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**Employee's Claim Petition for Compensation.**

NEW JERSEY DEPARTMENT OF LABOR.

WORKMEN'S COMPENSATION BUREAU,

Trenton, N. J.

Employee's Claim Petition for Compensation.

GEORGE HERBERT, Petitioner,  vs.  NEWARK HARDWARE AND PLUMB- ING SUPPLY COMPANY, Respondent,	}	10
-------------------------------------------------------------------------------------------------------------------	---	----

Received at Trenton—1927 20  
Claim Petition No.....  
Petition Prepared ....., 19.....  
Attorney for Petitioner, SARA M. LEWITT, 128  
Market St., Newark, N. J.

To the Workmen's Compensation Bureau of New  
Jersey:

The claimant respectfully alleges the following 30  
facts:

1. What is your name? George Herbert.
2. Where do you live? 22 So. Orange St. Newark.
3. Sex Male. 4. Age 45. 5. Married? Yes.
6. By whom were you employed at the time of the accident? (Give name and business address) Meyers Newark Hardware & Plumbing Supply Co. 147 Mulberry St. Newark.
7. What was the business of your employer?.. 40

*Employee's Claim Petition for Compensation.*

10 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.

20

George Herbert,  
22 So. Orange Ave.

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

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

George Herbert.

Subscribed and sworn to before me, this 4th day of August, 1927, at Newark, N. J.

George Herbert,  
Atty. at Law of N. J.

40

*Employee's Claim Petition for Compensation.*

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

## TO THE RESPONDENT

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. 10

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts. 20

Workmen's Compensation Bureau,

W. E. Stubbs,  
Secretary.

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**Respondent's Answer to Employee's Claim  
Petition.**

NEW JERSEY DEPARTMENT OF LABOR.  
WORKMEN'S COMPENSATION BUREAU,  
Trenton, N. J.

Respondent's Answer to Employee's Claim Petition

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GEORGE HERBERT,  
Petitioner,

vs.

NEWARK HARDWARE AND PLUMB-  
ING SUPPLY COMPANY,  
Respondent,

20

Claim Petition No. 7092.  
....., 19....

Attorney for Respondent, JOSEPH C. PAUL, Esq.,  
44 Clinton St., Newark, N. J.

In answer to Claim Petition filed in this  
cause:

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1. What is the petitioner's name? George Herbert.
2. Where does he reside? 22 S. Orange St., Newark, N. J.
6. Was the petitioner in your employ at the time of the accident? Yes.
7. State your business: Plumbing.
8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him? .....

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*Respondent's Ans. to Employee's Claim Petition.*

9. Did you give such notice to him? .....
10. When did you first have knowledge of this accident? .....
11. Did you receive notice of this accident from the Petitioner? .....
12. If so, on what date? .....
13. Has any claim for compensation been made? 10  
.....
14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? .....
15. When did the accident happen? .....
16. Where did the accident happen? .....
17. What was the nature of the accident, and how did it happen? .....
18. On what date was the petitioner compelled to stop work because of injury? ..... 20
19. On what day was the injured well enough to work again? .....
20. If still disabled, on what date do you estimate he will be able to work? .....
21. Give your understanding of the nature of any injury from which he should recover?
22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member or impairment of any physical organ, Explain fully ..... 30
23. Were the wages fixed by piece-work? .....
24. If so, what was the average weekly wage of the injured? .....
25. If wages were fixed by the hour, state rate per hour .....
26. Give number of hours in an ordinary working day ..... 40

*Respondent's Ans. to Employee's Claim Petition.*

27. Give number of days in an ordinary working week .....
28. State the amount of weekly wages .....
29. How much money have you paid the injured as compensation (not including medical aid) since the accident? .....
- 10 30. Have you promised to pay compensation?..
31. If so, how much? .....
32. Was medical aid required? .....
34. Were you requested to supply the necessary medical service required by law? .....
35. Did you furnish this service? .....
36. If so, between what dates? .....
37. If not, give reason for failure to do so .....
38. Give name of physician and hospital rendering service at your direction .....
- 20 39. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reasons for this conclusion. We contend that the hernia received by the petitioner is not compensable within the contemplation of the Workmen's Compensation Act.

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*Respondent's Ans. to Employee's Claim Petition.*

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

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

.....  
Subscribed and sworn to before me, this.....  
.....day of ....., 19...  
at .....

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee or any other person authorized to administer an oath). 20

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

## WORKMEN'S COMPENSATION BUREAU.

10	GEORGE HERBERT, Petitioner,	}	Determination of Facts and Order for Judgment.
	vs.		
	NEWARK HARDWARE & PLUMB- ING SUPPLY Co., Respondent,		

On July 13, 1927, the petitioner, George Herbert, while in the employ of the Newark Hardware & Plumbing Supply Company, suffered an accident during the course of his employment, while lifting an exceptionally heavy combination gas and coal stove, when the man helping him put the stove on a truck, let go of his end, throwing the entire weight upon the petitioner. The petitioner's injury due to this accident manifested itself at the time, by a Hernia, and on September 30, 1927, the above captioned matter was tried and heard before your Honor and an award was made for Hernia, consisting of twenty weeks' compensation at the rate of seventeen dollars (\$17.00) per week, amounting to three hundred forty dollars (\$340.00) and a counsel fee of fifty dollars (\$50.00) was allowed the attorney for the petitioner.

