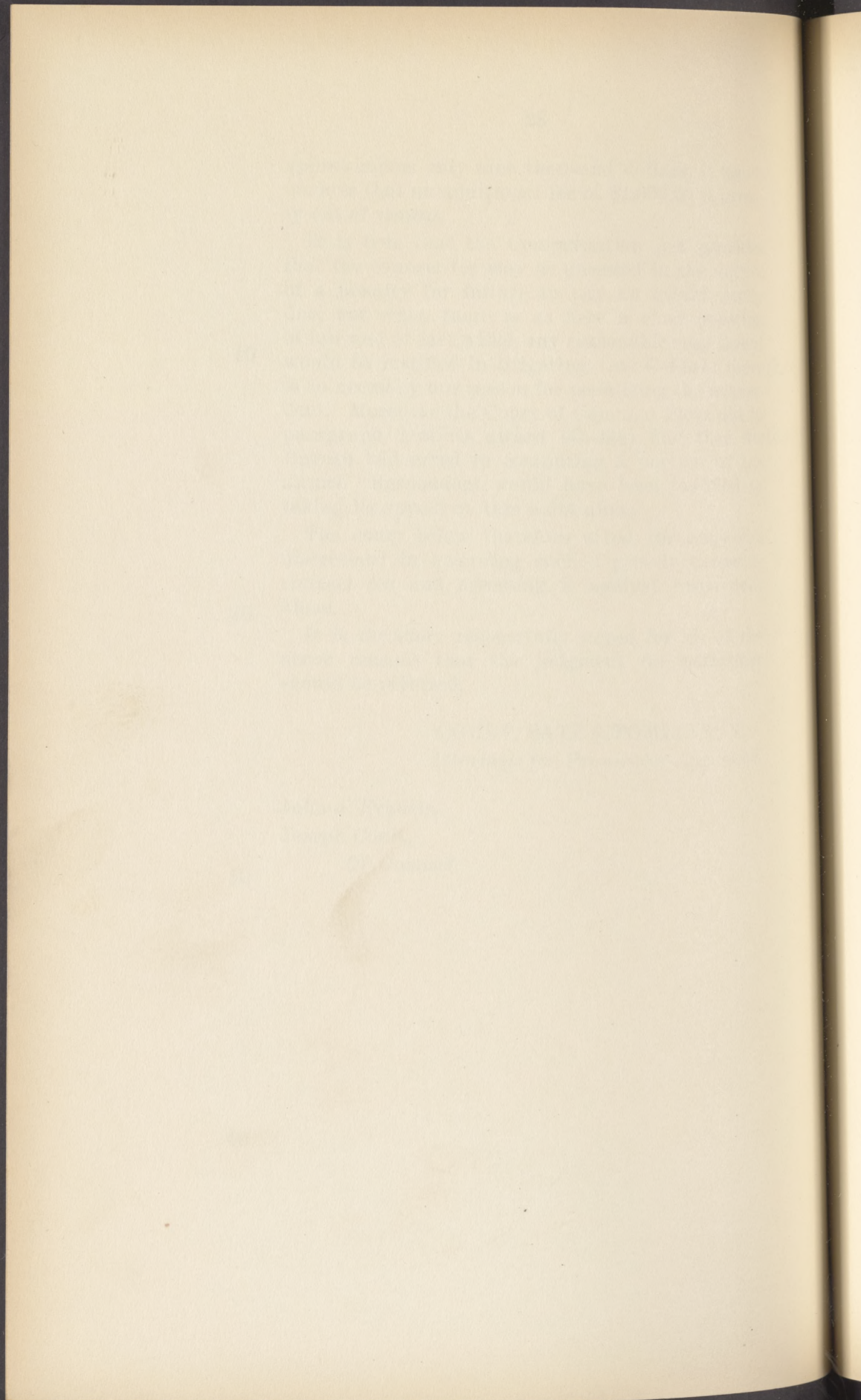
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The Great Court of Errors and Appeals

Section 1. The Court shall consist of the Chief Justice and such number of Justices as may be appointed by the Governor, and shall have the same powers and jurisdiction as the Court of Appeals.

Section 2. The Court shall hold its sessions at such times and places as may be determined by the Governor.

Section 3. The Court shall have the power to hear and determine all appeals from the decisions of the Court of Appeals.

Section 4. The Court shall have the power to hear and determine all writs of habeas corpus, writs of certiorari, writs of mandamus, and writs of prohibition, and all other writs which may be granted by the Court of Appeals.

Section 5. The Court shall have the power to hear and determine all cases in which the Governor is a party, and all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition.

Section 6. The Court shall have the power to hear and determine all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition, and all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition.

Section 7. The Court shall have the power to hear and determine all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition, and all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition.

Section 8. The Court shall have the power to hear and determine all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition, and all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition.

Section 9. The Court shall have the power to hear and determine all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition, and all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition.

Section 10. The Court shall have the power to hear and determine all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition, and all cases in which the Governor is a party to a writ of habeas corpus, writ of certiorari, writ of mandamus, or writ of prohibition.

New Jersey Court of Errors and Appeals

JULIA PLASKON,
Petitioner-Appellee,

v.

NATIONAL SULPHUR COMPANY,
Respondent-Appellant.

BRIEF OF PETITIONER-APPELLEE.

Statement.

This matter is before the Court on appeal from the judgment of the Supreme Court which affirmed an award to the petitioner-appellee and other dependents under the Compensation Act amounting to about Nine Thousand Dollars for the death of John Plaskon.

The matter came before the Supreme Court on a writ of certiorari allowed by Part II subsequent to a denial of the writ by the Chief Justice, after a hearing and a submission of briefs, to review the determination and award of the Hudson County Court of Common Pleas entered October 25th, 1933, whereby the said Court of Common Pleas on appeal from the Workmen's Compensation Bureau affirmed a determination and award of the said bureau in favor of the petitioner.

The Facts.

A formal petition was filed in the above matter asking for compensation under the terms of the Compensation Law of this State and an answer having been duly filed, the same came on for a hearing in Jersey City before Deputy Commissioner Charles E. Corbin on November 20, 1925, the petitioner being represented by Attorney Anthony A. Gottko and the respondent by Attorney Frank G. Turner.

At the time of the hearing in this case the petitioner testified in her own behalf and she also called to testify Mr. Owen O'Neill, Mr. Otto Christensen, Mr. Thomas Szewczak, and Mr. Frank Zaworski. At the end of the petitioner's case the attorney for the respondent moved for a non-suit on the grounds that the petitioner had failed to show that the deceased died as a result of an injury by accident arising out of and in the course of the employment, stating that there was no proof whatsoever that there was an injury by accident arising out of and in the course of the employment. After argument of counsel the motion for a non-suit was granted, and said judgment of dismissal was signed on December 16, 1925.