This award was carried by the respondent to the Common Pleas Court, which award was affirmed by Judge Walter D. Van Riper, and from there it was carried again by the respondent to the Supreme Court, where it was affirmed again in an

*Determination of Facts and Order for Judgment.*

opinion dated August 1, 1928. The award made by your Honor of September 30, 1927, was paid to the petitioner on or about October 15, 1928.

On November 7, 1928, a petition was filed by the petitioner alleging that the petitioner was suffering from Locomotor Ataxia, Acute Retention of the Urine and was totally disabled.

The attorney for the respondent, made an application to the Court to dismiss the petition as filed on November 7, 1928, together with the amended petition filed several weeks later on the ground that the said petitions were filed out of time and that new matter was being alleged which was not alleged in the original petition. Commissioner Goas after hearing the arguments of both sides, dismissed the new petition as filed on November 7, 1928, together with the amended petition, but allowed the above captioned matter to be re-opened on the ground of increased disability, since the application to re-open the original case was made within one year from the date of the last payment of compensation as provided in the Workmen's Compensation Act, Chapter 149, Paragraph 5, of the Pamphlet Laws of 1918, page 31, Amended and Supplemented 1927 Edition.

Accordingly the above captioned matter was reopened on January 9, 1929, and the matter was tried and heard before your Honor on the ground of increased disability and it was proved by the witnesses and the medical testimony of Dr. I. Willner, Dr. Julius Sobin, Dr. Leo Y. Granger and Dr. Ambrose F. Dowd, that the petitioner was then suffering from Locomotor Ataxia or Tabes Dorsalis and that his present condition was the direct result of the accident suffered by

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*Determination of Facts and Order for Judgment.*

the petitioner on July 13, 1927, at which time, the petitioner suffered a severe strain to his abdomen and back which strain affected the petitioner's central nervous system and re-awakened a dormant condition of syphilis.

10 It was impossible at the time of the accident to determine the extent of the injuries suffered by the petitioner and the said injuries did not become manifest until some time after the original hearing. The testimony adduced at the hearing showed that the petitioner was not able to do any work whatsoever from the day of the accident until the present time and that his decline was gradual and rapid and the petitioner became progressively worse so that one year and a half after the accident he is admitted by both the physicians of the  
20 petitioner and the respondent to be a total physical wreck.

At the hearing on January 9, 1929, the testimony of the petitioner was to the effect that about twenty-five or thirty years ago, when the petitioner was a young boy he contracted a venereal disease, for which he was treated and apparently cured. From that time until shortly after the petitioner was injured in the accident of July 13, 1927, he  
30 was a robust healthy man, doing all kinds of heavy manual labor, such as riding bronchos, sharp shooting, traveling with a circus, locksmith work, etc. and for over three years he had been working for the Newark Hardware & Plumbing Supply Company, as a general repair man and laborer. During his employment at the Newark Hardware & Plumbing Supply Company, the petitioner was a competent, steady worker, and the testimony showed that during all that time, he  
40 lost only two days from work due to an upset stomach or headache.

*Determination of Facts and Order for Judgment.*

From the testimony of the petitioner's wife, and several of the witnesses who knew him for a period of from twelve to twenty years, the petitioner was a man in good health, who worked steadily and except for an occasional attack of rheumatism, he was never sick. These rheumatic attacks were apparently of so little moment that he never consulted Dr. Granger about them, although Dr. Granger was the family physician and visited the house frequently because of the children. 10

Shortly after the accident, the petitioner became weaker and weaker and appeared to be losing the use of his lower limbs and when Dr. Granger was called he diagnosed the petitioner's case as Locomotor Ataxia. 20

Upon cross examination by Mr. Paul, Dr. Granger said that when he was called in to treat Mr. Herbert, the day of the accident, he found the petitioner suffering from a Hernia and Acute Retention of the Urine. He described the Hernia as being a traumatic one in which there was a tearing and a puncturing of the abdominal wall with a protrusion of the gut and a tearing of the abdominal muscles, and that the same force which caused the Hernia also strained the muscles of the back which injured and influenced the spinal cord. He further testified that the accident in this case was a direct shock to the petitioner's central nervous system, which shock aggravated and accelerated a condition already existing in the petitioner's system. All of the physicians testifying agreed that the petitioner was totally disabled. Upon cross examination Dr. Ambrose F. Dowd, also testified that the trauma that the petitioner sustained aggravated 30 40

*Determination of Facts and Order for Judgment.*

and accelerated the pre-existing syphilis of his central nervous system, and the same force which caused the Hernia also strained the muscles of his back which injured and influenced the spinal cord.

10 After having heard all of the testimony of the witnesses together with the medical testimony of both the petitioner and the respondent, Commissioner Harry A. Goas, found that the petitioner's present physical condition was super-  
 20 induced by the accident sustained on July 13, 1927, which accident accentuated and reawakened and brought to a critical stage a dormant condition of syphilis. Commissioner Harry A. Goas therefore allowed the petitioner 400 weeks' compensation for the petitioner's permanent disability at the rate of seventeen dollars (\$17.00) per week from which was to be deducted the 20 weeks already paid to the petitioner on the original award and further allowed the petitioner 25 weeks of temporary disability.

I further find that a counsel fee of five hundred dollars (\$500.00) for the petitioner's attorney is to be paid by the respondent.

30 On May 16, 1929, counsel for the respondent had a re-argument of the case before Commissioner Harry A. Goas, at which hearing the Commissioner again found for the petitioner.

June 3, 1929.

HARRY J. GOAS,  
Deputy Commissioner.

**Notice of Appeal.**

**WORKMEN'S COMPENSATION BUREAU  
OF THE STATE OF NEW JERSEY.**

<hr/> GEORGE HERBERT, Petitioner,  vs.  NEWARK HARDWARE & PLUMB- ING SUPPLY Co., Respondent, <hr/>	}	On Petition.	10
		Notice of Appeal.	

- To William E. Stubbs, Secretary ,Trenton, N. J.
- To Clerk of Common Pleas, Essex County. 20
- To Sara M. Lewitt, attorney for petitioner, 128  
Market Street, Newark, N. J.

Please Take Notice, that the respondent, Newark Hardware & Plumbing Supply Co. does appeal from the judgment of the Workmen's Compensation Bureau of the State of New Jersey in the above cause, to the Essex County Common Pleas.

Said judgment and determination of the facts 30  
thereon, dated June 3, 1929, and signed by Harry J. Goas, Deputy Commissioner of Compensation, and the effect of said judgment is to make an award against the respondent and the respondent appeals from the whole of said award, on the grounds to wit:

1. That the petitioner's claim for compensation is barred by the Statute of Limitations, as set forth in the Workmen's Compensation Statutes as amended. 40

*Notice of Appeal.*

2. That the Deputy Commissioner of Compensation was in error in signing the award for compensation for the reason that under the Hernia Section of the Statute it is provided that upon paying all the compensation due for a hernia, the respondent's obligation shall cease and terminate  
10 unless death results from the hernia and the petitioner in this case is still living.

3. That the award is against the weight of evidence and the petitioner did not sustain the burden of proof in showing that his condition today is the result of a hernia which he sustained on July 13, 1927.

4. That the Deputy Commissioner was in  
20 error in finding that the petitioner was entitled to additional compensation for the reason that locomotor ataxia or tabes is not the result of aggravation of a previous existing condition but that it is a slow, progressive disease and that the hernia which the petitioner sustained on June 13, 1927, had nothing whatever to do with the petitioner's present condition.

JOSEPH C. PAUL,  
Attorney for Respondent-Appellant.

30 July 1, 1929.

## Order.

## ESSEX COUNTY COURT OF COMMON PLEAS

<p style="text-align: center;">GEORGE HERBERT, Petitioner,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">NEWARK HARDWARE &amp; PLUMB- ING SUPPLY Co., Respondent,</p>	}	<p>On Petition, etc.      10</p> <p>Order.      10</p>
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It appearing that the respondent-appellant here in has duly filed notice of appeal to the Essex County Court of Common Pleas from the judgment rendered in the cause in the Workmen's Compensation Bureau of the State of New Jersey, and that transcript of record and testimony has been filed, 20

It is on the      day of July, 1929, upon the application of Joseph C. Paul, attorney of the respondent, appellant,

ORDERED that the hearing of said appeal be had on the 24th day of September, 1929, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Essex County Court of Common Pleas, in the Court House in Newark before Hon. Dallas Flannagan, Judge, of the Essex County Court of Common Pleas. 30

Dated July 27, 1929.

DALLAS FLANNAGAN,  
Judge.

On motion of  
JOSEPH C. PAUL,  
Of Counsel. 40



*Memorandum Opinion.*

made within a year of the payment on October 15, 1928.

On the trial the weight of evidence supports both the petitioner's claim that the ultimate result of the accident was Locomotor Ataxia as well as the petitioner's good faith in the matter. The Commissioner awarded petitioner 400 weeks' compensation for permanent disability at seventeen (\$17.00) dollars per week, from which was to be deducted the twenty weeks already paid to the petitioner, besides five hundred (\$500.00) dollars attorney's fees. 10

In Workmen's Compensation cases there can be but one proceeding for all the results of the same injury or accident. Any further petition for results of the same accident not disclosed on the hearing as and for a separate proceeding must be rejected. The weight of authority is that under the general equity power to amend or grant rehearings, any important matter not disclosed or involved in the original hearing may, however, be added as an amendment to the original petition as and for a rehearing thereof. Even then the workman must apply for relief within the statutory time within which the Compensation Bureau's Jurisdiction to rescind, alter and amend its decision continues Ch. 95, Laws 1911, Sec. 23, Sub-Div. "h," ch. 149, L. 1918, sec. 5. 20 30

The new order in such cases would be a modification or amendment of the prior award.

*Ehrhart v. Industrial Accident Commission*, 172 Cal. 626; 158 Pac. Rep. 194-5;

*De Lucca v. Venzetti*, 128 Atl. Rep. 545-6;

*Benjamin & Johnes v. Brabbon*, 103 Atl.