On April 25, 1932, on behalf of the petitioner, Julia Plaskon, a petition was made to Deputy Workmen's Compensation Commissioner Charles E. Corbin by Attorney John C. Grimshaw, representing the petitioner, to reopen the case for the purpose of taking newly discovered testimony. Thereafter on April 30, 1932, Attorney Chester W. Rothfuss, representing the respondent, was

served with a rule to show cause why the determination and rule for judgment theretofore entered in this case should not be set aside and the case reopened for the purpose of taking newly discovered evidence. Thereafter copies of affidavits secured by the attorney for the petitioner were served upon the aforesaid Chester W. Rothfuss and the case came on for a hearing before the Workmen's Compensation Bureau on May 9 and June 7, 1932. At neither of the aforesaid hearings did the respondent request that the petitioner produce the witnesses who had made affidavits which were prepared on the rule to show cause. At the termination of this hearing an opportunity was given to both parties to submit a memorandum as to law, to submit the affidavits on behalf of the petitioner, and an opportunity was given to the respondent to submit any affidavits that it desired. No counter affidavits and no memorandum were submitted by the respondent. Thereafter, the Deputy Compensation Commissioner, after going over the memorandum and affidavits duly filed, signed an order reopening the judgment of dismissal which was dated on December 16, 1925, for the purpose of taking further evidence secured in behalf of the petitioner and said order was dated June 10th, 1932. Between June 10th, 1932, and date of order signed by the Deputy Compensation Commissioner reopening the original judgment, and July 21st, 1932, the date of hearing, the respondent did not at any time file an objection to the proceedings which were originally held or take the matter to the Supreme Court on certiorari proceedings on the making absolute of the rule for reopening the case.

The case came on for hearing on July 21, 1932, and the respective parties being represented by counsel, the petitioner, her son, Josepn Plaskon, also Mr. Otto Christensen, Mr. Mike Matus, Mr. John Hagan, Mr. Thos. Stberke, Mr. Patrick L. Joyce, Mr. Frank Fernan and Attorney John C. Grimshaw testified in addition to the introduction in evidence of photographs of the scene of the accident and the death certificate.

At the end of the petitioner's case the attorney for the respondent moved for a non-suit and the Court found that the petitioner had sustained the burden of making out a prima facie case that the deceased died as the result of an injury by accident arising out of and in the course of his employment. The case was adjourned to give the respondent an opportunity to put in a defense and the case again came on for hearing on October 6, 1932, at which time the respondent rested, not producing any evidence in defense and the Court on October 25, 1932, signed a determination and rule for judgment in favor of the petitioner which is a part of the proceedings in this case and from which judgment this appeal has been taken.

The respondent applied to Chief Justice Gummere for a writ of certiorari to review the order made by the Deputy Commissioner, which was denied. The respondent then appealed to the Common Pleas Court, which affirmed the determination and award of the said bureau in favor of the petitioner.

The respondent applied to Chief Justice Brogan for a writ of certiorari which was denied

and then to Part II of the Supreme Court. The writ having been granted, the matter came before the Supreme Court, the Court affirmed the judgment and from which judgment appeal was taken to the Court of Errors and Appeals.

THE LAW.

POINT I.

In behalf of the petitioner-appellee it is contended that the Workmen's Compensation Bureau had jurisdiction of this matter and as the decision of the Court was a matter of discretion it is not reviewable on appeal to the Common Pleas Court or on a review in the Supreme Court of the Common Pleas Court's decision on the appeal and further on appeal to the Court of Errors and Appeals from a judgment of affirmance by the Supreme Court.

In the case of *Rose v. Wagner Construction Company*, reported in 2 N. J. M. R. 118, a New Jersey Supreme Court case before Justices TRENCHARD and PARKER, it was held:

“May the commissioner set aside his judgment already entered in the county clerk's office and order a retrial? Held, that he has that power.”

On the question of jurisdiction the Court says:

“This is a certiorari to the award of compensation by the deputy commissioner of labor. The fundamental question raised is whether that commissioner has jurisdiction to open a judgment entered by him and to order a retrial.”

“We cannot agree to the proposition that the commissioner’s power over his judgment ceased because it was docketed in the county clerk’s office. As we read the statute, it did not become a judgment until so docketed or entered, and its entry in the county clerk’s office was no different from the entry of a judgment in the Court of Common Pleas or in the Circuit Court. That office is the depository of the records of both courts and under the statute, of the disposition by the commissioner or deputy commissioner, of these compensation cases; so that if he had jurisdiction to open the judgment at all the mere fact that it had been entered of record in the county clerk’s office would not affect that jurisdiction.”

On the question of whether there was jurisdiction to open the judgment, the Court holds:

“But we consider that the statute does confer power to open such judgments, if not expressly yet by plain implication. Section 11 of the act of 1918, page 433, both in its form as there enacted, and as amended in 1921 (p. 733), provides that ‘the judgment of the said bureau shall be final and conclusive between the parties, and shall bar any subsequent action or proceeding, unless reopened by the said bureau or appealed as hereinafter provided.’ It is argued for the prosecutors that the subsequent portion of the statute contains no provisions with respect to reopening judgment and does contain provisions with respect to appeal, and that we should, therefore, conclude that, because there is no provision for reopening as thereinafter provided, there can be no reopening. Our reading of the statute leads to precisely the opposite results.

Taking the provision as a whole and in connection with its context, our construction of the same is that the clause 'as hereinafter provided' refers to the appeal and not the reopening; in other words, that a correct construction of the sentence calls for a comma after the word 'bureau.' So read, there is, as we have just said, a plain implication of power to reopen, and this implication is in no way impaired by the previous provisions in section 10 with respect to modifying awards of compensation. We conclude, therefore, that the writ should be dismissed."

Thus the authorities declare to the effect that the Deputy Workmen's Compensation Commissioner had power to reopen the case and allow further testimony to be put in by the petitioner. It is also clear that this was a matter of discretion on the part of the Deputy Commissioner and that as such it cannot be reviewed on appeal. Therefore, the appeal to the Common Pleas Court must fail and likewise the attempt to review the Common Pleas Court decision by certiorari proceedings in the Supreme Court and now by appeal to the Court of Errors and Appeals from a judgment of affirmance by the Supreme Court.

In the case of *William H. Barkhorn and Company v. Zinno* (Supreme Court of New Jersey, October 28th, 1925), 130 Atl. page 823, Syl. #4; reopening case after motion for non-suit was made held matter resting on Trial Court's discretion.

"Reopening case after motion for non-suit was made held matter resting in Trial

Court's discretion, and presenting no basis for error."

In the case of *Hannon v. Delaware, L. and W. R. Co.* (Court of Errors and Appeals of New Jersey, November 20th, 1922), 119 Atl. page 86, it was held:

"For * * * reopening of case for further evidence discretionary with Court."

It was within the discretion of the Court to reopen the case after it was closed and allow another witness to be called.

"Five * * * exercise of discretion in reopening case and permitting other witness to testify not reviewable on error."

Court's exercise of discretion in reopening case and allowing another witness to testify is not reviewable on error.

In *Assets Development Company v. Wall* (Court of Errors and Appeals of New Jersey, November 20th, 1922), 119 Atl. page 10, the Court held:

"A Court has power to open a judgment on good cause shown, at any time while the cause remains under its control, provided the moving party embraces the first opportunity he has of presenting his case.

"An application to open a judgment regularly entered is addressed wholly to the discretion of the Court in which it was rendered, and *the determination of the Court is not reviewable on appeal.*

"That the courts of this state, whose practice and procedure are in accordance with the rules and regulations of the common law, have power to open judgments

upon good cause shown is settled beyond controversy. It was exercised by the Supreme Court as early as the year 1795, in the case of *Miller v. Alexander*, 1 N. J. Law 400, and has continued to be exercised from that time to the present, whenever it was properly invoked, and the court may exercise this power at any time while the cause remains under its control, provided the moving party embraces the first opportunity he has of presenting his case. *Kelly v. Bell*, 17 N. J. Law 270.

"It is equally well settled that by the common law an application to open a judgment regularly entered is addressed wholly to the discretion of the court in which it was rendered, and *that consequently a writ of error (an appeal under our present practice) will not lie to review the determination of that court.* *Smith v. Livesey*, 67 N. J. Law 269, 51 Atl. 453."

In the case of the *First National Bank of Red Bank v. George S. Jones*, reported in 44 N. J. L. page 60, it was held as follows:

"A writ of Error will not lie to the Pleas on a Rule discharging a Rule to Show Cause why a judgment regularly entered should not be opened to let in a proposed defense."

This case was heard before Justices BEASLEY, SCUDDER, REED and MAGIE, and the opinion was written by Chief Justice BEASLEY who said, amongst other things:

"This is a writ of error removing a rule which had been entered in the Monmouth Pleas, dismissing a rule which had been previously granted to show cause why a judgment which had been regularly

entered should not be opened. Such a rule as this has always been deemed incidental in the course of a suit, and discretionary in its character, and therefore not a subject to be reviewed on writ of error. When the Court has exercised its discretion in cases of this sort, it is impossible to say that any error in law has been permitted. This practice is entirely settled, and it conclusively negatives all rights to such a remedy. The admission of a principle sustaining this procedure would very largely increase the litigation of this Court."

In the case of the *Trade Insurance Co. v. Barraciff*, reported in 45 N. J. Law 543, 46 Am. Rep. 792, it is held:

"Whether a plaintiff, after resting shall be allowed to reopen his case and produce further testimony, is a matter addressed to the discretion of the trial court, whose action thereon cannot be reviewed, by writ of error."

In *Hannon v. Delaware, L. & W. R. Co.* (Court of Errors and Appeals of New Jersey, November 20th, 1922), reported in 119 Atl. Rep. 86 and 98 N. J. L. 191, the Court held:

"It was within the discretion of the Court to reopen the case after it was closed and allow another witness to be called."

The Court of Errors and Appeals held:

"Court's exercise of discretion in reopening case and allowing another witness to testify is not reviewable on error."

The respondent had ample time and oppor-

tunity on the proceedings upon the rule to show cause to question the proceedings, to further bring to the Deputy Commissioner the advisability of having the witnesses who had signed affidavits produced in Court before the Deputy Commissioner signed an order on the argument on the rule to show cause. The respondent did not make such move nor did the respondent file answering affidavits or a memorandum of law. Although there may be certain technicalities involved in a proceeding of this kind which would under the practice act give to the respondent certain grounds for objection, it is the petitioner's contention that any technicality that is raised at this time by the respondent was waived. The respondent did not object to the proceedings as not being in accordance with the practice act at the proper time. The respondent did not make a demand for the producing of the witnesses who signed the affidavits in question nor did they raise any objection on the proceedings in connection with the rule to show cause. The respondent further failed to in any way contradict the contentions of the petitioner.

If, after all that, the allowance of the rule to show cause was error, the respondent waived their rights to review the question by not applying to the Supreme Court for a writ of certiorari at that time, but instead they permitted the case to go to trial on its merits. The respondent cannot at this time, after the case has been tried on its merits, raise this question on appeal to the Common Pleas Court, nor in the proceeding in the Supreme Court to review the Common Pleas' judgment entered on the ap-

peal, as this was a discretionary action on the part of the Court that is not reviewable on appeal, nor can they raise the question on appeal to the Court of Errors and Appeals from a judgment of affirmance by the Supreme Court.

POINT II.

There was no abuse of the Commissioner's exercise of discretion as the evidence was newly discovered; it had in fact been discovered since the former trial; by the use of reasonable diligence it could not have been obtained prior to or at the time of the previous trial; and it was such testimony as was material to the issue and went to the merits of the case and was not cumulative. The Common Pleas Court did not err in sustaining the Bureau's finding on a discretionary matter. The Supreme Court has affirmed the judgment of the lower Court.

In support of the petitioner-appellee's contention that the evidence in question is newly discovered evidence it is maintained that the evidence on the original trial described the accident as witnessed by an uninterested witness, an employee of the Standard Oil Company, the recovering of the body and the testimony of two of the employees of the National Sulphur Company pertaining to the facts that transpired prior to the accident. These were details as to the movements of the deceased and the two witnesses, and the testimony as it stood failed to give all of the facts pertinent to this case and

which were not known by the petitioner-appellee at the time of the original trial and which facts involved a custom employed by the employees of the National Sulphur Company. These facts were not known by the public and when this custom which was employed to the interest of the respondent, was presented in the Compensation Court at the formal proceedings referred to it was of such a nature that the Workmen's Compensation Bureau reversed its original determination and found that there was an injury by accident arising out of and in the course of employment and found as a matter of law that it was within the power of said court, to reopen the case to take such testimony which, as a matter of fact, was newly discovered evidence and which if presented would make out a *prima facie* case on behalf of the petitioner.

The petitioner-appellee cites the following cases on the question of newly discovered evidence.

In the case of *Kursheedt, et al., v. Standard Bleachery Company, et al.* (Supreme Court of New Jersey, Nov. 9, 1908), 77 N. J. L. page 99; 71 Atl. Rep. page 39, the Court held:

“On an application for a new trial on the ground of newly discovered evidence, if it appears that testimony has in fact been discovered since the former trial, which, by the use of reasonable diligence, could not then have been obtained, and that such testimony is material to the issue, goes to the merits of the case, and is not cumulative, the application will be granted.”

Argued, June Term, 1908, before GUMMERE, C. J., and TRENCHARD and MINTURN, JJ.