Rep. 689-90, affirmed 105 Atl. Rep. 717. 40

*Memorandum Opinion.*

10 But good faith on the part of the workman and of his advisors must be (and here it was) established before a hearing is had on the ground that the full extent of the injury was neither disclosed nor suspected at the time of original hearing. (Indicated in *Hamilton v. Congoleum Nairn*, 7 Misc. Rep. 248; *Wheeler v. Walcott Holding Co.*, 7 Misc. Rep. 206).

The conclusion of Workmen's Compensation Bureau will be affirmed with one hundred and fifty (\$150.00) dollars additional counsel fee in this court. A determination may be made under rule 6 of this Court.

(Signed) DALLAS FLANNAGAN.

November 12, 1929.

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**Determination of Facts and Order.**

## ESSEX COUNTY COURT OF COMMON PLEAS

<p style="text-align: center;">GEORGE HERBERT, Petitioner-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">NEWARK HARDWARE PLUMBING SUPPLY COMPANY, Respondent-Appellant.</p>	}	<p>On Appeal.</p> <p>Determination of Facts and Order.</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p>
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A petition having been filed in the above matter for compensation to which the petitioner was entitled by virtue of the 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, etc," as revised with amendments as of July 1st and the 4th, 1921, together with the several amendments and supplements thereto and acts amendatory thereof, and particularly Chapter 10 of Section 2 of Laws of 1921; and the respondent having duly filed an answer to the within petition and a time and place for the hearing of the petition having been fixed by the Workmen's Compensation Bureau of the Department of Labor in the State of New Jersey, pursuant to Chapter 149 of the Laws of 1918, and the same having come on for a hearing before Commissioner Goas, on the said petition and answer, admissions in open court and testimony taken before the said Commissioner, and the said Commissioner having filed a determination of facts and order providing for com-

*Determination of Facts and Order.*

10       pensation as follows: "That judgment final be entered in favor of the petitioner and against the respondent and that the respondent make payments to the petitioner as follows: for total disability consisting of four hundred weeks at the rate of seventeen dollars (\$17.00) per week from which was to be deducted the twenty weeks already paid to the petitioner on the original award. The Commissioner further allowed the petitioner twenty-five weeks' temporary disability, together with a counsel fee to be paid to the petitioner's attorney, by the respondent in the sum of five hundred dollars, and the respondent having given notice of appeal, and having perfected such appeal according to Chapter 149 of the Laws of 1918, and this Court having set a time and place for a hearing of the said appeal, the said appeal came on Sept. 24, 1929 in the presence of Sara M. Lewitt, attorney for the petitioner and Joseph C. Paul, attorney for the respondent, and the Court requested that "Briefs" be submitted. Upon the filing and reading of the Briefs hereby submitted by the respective counsel, I do find and determine from the evidence and said stipulation as follows:

30       1. That George Herbert had been for some-time previous and on July 13, 1927 in the employ of the above respondent.

2. That his duties were that of a repair man and general helper at the respondent's store in the City of Newark, County of Essex and State of New Jersey.

3. That his wages amounted to thirty-two dollars and fifty cents (\$32.50) per week.

40       4. That on the 13th day of July, 1927, petitioner-appellee met with an accident arising out

*Determination of Facts and Order.*

of and in the course of his employment; that intoxication was not the proximate cause of said accident, nor was the injury intentionally self-inflicted.

5. That the respondent-appellant was duly served with a petition and order in a formal proceeding as provided by an act, known as the Workmen's Compensation Act, together with the various supplements and amendments thereto. 10

6. That the respondent-appellant had knowledge of the said accident within the time prescribed by law.

7. That the said accident resulted while the petitioner-appellee was assisting his fellow employees in lifting a heavy coal and gas stove. It appears that one of the helpers let go of the end because of an injury to his hand; and that left the entire weight of the stove on the petitioner. The petitioner was working and lifting under circumstances which sometimes are calculated to produce the very thing that happened here, rupture, or ruptured intestines, or gut causing Hernia, together with an acute retention of the urine. At the same time the petitioner suffered a severe strain to his abdomen and back, which strain affected the petitioner's central nervous system and reawakened a dormant condition of syphilis. 20 30

8. As a result of the said accident, the petitioner suffered an immediate disability from the 13th day of July, 1927, and from the medical opinions of both petitioner's and respondent's physicians, will never be able to work again.

9. That the petitioner-appellee is entitled in accordance with the maximum and minimum pro- 40

*Determination of Facts and Order.*

visions of the Act, to compensation at the rate of seventeen dollars per week.

10 That the petitioner-appellee is entitled to compensation for permanent disability for a period of four hundred (400) weeks, together with temporary disability for a period of twenty-five weeks at the rate of seventeen dollars (\$17.00) per week, and interest from the 13th day of July, 1927, together with the taxed costs. From this allowance is to be deducted the twenty weeks already paid the petitioner for a hernia.