TRENCHARD, J. "The plaintiffs were in the business of making aprons from bleached goods called 'lawn,' and bought the goods unbleached 'in the gray,' as it is called, and at different times between January 1, 1905, and May, 1907, sent such goods amounting to 3,159,873 yards to the defendants' bleachery to be bleached. The plaintiffs' claim was that the process of bleaching caused a stretch or increase in the goods bleached, amounting to at least one per cent of the yardage, and that by the contract between the parties, the plaintiffs were entitled to this stretch, and, notwithstanding the plaintiffs' rights, the defendants had appropriated the stretch to their own use. The defense seems to have been a denial that the goods had been stretched by the bleaching in the defendants' works.

"The jury found a verdict for the defendants, whereupon the plaintiffs obtained a rule to show cause why a new trial should not be granted on the grounds, among others of newly discovered evidence and that the verdict was contrary to the weight of the evidence.

"Reviewing the evidence before the jury, it appears that there was no substantial dispute that, under the contract between the parties, the plaintiffs were entitled to the stretch, if any that arose from bleaching. To sustain the verdict for the defendants, the jury must have been able to properly find that the goods were stretched and that the stretch was appropriated as claimed. With respect to this question, we are in such doubt that we cannot say that the verdict is so clearly against the weight of the evidence

as to justify us in disturbing it on that ground.

“Coming now to the new evidence taken under the rule, we observe that it is of three kinds: First, That relating to the ‘count’ or the number of threads to the inch in the lawns bleached for the plaintiffs by the defendant. Second, That relating to the ‘Northrup Loom.’ Third, *Direct evidence given by certain former employees of the defendants as to the stretch or ‘overs’ which was obtained at the works of the Standard Bleachery and what was done with it.* It is unnecessary to state with greater particularity this evidence, it is sufficient to say that much, if not all, of it has in fact been discovered since the former trial; that, by the use of reasonable diligence, it could not have been then obtained; that is material to the issue and goes to the merits of the case, and is not cumulative. Under these circumstances the motion for a new trial ought not to be denied. *Van Ripper v. Dundee Mfg. Co.*, 33 N. J. Law 152. Let the rule to show cause be made absolute.”

The aforesaid case is cited as being directly in point with the case in issue. The newly discovered evidence comprised witnesses who were employed by the defendants at the time of trial and whose knowledge of the customs employed by the respective defendants was unavailable to the plaintiff until the said employees had severed their connections with their employers, and after the trial the plaintiff learned the true facts existing which was wholly within the knowledge of the defendants.

In *Ellis v. F. L. C. Martin Automobile Co.* (Supreme Court of New Jersey, April 7, 1909) 72 Atl. page 438; 77 N. J. L. p. 339, the Court held:

“An application for a new trial on the ground of newly discovered evidence will be granted when it appears that testimony has in fact been discovered since the former trial, which, by the use of reasonable diligence, could not then have been obtained, and that such testimony is material to the issue, goes to the merits of the case, and is not cumulative.”

In this case there was a verdict for the plaintiff, the plaintiff testifying “that he had purchased the car in April, 1907, and had used it continuously in his practice from that time until June 18, 1907, when he took it to the defendant to have the tire retreaded; that he never had any difficulty with it; that it was in good condition when he left it with the defendant. On the other hand, the witnesses called by the defendant company testified in effect that the car was badly in need of repair when it was brought to them.

The Court further held in this case:

“The newly discovered evidence is to the effect that in fact the car was bought by the plaintiff on June 14, 1907 (but four days before it was left at the garage), that it had never been in his possession before that time; that it was then four years old and was sold as it stood on the floor, without demonstration and without guarantee; and that its value was much less than that stated by the plaintiff on trial. With respect to this evidence it

is sufficient to say that it has in fact been discovered since the former trial; that by the use of reasonable diligence, it could not have been obtained then; that much if not all of it is material to the issue and goes to the merits of the case, and is not cumulative. Under these circumstances the motion for a new trial ought not to be denied. *Van Riper v. Dundee Mfg. Co.*, 33 N. J. Law, 152; *Kursheedt v. Standard Bleaching Co.*, N. J. Supreme 71 Atl. 30. Let the rule to show cause be made absolute."

In the case of *Corkery v. Central R. R. of New Jersey* (Supreme Court of New Jersey, June 12, 1899), 43 Atl. 655, the Court held:

"Evidence of a different kind and character from that produced on the trial, though bearing on the points litigated at the trial, is not cumulative."

Action by James Corkery against the Central Railroad of New Jersey. Rule to show cause why a new trial should not be granted. Rule made absolute.

"We think the rule must be made absolute on the ground of the discovered evidence. Reasonable diligence to procure the evidence for the defense at the trial seems to be shown. There was pertinent evidence undiscovered. While some of it was cumulative there was other evidence which, though bearing on the points litigated at the trial, was of a different kind and character from that produced and so not cumulative, under the doctrines of *Mulock v. Mulock*, 28 N. J. Eq. 15; *Manufacturing Co. v. Van Riper*, 33 N. J. Law 156."

In *Wolcott v. Jackson* (Court of Chancery of New Jersey, March 31, 1894), 28 Atl. page 1045; 52 N. J. 387, the Court held:

“1. A court of equity will not entertain a bill for a new trial in an action at law when the party seeking such relief can obtain it by application to the law court.

“2. By the statute of 1885 (Supp. Revision, p. 810) the time within which an application for a new trial may be made to a law court is made coextensive with that within which such an application may be made to a court of equity.”

As to the time upon which an application for a new trial on the grounds of newly discovered evidence shall be made the power of action of law is now as unlimited as that of act of equity and the Court says:

“It remains to be shown that the complainant has an adequate remedy at law; in other words, that if he has discovered new evidence which entitled him to a new trial, he can obtain it by applying to the Monmouth pleas. Formerly it was a rule of practice of all the law courts of this state that an application for a new trial on the ground of newly discovered evidence must be made within the term at which the trial was had, and not afterwards. While that rule was in force, *it was competent for this court to entertain a bill for a new trial in any case where the new evidence made a new trial necessary to the accomplishment of justice*, and it was made to appear that the new evidence could not have been discovered by the exercise of reasonable effort and diligence, in time to have been used on the

trial, or on an application to the law court for a new trial. *Had equity not assumed jurisdiction in such cases it is evident that a defeated litigant in a suit at law, who, according to the real truth of the case, had right on his side, would have been remediless; and that is a condition of affairs which no enlightened system of jurisprudence will tolerate.* But the rule of limitation above mentioned has been abrogated. *The period within which a law court may now grant a new trial is quite as unlimited as that within which this court may do so.* By a statute passed in 1885, it is enacted 'that it shall not be necessary to file a bill in equity to obtain a new trial in an action at law, merely because the term in which the verdict was rendered has expired, but a new trial may be granted by a law court after the expiration of the term.' Supp. Revision page 810, page 12. There can be no question I think, that, if the complainant can establish a sufficient case, he can, by force of this statute, obtain a new trial in the Monmouth Pleas. The time within which he must make his application is not defined or limited by the statute, but, in order to put an end to litigation, and to bring about a state of repose, he is required, by general principles of justice, to proceed with diligence, and make his application within a reasonable time."

POINT III.

The petitioner-appellee wishes to draw to the Court's attention the question of justice involved and to which end the Court in this State will go a long way. From the reading of the case in issue, in its entirety, it is contended that there was a gross miscarriage of justice in the first instance. When the facts were brought before the Deputy Commissioner he deemed it proper, equitable and just to rectify this gross miscarriage of justice and render a final judgment in favor of the petitioner-appellee. Justice Perskie's opinion and affirmance by the Supreme Court is very definite and conclusive.

The Court is referred to the following citation from Corpus Juris (46 C. J. 416, paragraph 472, Interest of Justice):

"New trials have been granted many times in the interest of justice. Where an injustice has been done, and a further trial is necessary to secure justice a trial court has not only the right and inherent power, but also the duty, to grant a new trial. Conversely, a new trial should not be granted unless it appears that an injustice has been done." *Kursheedt v. Standard Bleachery Co.*, 80 N. J. L. 34, 76 A. 322.

The Court will note that Corpus Juris cites the case of *Kursheedt v. Standard Bleachery Co.*, 80 N. J. L. 34, 76 A. 322, as cited in detail in this brief on page 13.

The Court is well acquainted with the reme-

dial purposes of the Workmen's Compensation Act in this State, of the broad interpretation given to the provisions of the said act by the courts of this state and where a gross injustice has been done, the petitioner-appellee contends that she is protected under the provisions of the aforesaid act based not only upon the act but upon the interpretation of the act at various times by our courts. The aforesaid case is directly in line, demonstrating the extent to which the courts in this state will go to mete out justice.

The Court is also referred in this connection to the case of *Seaboard By-Products v. Lusecs* (Supreme Court of New Jersey, June 23, 1924), 123 Atl. 136:

“3—Master and servant—Compensation Act liberally construed. The Workmen's Compensation Act should receive liberal construction.”

POINT IV.

The petitioner-appellee contends that the proceedings taken in this case were proper and that their propriety has been passed on by the Court of Errors and Appeals, in the case of *Katz v. Zapela*, 163 Atl. 662, where on *ex parte* affidavits the case was ordered reopened by the Deputy Compensation Commissioner.

The Court is referred to the case of *Rose v. Wagner Construction Company*, cited on page 5 of this brief, and also the case of *Katz v. Zapela*, 159 Atl. 306, cited in detail below:

“1—Master and Servant.

Workmen's Compensation Bureau has jurisdiction to control its judgment while cause is within its control, provided party seeking relief moves at first opportunity.

“2—Master and Servant.

Workmen's Compensation Bureau properly vacated fraudulently induced dismissal of compensation proceedings, claimants having acted diligently.”

“Proceeding under the Workmen's Compensation Law by Fannie Zapela, claimant, for the death of her husband, opposed by Harry Katz, employer. To review an order of the Workmen's Compensation Bureau, vacating its order of dismissal and reopening the proceedings, Harry Katz brings certiorari.

“Writ dismissed. Argued October Term, 1931, before TRENCHARD, DALY, and DONGES, JJ.

“*Per Curiam*: This writ of certiorari brings up for review an order of the Workmen's Compensation Bureau which vacated an order made on February 28, 1929, which latter order dismissed the petition for compensation of the defendant in certiorari.

“Fannie Zapela (hereinafter sometimes called the petitioner) is seeking to obtain compensation for the death of her husband as the result of an accident arising out of and in the course of his employment as a painter by Harry Katz, hereinafter sometimes called the prosecutor.

“The accident occurred in New York City, on January 19, 1928. Compensation proceedings were instituted in New York and resulted in judgment in favor of Mrs.

Zapela against Katz, but not against the insurance carrier, on the ground that by the terms of the insurance policy the coverage was confined to the employer's operating in the State of New Jersey. This judgment was affirmed by the Appellate Division on February 19, 1929, 225 App. Div. 836, 232 N. Y. S. 926.

"The prosecutor resided and has his place of business in New Jersey.

"On December 4, 1928, the petitioner filed a petition in this state for compensation, which was dismissed on February 28, 1929, on the ground of lack of jurisdiction, the evidence then being, as in the New York case, that the hiring took place in New York. Suit was started in this state on the New York judgment and then discontinued. Apparently the judgment against Katz is uncollectible. Subsequently a petition was filed seeking to have the order of dismissal set aside and the proceedings reopened. On April 30, 1931, an order was entered to this effect and prosecutor now seeks to have it set aside.

"It appears that in the compensation case in New York, and at the time of the dismissal of the petition in New Jersey, Katz testified that he met the decedent in New York and hired him in that city. Later he was indicted for a violation of the New York statute in failing to carry insurance to cover his employees. Upon the trial of this indictment he testified that he hired decedent by telephone from his home in Jersey City. He further testified that his original story was prompted by an employee of the insurance company. Upon this testimony he was acquitted. So the petitioner now claims that a fraud was perpetrated upon the New Jersey Com-

pensation Bureau when the petition was dismissed. It appears that this is so.

“The prosecutor claims that the bureau was without jurisdiction to set aside the order dismissing the petition, and that it could obtain jurisdiction only by the filing of a new petition, which he says could not be done here because more than a year has elapsed since the accident.”

“(1, 2) But we consider that this case is controlled so far as this court is concerned, by the decision of the Supreme Court in the *Rose v. Wagner Construction Co.*, 2 N. J. Misd. R. 118, where it was said: ‘The petitioner was working at the Jersey City yards of the Erie Railroad Company when his leg was accidentally crushed in a turntable and had to be amputated. Claiming to be the employee of the Erie Railroad Company, and on the theory that the injury had been sustained in interstate commerce, he brought suit in the Federal Court in New York under federal statute. The trial of that suit was apparently delayed and, while it was pending, he brought the present action under the Workmen’s Compensation Act against both the Erie Railroad Company and the Wagner Construction Company in the alternative. Those companies appeared for trial on the day set, and petitioner did not appear. The Deputy Commissioner, after granting an adjournment of a few hours, went on with the case in the afternoon in the absence of petitioner. The Wagner Construction Company admitted that it was the employer and consented to the compensation award; the Erie Company moved for and obtained a dismissal. The Deputy Commissioner thereupon signed a judgment, which was entered as required

by the statute in the County Clerk's office. The claim of the prosecutor is that the jurisdiction of the Commissioner ended at this point. However, counsel for petitioner went afterwards to the Deputy Commissioner and obtained from him an order vacating his previous order for judgment and setting aside "all judgments entered in any court," and placing the case again on the Commissioner's calendar for hearing. It is claimed that the Deputy Commissioner had no power to take this action and that the previous judgment should stand irrevocably, except as affected by right of appeal * * *. But we consider that the statute does confer power to open such judgments, if not expressly, yet by plain implication. Section 11 of the Act of 1918, page 433, both in its form as there enacted, and as enacted, and as amended in 1921 (p. 733), provides that "the judgment of the said bureau shall be final and conclusive between the parties, and shall bar any subsequent action or proceeding, unless reopened by the said bureau or appealed as hereinafter provided." It is argued for the prosecutors that the subsequent portion of the statute contains no provision with respect to reopening judgment and does contain provisions with reference to appeal, and that we should, therefore, conclude that, because there is no provision for reopening as thereafter provided, there can be no reopening. Our reading of the statute leads to precisely the opposite result. Taking the provision as a whole and in connection with its context, our construction of the same is that the clause "as hereinafter provided" refers to the appeal and not the reopening; in other words, that a correct construction of the sentence calls for a

comma after the word "bureau." So read, there is, as we have just said, a plain implication of power to reopen, and this implication is in no way impaired by the previous provision in Section 10 with respect to modifying awards of compensation.'