20 11. That the respondent-appellant pay a counsel fee on this appeal of \$150.00 and taxed costs to Sara M. Lewitt for legal services rendered on this appeal, which shall be taxed as part of the costs in addition to the counsel fee of five hundred dollars awarded by Deputy Commissioner Goas, on the original trial of said action, and that all counsel fees together with all taxed costs to be paid by the respondent-appellant.

30 It is therefore on this 9th day of January, 1930, ordered that judgment final be entered in favor of George Herbert, the petitioner-appellee and against the Newark Hardware Plumbing Supply Company, respondent-appellant, for a period of four hundred and five weeks a total of six thousand eight hundred and eighty-five dollars (\$6885.00).

And it is further ordered that the amount of compensation which has already accrued from the 13th day of July, 1927, to the present date together with all taxed costs, interest and counsel fees shall be paid in bulk forthwith by the respondent-appellant.

40 DALLAS FLANNAGAN,  
Judge of Essex County  
Court of Common Pleas.

**Judgment.**

## ESSEX COUNTY COURT OF COMMON PLEAS

50432

GEORGE HERBERT,  
 Petitioner,  
 vs.

NEWARK HARDWARE & PLUMBING  
 SUPPLY COMPANY,  
 Respondent.

} On Petition. 10

*On Determination after Hear-  
 ing of Harry J. Goas, Deputy  
 Commissioner. Judgment en-  
 tered July 18, 1929.*

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Sara M. Lewitt, attorney for petitioner.

Judgment on petition, on determination after hearing of Harry J. Goas, Deputy Commissioner, in the above-entitled action was rendered on the eighteenth day of July, A. D. nineteen hundred and twenty-nine in favor of the petitioner, George Herbert and against the respondent Newark Hardware & Plumbing Supply Company for the sum 30 following:

The petitioner was allowed 400 weeks' compensation for the petitioner's permanent disability at the rate of seventeen dollars (\$17.00) per week from which was to be deducted the 20 weeks already paid to the petitioner on the original award and further allowed the petitioner 25 weeks' temporary disability.

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*Judgment.*

I further find that a counsel fee of five hundred dollars (\$500.00) for the petitioner's attorney is to be paid by the respondent.

On May 16, 1929, counsel for the respondent had a re-argument of the case before Commissioner Harry J. Goas at which hearing the Commissioner again found for the petitioner.

Judgment signed and entered July 18, 1929.

WILLIAM S. GUMMERE,  
Judge.

JOHN H. SCOTT,  
Clerk.

Book S. 2 Common Pleas, page 117.

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**Writ of Certiorari.**

Filed

(Seal) The State of New Jersey to the  
Court of Common Pleas in and for  
the County of Essex, and John H.  
Scott, Clerk of the said Court,

GREETING :

10

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 9th day of January, 1930 by the Honorable Dallas Flannagan, Judge of the said Court of Common Pleas, in and for the said County of Essex, in a certain proceeding brought on behalf of George Herbert, petitioner, against Newark Hardware & Plumbing Supply Co., respondent, for the determination and recovery of compensation under an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of his employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved 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 Essex and John H. Scott, 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, you do certify and send together with this writ, to our Justices of our Supreme Court

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30

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*Writ of Certiorari.*

of Judicature, at Trenton, on the 14th day of February, 1930, that therein may be caused to be done what of right and according to law ought to be done.

10 Witness, the Honorable WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court at Trenton, on the 25th day of January, 1930.

Clerk.

JOSEPH C. PAUL,  
Attorney and of Counsel for  
Respondent-Prosecutor in Certiorari.

## ALLOCATUR.

This writ is allowed. Let it be sealed.

20 WILLIAM S. GUMMERE,  
Chief Justice of Supreme Court.  
January 22, 1930.

30

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**Return to Writ.**

State of New Jersey, )  
 County of Essex,    ) ss. :

I, Dallas Flannagan, Judge of the Court of Common Pleas in and for Essex County, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey the proceedings had before Honorable Harry J. Goas, Deputy Commissioner, New Jersey Department of Labor, Workmen's Compensation Bureau, and the proceedings had before the Court of Common Pleas in appeal and the order dismissing the appeal and all things touching and concerning the same as by the within writ to me directed, I am commanded.

10

In Witness Whereof, I have hereunto set my hand and the seal of the said Court at Newark, N. J., this 6th day of February, 1930.

20

DALLAS FLANNAGAN,  
 Judge of the Court of  
 Common Pleas of Essex County.

(Seal)

January 28, 1930.

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## Reasons.

## NEW JERSEY SUPREME COURT.

10	GEORGE HERBERT, Petitioner, Defendant-in-Certiorari,  vs.  NEWARK HARDWARE & PLUMB- ING SUPPLY Co., Respondent. Prosecutor-in-Certiorari.	}	On Certiorari.  Reasons.
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20 The 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 case:

1. That the petitioner's claim of compensation is barred by the Statute of Limitations.

30 2. That the Deputy Commissioner of Compensation allowed the original petition as filed to be amended so as to bring in new disabilities after the original petition had been adjudicated by the compensation court, on appeal affirmed by the Common Pleas Court and on certiorari, affirmed by the Supreme Court and judgment paid.

3. That the Deputy Commissioner of Compensation had no jurisdiction for allowing the amendment 1½ years after the accident for the reason that the amendment was not based on newly discovered evidence.