"The cases cited by the prosecutor in the case at bar deal with the modification of awards and are distinguished by the above language.

"The effect of the above decision would seem to be to give the bureau the same control over its judgments that the common-law courts have, and the rule there is that the power may be exercised at any time that the cause remains under the court's control, provided the moving party embraces the first opportunity he has of presenting his case. *Assets Development Co. v. Wall*, 97 N. J. Law 469, 119 A. 10. The defendant in the instant case seems to have been diligent.

"The writ of certiorari will be dismissed, with costs. Affirmed by the New Jersey Court of Errors and Appeals on January 5, 1933, 163 A. 622."

The above case, like the one at issue, was heard on arguments of the respective counsel and on ex parte affidavits on a rule to show cause and on the return of said rule the ex parte affidavits were used and the rule made absolute by the Deputy Commissioner, reopening the case. The decision was reviewed by the Supreme Court on a writ of certiorari and sustained and it was also sustained by the Court of Errors and Appeals. If the respondent-appellant in the case at issue wanted to review the decision of the Deputy Commissioner on the rule to show cause he should have taken this same procedure and applied for a writ of certiorari.

POINT V.

The original order of dismissal, page 19 in the State of Case, was in the nature of an order of non-suit which would leave the petitioner-appellee in a position to file a new petition.

Counsel for the respondent in his affidavit, (2) page ~~A-3~~, refers to the rule to show cause, affidavits and proceedings in connection therewith regarding the opening of the original judgment. The question raised by the respondent-appellant is a moot question only because a non-suit having been originally granted, the petitioner could again file a formal petition for compensation. The petitioner is still in a position to file a new petition, inasmuch as the respondent-appellant has failed to comply with the provisions of law contained in Chapter 187, Laws of 1924, which requires the reporting of accidents and the filing of various forms. In case of such failure, the law provides as follows:

“Any employer or insurance carrier failing to make report as required by this act, shall in such instance be deprived of the defense provided in paragraph 23 (h) of the Workmen’s Compensation Act, approved April fourth, one thousand nine hundred and eleven, as chapter 95, as amended by chapter 93, Laws of 1919.”

Paragraph 23 (h) referred to above provides for a statute of limitations of one year from the date of accident or one year from the date of last payment of compensation. This respondent-

appellant having failed to comply with the provisions, the petitioner-appellee could have filed a new petition instead of moving to reopen and could still do so.

The following cases are cited in connection with the above.

In the case of *Frazier v. L. Bamberger & Co.*, 160 Atl. 630, affirmed by Court of Errors and Appeals, 166 Atl. 101, it was held:

“Finding that employer was deprived of one-year limitation defense, where employer failed to send supplemental report of accident and to file three other reports required, held justified.”

Also, in the case of *Franko v. Ohio Chemical Co.*, 150 A. 221, affirmed by Court of Errors and Appeals, 154 A. 632, the Court held:

“Evidence held to show employer’s knowledge of injury extending beyond waiting period, so as to require report of accident to plead limitation (Workmen’s Compensation Act, par. 23(h), as amended by P. L. 1919, p. 214, Sec. 9; P. L. 1924, p. 403, Sec. 6; P. L. 1925, p. 405).”

IN ANSWER TO THE RESPONDENT- APPELLANT’S BRIEF.

POINT I.

The respondent-appellant inserts in the State of Case a statement by the court stenographer of the New Jersey Department of Labor, Workmen’s Compensation Bureau, which is not sworn to and in which the stenographer states

that he has reviewed his stenographic notes on the argument of the rule to show cause. He states that the petitioner-appellee did not produce or offer the witnesses whose affidavits were presented in connection with the rule to show cause, but the respondent-appellant has failed to incorporate the stenographic record of the argument on the rule to show cause as a part of this record, and it must, therefore, be assumed that the order opening the judgment was justified, and in this connection I cite the case of *Greenbaum v. Higgins, et al.*, 147 A. 722, in which the Court holds as follows:

“1. Certiorari—Supreme Court on Certiorari, in absence of presentation of details of evidence on hearing, must assume order opening judgment was justified.

“Where evidence taken at hearing on rule to show cause why judgment should not be opened is not presented in detail on certiorari, Supreme Court must assume that evidence justified trial court’s order opening the judgment.”

There was no exception on the part of the respondent-appellant to the proceedings on the rule to show cause, nor any request on its part for the production of the witnesses whose affidavits were presented.

POINT II.

In answer to the respondent-appellant's argument in Point II, the facts of this case as noted in the State of Case are definite and conclusive and four courts of competent jurisdiction have found the facts in favor of the petitioner-appellee's contention.

The citations on various points cited hereinbefore, I feel, are ample to cover this question raised by the respondent-appellant.

POINT III.

The hearing before the Bureau was proper and regular under the circumstances.

The Court's attention should be drawn to the fact that this case was originally tried without a jury and the proceedings on the reopening were before the same Deputy Commissioner of the Workmen's Compensation Bureau, no jury being involved. At the hearings after the reopening the Deputy Commissioner had before him a written transcript of the testimony taken before him at the original hearing.

POINT IV.

In answer to the respondent-appellant's argument in Point IV, the discretionary power of the Bureau, although not appealable, was sustained by the Court of Common Pleas, the Supreme Court and the question of *ex parte* affidavits has been passed upon by the Court of Errors and Appeals in the case of *Katz v. Zapela*, 163 A. 662, cited on page 20 of this brief. (21)

The respondent-appellant cites Section 9, Chapter 149 of the Laws of 1918, supplementing the original Workmen's Compensation Act, providing as follows:

"At such hearing evidence, *exclusive of ex parte affidavits*, may be produced by both parties, but the official conducting such hearing shall not be bound by the rules of evidence."