40 4. That under the Hernia Section of the Statute, it is provided that upon paying the compensation due for a hernia, the respondent's

*Reasons.*

obligation shall cease and terminate unless death results from the hernia and the petitioner in this case is still living.

5. That the Essex County Court of Common Pleas was in error in finding that petitioner was entitled to additional compensation for the reason that locomotor ataxia or tabes is not the result of aggravation of a previous existing condition but that it is a slow, progressive disease and that the hernia which petitioner sustained on June 13, 1927 had nothing whatever to do with the petitioner's present condition. 10

6. That the award is against the weight of evidence and the petitioner did not sustain the burden of proof in showing that his condition today is the result of a hernia which he sustained on July 13, 1927. 20

JOSEPH C. PAUL,

Attorney for Prosecutor and of Counsel.

January 28, 1930.

**Testimony.**

NEW JERSEY DEPARTMENT OF LABOR.

WORKMEN'S COMPENSATION BUREAU.

Newark, Essex County, District.

10	GEORGE HERBERT, Petitioner,	}	On Motion.
	vs.		
	NEWARK HARDWARE CO., Respondent.		

20 Transcript of stenographic notes of the testimony taken in the above-entitled matter before Hon. Harry J. Goas, Deputy Compensation Commissioner, at the Compensation Department of the Workmen's Compensation Bureau, 9-15 Franklin Street, Newark, New Jersey, on the 9th day of January, A. D. 1929, at 2:30 in the afternoon.

## APPEARANCES:

30 Sara Lewitt (Schwartz & Lewitt), for petitioner; Joseph C. Paul, Esq., for respondent.

40 Mr. Paul: Commissioner, in this case the man was injured on July 13, 1927, and a petition was originally filed by Miss Lewitt on August 27. There was a trial before your Honor and you made an award for hernia and the award as made by your Honor gave the man twenty weeks at seventeen dollars a week, or \$340. In the judgment and order signed by your Honor you found the fact that the petitioner did sustain a hernia and as a result gave the award. That was appealed

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to the Court of Common Pleas where it was affirmed. From there on certiorari to the Supreme Court, on the ground that the man having had a hernia he could not have another hernia, but the Supreme Court took a different view. It was then paid by the respondent, after the Supreme Court had affirmed the award, in August, 1928.

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Now, there has been a new petition filed on November 7, 1928, reading: "The petitioner desires to reopen the case, which has already been determined"—(reading petition) and contending the man is now a total physical wreck.

My motion is to strike out the petition, and I have reserved my right to amend the answer filed, for the reason that this is based upon a hernia. The hernia section of the Act is quite clear and the Court having once determined the man had a hernia for which he was paid, if the petitioner did not take care of himself for one year and a half, it was no fault of ours. We had the right to contest the hernia, which we did do, and from the facts in the case, the man's own statements, having admitted he had a hernia, we had a right to contest it, but since the Supreme Court affirmed the award we paid it in one lump sum, cash, and I cannot see where the man can come back now. The petition further reads that the man's condition is severe because of neglect and that is not a cause of action. They say that you paid for the hernia, but now he has got something else which is a new cause of action and therefore not within one year of the time of the accident—and I have not raised that element, although I will if your Honor wishes me to—just the question that this is a hernia and we have paid him 100%, and I cannot see how it can be reopened. Therefore, I ask to strike out the petition.

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Miss Lewitt: Well, I think I should move to strike out the answer, and assuming all Mr. Paul has said with reference to the trial and the judgment is true, it was decided by your Honor and appealed to the Supreme Court and the judgment was paid after it was sustained all the way up. The situation in this case is very simple. The petitioner was injured, there was a hernia, the hernia was paid for, but at the same time, despite the fact the hernia was paid for, it cannot be claimed he will be barred from recovery because of an aggravation of a condition—and that is what we are coming in for, an aggravation of a condition—due to the hernia. There is no bar. All we have to do is come in and reopen the old petition and we are in time, because the proceedings in any law court are stayed by appeal and in this case it took some time for the respondent to decide whether they wanted to pay this thing or not. During those nine months this petitioner has suffered and has been in very bad condition, and I think, due to the neglect of the respondent, the man's present condition is suffered, and for that reason alone, this action is not barred. And then the other period is a period of aggravation. The mere fact the hernia was paid for is not a bar to this action.

There is a condition of aggravation by reason of the neglect due to the various appeals, due to the fact this man did not receive the attention he should have had. The respondent cannot say, because they wanted to test the validity of the judgment, they wanted to jeopardize this man's life, and in this case that is exactly what was done—not only his own life but his entire family was jeopardized.

The Court: The whole amount was paid when?

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Mr. Paul: August, 1928.

(Discussion between counsel).

The Court: So far as the hernia is concerned, that passed on the hernia only. First, he may agree to have an operation if it is advisable, the respondent to pay for the operation not exceeding \$150. He has a period of recuperation for which they pay seven weeks, or if he doesn't want the operation he may elect not to have the hernia operation, and get the payments in cash, in which case he can take the twenty weeks' compensation and that is the end of the hernia situation. That is the only alternative, speaking from the hernia standpoint only. If death results from the hernia or the operation, it is predicated upon the feature of the death. If death results from the hernia or the operation and it is ordinarily based on an operation the result of a hernia, that is, it becomes strangulated and immediate help is necessary, then the provisions of paragraph 12 shall apply. Then it is a regular death case and it goes ahead on that basis. But there is nothing in the Act that I see that a hernia, as such, can be aggravated. Now, the petition was filed for a hernia and was presumably disposed of for the hernia. Now the situation arises the man is in this condition now. If it is based on an aggravation of the hernia and the man's condition is confined to the hernia, in fact, even then I do not think the act applies because he has gotten his money for the twenty weeks. He did not elect to take the operation, and I don't see how the respondent can be brought in to pay more for the hernia.

Now, the question is, is he suffering from the hernia or from something else or a combination of both, and then the question arises whether it shall be reopened for a condition aggravated by

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10 a hernia. The petition originally was filed on the theory of hernia only. Now we are concerned with this medical situation; this question arises whether the petitioner can bring in a new condition at the expiration of this period. That is another feature that might arise. In other words, the original accident happened July 13, 1927, and the petition was filed for a hernia. Now he is suffering I daresay not so much from a hernia as from another condition that the hernia may have incidentally caused to start up, but the question is whether this case can now be reopened to allege a new condition at this time.

(Further discussion between counsel).

20 The Court: My present thought is, the old petition can be reopened, not expressing an opinion as to the medical side of it—I think that is a matter of proof—but I rather think you can reopen for a condition that possibly existed at that time although it was not brought to the fore, and I think you can bring that in now if you can bring in proof that the accident did bring that thing to light at any time. I think I will decide now to reopen the case to give you an opportunity to put in that proof and hold it in abeyance until the  
30 time of the hearing as to whether it is to be on the petition filed recently or on the original petition. The original petition can be reopened if it is within the statutory time and this can be reopened, and I think you have established at least a prima facie case to reopen this question of medical proof to connect it up. I will consent to have it reopened and decide later as to whether it will be on the old one or on the new one.

Mr. Paul: I ask an exception.

40 The Court: Note an exception.



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ed, and the award was paid in September of 1928, or thereabouts.

Now there has been an amended petition filed, to the original petition, and that petition is entitled "A petition to reopen the old petition, originally filed," and Question Number Seventeen: "What was the nature of the accident—and how did it happen," the answer is, "While lifting a heavy stove, petitioner sustained a hernia and acute retention of the urine."

My motion is to strike out this petition as filed now, on the ground that it does not come within Section Ten of the Act, Paragraph Twenty-one, providing that an agreement or award may be modified which holds that an agreement may be modified upon application of either party where it is shown that the incapacity of the injured employee has subsequently increased or diminished; the reason being, sir, that they have alleged in the new petition an entirely new subject-matter. In other words, there is no connection between the hernia and the acute retention of the urine.

They might have alleged in the first petition a fracture or the loss of the right arm, so they were paid for it; and a year and a half later they might come in and file a petition to reopen the original petition and say, "Yes, we were paid for this, thank you. Now we have a fracture of the left leg from the same accident; we would like a recovery for that."

I say, sir, it is improper for any one to come back and open an original petition and allege an entirely new matter, not originally alleged. They can come in and say, "Our condition is worse than what we were paid for as a result of the original hernia," but they do not do that. They come in and state an entirely new medical history and mat-

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ters not brought before the Court; and as your Honor knows, under the hernia section of the Act, it does not at all take into consideration an aggravation of a hernia.

One of two things may happen there; the man is operated and the employer pays for that, or the man is paid twenty weeks' compensation and then he is through, so far as the hernia is concerned, unless death results from the hernia, and then they may come in and if they can show death resulted from the hernia, they are entitled to more compensation. 10

This man is still living and in Court today, and I say, having been paid for this hernia, they cannot come in now and allege an entirely new subject-matter not the result of the hernia. For those two reasons—and I am supported by some cases—I make my motion to dismiss, and on the further ground that this new matter is more than one year after the date of the accident, and irrespective of whether we paid in September or not, because that was for a hernia, now they are coming in to say, "Yes, but we allege it on the same ground and on the same date—acute retention of the urine." That has nothing to do with a hernia, because in *Braden v. Benjamin & Jones*, 125 A. 717, a case under the Workmen's Compensation Act, which was solemnly adjudicated on a petition and an agreed state of facts, ruled it should not be reopened to allow a party to make a new and a distinct case. That is exactly what happened here: the first case was adjudicated, appealed, affirmed, paid, and now they are back with an entirely new subject-matter, trying to reopen it again. I say that that is improper and the case should be dismissed. 20 30 40

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Miss Lewitt: I think that was already decided on our previous motion. The case was reopened by consent of your Honor, and it was understood that you had dismissed the amended petition on the ground that there was no new accident, as Mr. Paul alleges; and I might at this time say, the acute retention of the urine is the outcome of the hernia, according to the concensus of medical opinion.

At the time it was decided on the motion, I dropped the new and amended petition, and we are going in on the old petition and on the contention of aggravation; so Mr. Paul's motion is untimely, because it was definitely decided it was on the old petition we are trying the case and the amended petition was already dismissed by your Honor at the time we argued it.