The petitioner-appellee contends that this provision of the act applies only to hearings on the merits of a case and does not apply to motions or applications on rules to show cause. In this connection the Court is respectfully referred to the broad interpretation of the act in accordance with the decision of the Courts in this State on numerous occasions. The case of *Shaffer v. D'Arcy Spring Company*, 166 N. W. (Mich.), cited on page 23 of the respondent-appellant's brief, differs from the case in issue inasmuch as the affidavits which were used in the case at issue in connection with argument on the rule to show cause, and upon which the order to reopen

the case on the rule to show cause was signed by the Deputy Commissioner, were not used on the merits of the case. The witnesses that signed the said affidavits were presented in court and testified to the facts on the merits of the case and they were also presented for cross-examination as to the affidavits on the rule, as the record in this case will indicate. In the *Shaffer* case the affidavits were used without objection in the obtaining of the order reopening the case. In order that the Court may know the notation of the Court on the aforesaid case I wish to cite the following:

“3 —Depositions — Irregularity — Notice—Workmen’s Compensation Case.

“Where an injured servant gave the employer and insurer notice to take depositions on a day certain, but omitted the hour, and the depositions were taken, but the employer and insurer were not present, and subsequently the servant’s counsel wrote counsel for the adverse parties that it was not intended that the deposition should present the case on the merits, but simply go to whether he was entitled to an order reopening the case, and that if it was reopened he would then take other depositions to be used in the argument on the merits, the notice being irregular, the reception of the deposition in evidence against the employer’s and insurer’s objections was error.”

From the aforesaid the Court will appreciate that the case in issue differs from the citation of the respondent-appellant in that in the case in issue the witnesses who made affidavits that were used upon the rule to show cause were presented upon the trial on the merits. The *Michigan* case

implies that the use of improperly taken depositions which are analogous to *ex parte* affidavits, was perfectly proper on the question of securing a reopening but not on trial of case on the merits.

All cases cited on this point by respondent-appellant have to do with proceedings on the merits, which differ from proceedings to reopen a case. The Court is again referred to the decision entered in the case of *Katz v. Zapela*, 163 A. 662, cited on page 20. (21)

POINT V.

The allowance of counsel fee is discretionary, and, in view of the work done, of the amount involved, the fee is not unreasonable.

The counsel fee allowed by the Workmen's Compensation Bureau was assessed one-half against the respondent and one-half against the petitioner, and the respondent not wishing to abide by the decision of the Workmen's Compensation Bureau, it is reasonable that the fee on appeal should be assessed in its entirety against the respondent.

In Conclusion.

The Court is referred to the decisions of the Workmen's Compensation Bureau and the Judge of the Common Pleas Court as printed in the State of Case. The further trial was granted: first, upon the grounds of newly-discovered evi-

dence; second, upon the court's discretion; and, third, upon the gross injustice which was perpetrated upon this petitioner, not because of the petitioner's or her counsel's error, but because of facts which were only known to this respondent and which were unavailable to the petitioner.

The newly discovered evidence was such that the lower Court, upon hearing the evidence, did not hesitate to find in favor of the petitioner. The proceedings on the rule to show cause have not been presented to the Court by the respondent in the State of Case in its entirety, but only by way of affidavit from the court stenographer, citing certain points which the respondent was interested in, and, under the discretion of this Court, it must be assumed that the evidence justified the Trial Court's order in opening the original judgment of non-suit. The failure of the respondent-appellant to have reviewed the order opening the original judgment on the rule to show cause leave the respondent the only grounds for appeal involving the trial on its merits. However, the proceedings on the rule to show cause, the petitioner contends, were proper, in view of the decisions of the Court in this State, as cited in detail in this brief.

The evidence obtained by the petitioner which was presented as newly discovered evidence was, in fact, newly discovered and was unavailable to the petitioner at the time of the original trial and for a long time thereafter. The custom employed by this respondent was only learned by chance and was such a custom that no one unfamiliar with the operations of the respondent would be prompted to question any witness in

regard to them. These new facts were presented by the petitioner at the earliest available opportunity upon the petitioner learning of the existence of this custom, as brought out in the testimony.

The petitioner relies on these facts, which, taken together with the prior facts and testimony, will show the Court the gross injustice which was perpetrated upon the original trial and which your petitioner cannot be held responsible for.

Any technical error made by the petitioner upon the rule to show cause was waived upon the argument of the rule to show cause and the failure to review the order making it absolute, and further was covered upon the subsequent proceedings as stated and a part of this record.

The respondent-appellant raises the objections and cites their exceptions upon the proceedings involved on the rule to show cause. The respondent-appellant, however, has failed to submit to this Court a record of those proceedings, except the affidavit, and it must, therefore, be assumed that the Trial Court was justified in ordering the original judgment of non-suit opened, and the respondent-appellant has only the record of the trial on the merits upon which to appeal.

Finally, the Court is referred to the State of the Case, showing the respondent-appellant did not file answering affidavits, did not enter a defense (although the respondent had two witnesses in court who were still in the employ of the respondent), appealed to the Common Pleas Court to set aside this judgment but was affirmed, applied for writ of certiorari to the Chief Justice and denied in the following language:

“The application for writ of certiorari in the case of Plaskon v. National Sulphur Company has received careful consideration and after an examination of the record and the authorities cited on both sides I have concluded that the application should be denied”; thereafter, the writ of certiorari was granted after argument by the submission of briefs before Part II of the Supreme Court and after it was granted, the matter was submitted to the Supreme Court on briefs and the award ^{SUSTAINED} in an opinion by Justice Perskie, which covered every feature raised on appeal; the attention of the Court is respectfully called to Justice Perskie’s opinion as printed on page 67 of the State of Case; as this opinion clearly and concisely takes up each one of the issues raised by the prosecutor-appellant in its brief and decides each issue in favor of the petitioner-appellee, it is the contention of the petitioner-appellee that all features of law and fact have adequately been disposed of by all the Courts before whom the matter has been presented. The brief, as submitted to the Supreme Court by the prosecutor-appellant, was identical with the brief now submitted to the Court of Errors and Appeals.

The petitioner-appellee submits the matter on its merits to the Court and reiterates that the Court of Errors and Appeals case of *Katz v. Zapela* countenances the use in a compensation case of *ex parte* affidavits in granting a rule to show cause why a case should not be reopened in the same manner as was done in this case.

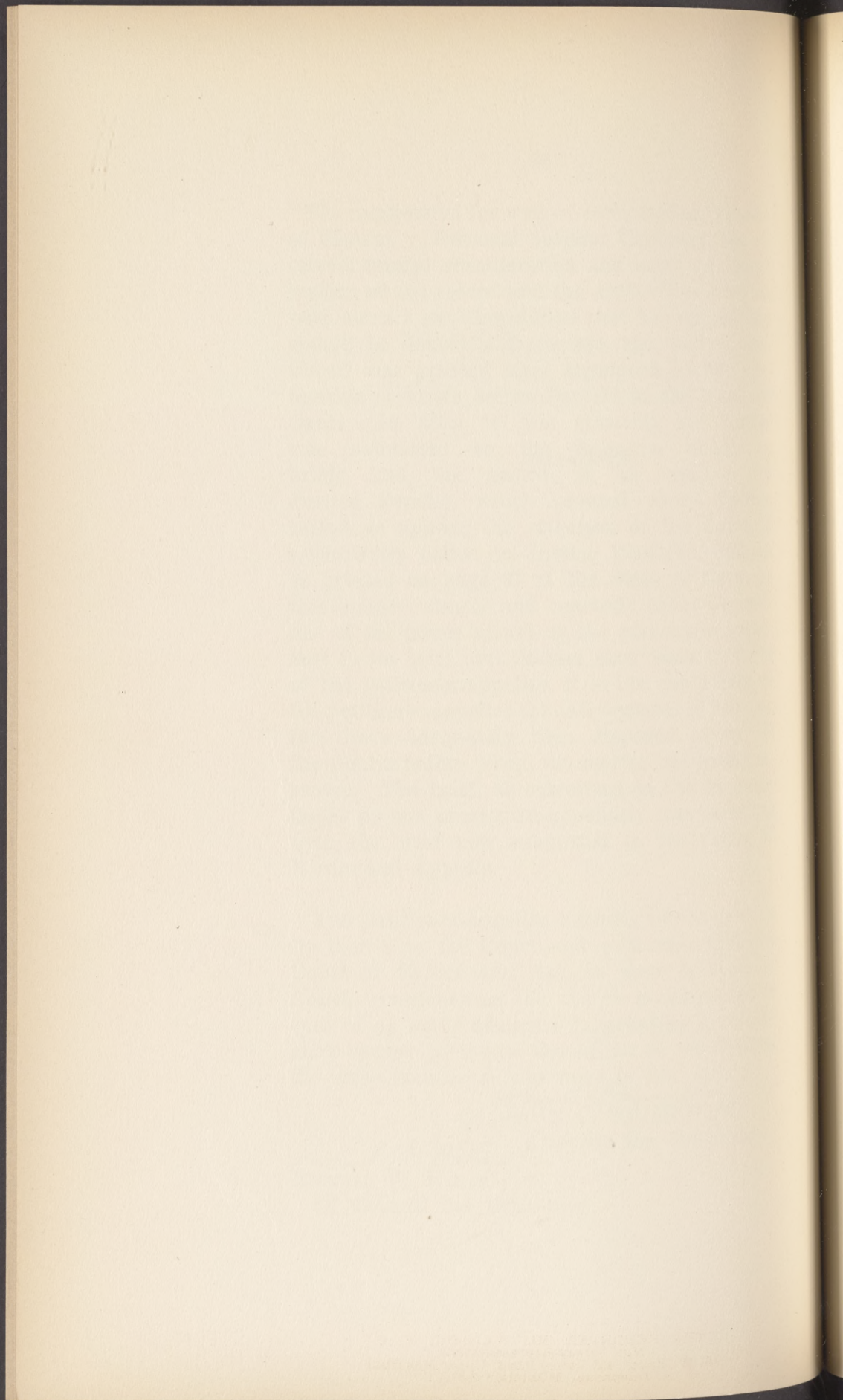
John C. Grimshaw
JOHN C. GRIMSHAW,

Attorney for Petitioner.

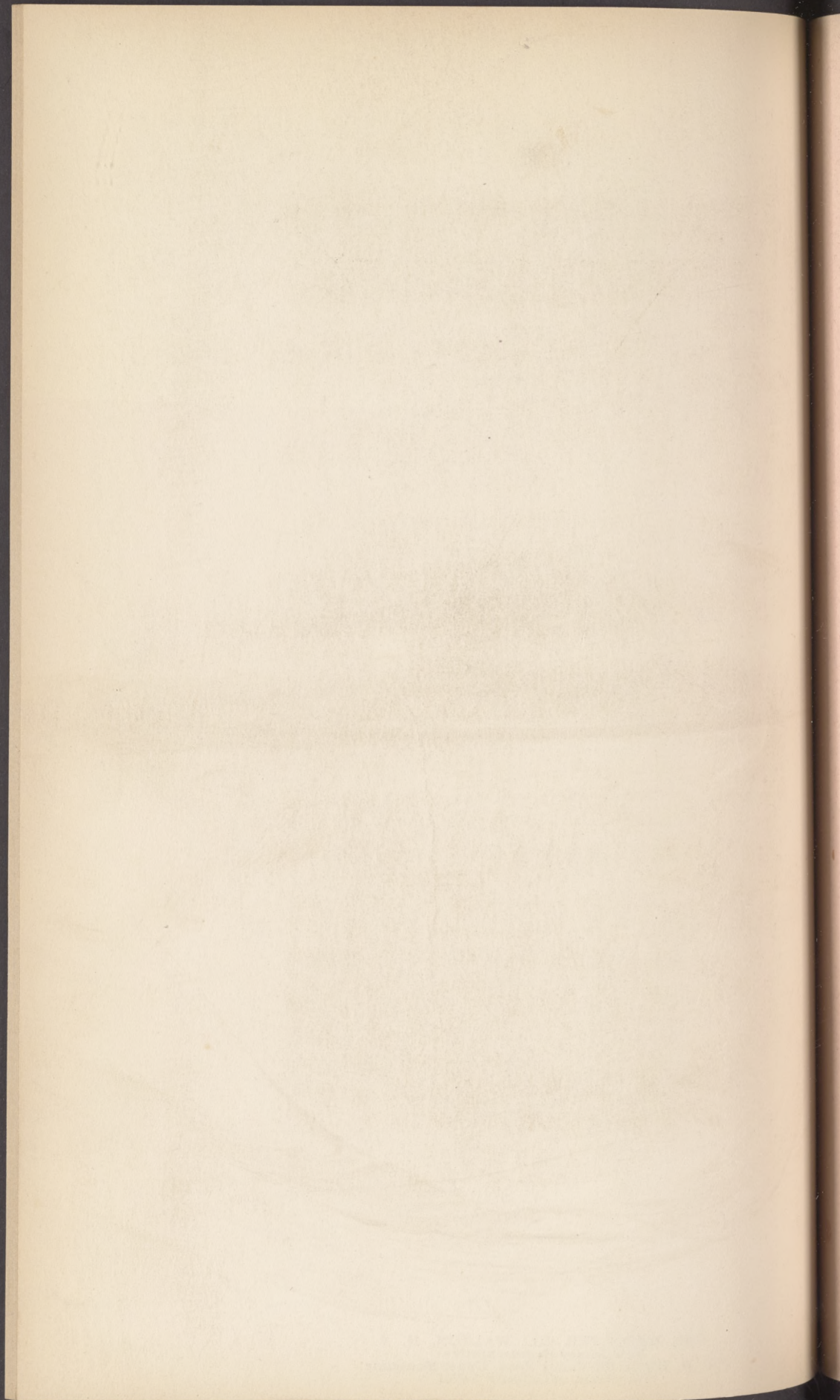
Richard W. Baker
RICHARD W. BAKER,

Of Counsel for Petitioner.

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