Mr. Paul: That was not my understanding of it. I received two petitions, one of which I argued before, and another one I received the other day, entitled "a petition to reopen"; the first one I received after the original was filed, I made a motion, and your Honor said instead of filing a new petition they should file a motion to amend the old petition, which was done. Now, if Miss Lewitt wants to withdraw this petition and rest upon the old petition filed, I say the Act does not contemplate the aggravation of a hernia unless in the event of a man's decease, in which event they must prove it is due to the hernia.

(Further discussion between counsel.)

The Court: I think I decided, as I recall, on the last argument, to permit the petitioner to reopen on the ground of alleged disability; not the hernia, but the condition he claims to have had

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at that time. Now, I do see, now that my attention is called to it, the petition of November 17, 1928 and the petition entitled the petitioner to reopen the old petition originally filed, and I think we will reopen it on the motion.

Miss Lewitt: On the motion to grant increased disability.

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The Court: On the motion. I consider that the motion made and the argument made as at the last hearing.

Mr. Paul: Do I understand that this petition, acknowledged November 5, 1928, and the acknowledged November 3, 1928, are withdrawn or dismissed?

Miss Lewitt: Withdrawn. In fact, I withdraw them right now.

The Court: Very well, it is withdrawn, and the case is reopened on the motion as made on January 29, 1929.

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Miss Lewitt: My last amended petition I desire to have withdrawn, but the first amended petition I desire to have dismissed as a matter of record.

The Court: Very well, I will consider it so.

Mr. Paul: I ask an exception to your Honor's ruling.

The Court: Note an exception.

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I notice that in the testimony of Dr. Leo Granger, taken December 23, 1927, which the decision in the former case is based on, mentions, among other things: "I sent him to the hospital on account of his hernia and acute retention of water," so you see that was in evidence at that time, but not being particularly pressed then, and the hernia testimony seemingly to predominate, I decided on the basis of a hernia, and made no mention

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of the retention of the urine. Whether it has any connection with it at the present time or not, I do not know; I think that remains to be seen, so I think we will go ahead and hear the testimony.

10 Mr. Paul: At this time I would like to object to any testimony as to acute retention of the urine on the ground it is not pleaded in the original petition filed and I am not expected to meet any allegations which are not properly pleaded.

In other words, if your probata does not meet your allegata you are out.

(Further discussion between counsel.)

The Court: I don't recall whether those were alleged at the time or not, in the petition.

Mr. Paul: Those were withdrawn.

20 Miss Lewitt: At this time, in order to facilitate that, do you think I could amend my original amended petition to take in acute retention of the urine, because that is in the evidence of Dr. Granger as brought out in the original trial.

Mr. Paul: I object to that. This petition was filed a year and a half ago.

Miss Lewitt: No, I don't mean that; I mean the first amended petition after the one I have withdrawn.

30 Mr. Paul: There is nothing now before the Court except the original petition, as filed.

The Court: The amendment to the original petition.

Mr. Paul: The amendment to the original petition has been dismissed.

Miss Lewitt: Well, I have the right to ask to have it amended so that they simply have it as a matter of record on the appeal.

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The Court: Now you are referring to the first or second amended petition?

Miss Lewitt: To the first—not the last one; I withdraw the last one.

The Court: Of course, so far as the amended petition is concerned, you cannot convey any greater right than what the petition and subsequent testimony developed at that time; so I am not so solicitous as to whether to take it on this amended petition or simply on the motion; because, after all, it refers back to the original petition and to the testimony that developed following. 10

Miss Lewitt: I desire to try it on the original petition reopened by you.

The Court: Yes, you are on safe ground there, providing he had this disability at that time; it would be better if it had been set up in the original petition, but there is no question but that it was mentioned at the evidence taken in the original case, the case was found for the petitioner on the ground of a hernia. Now, the question—of course, there is nothing mentioned about the other, so the question then is, "What is the status of that phase of the testimony that Dr. Granger can give." 20

Mr. Paul: Had there been anything mentioned about it, I would certainly have objected to it at the time, because it was not alleged. In other words, I can't come in and claim something you do not allege. 30

(Further discussion.)

The Court: It is, of course, somewhat irregular, not alleging it in the petition at the time; but after all, the petition was filed, the accident happened, and an order was found and sustained for 40

*George Herbert, for Petitioner, Direct.*

a hernia. The only thing, is this condition you allege now incidental to that same accident at the time?

Miss Lewitt: The medical opinion is simply the acute retention of the urine as the outcome of the hernia, it is one of the results of the hernia, it is one of the dependents.

10 Mr. Paul: I don't know whether Miss Lewitt is testifying or not, but it is not the concensus of medical authority at all.

The Court: I think I will rule the petitioner may go on with his case, with the addition made to it at this time, on the ground of increased disability and at the most, the respondent can claim prejudice—at the most—for not being apprised earlier. So on that premise we will go on.

20 Mr. Paul: Will the Court allow me an exception?

The Court: Note an exception.

GEORGE HERBERT, the petitioner herein, produced as a witness on his own behalf, being first duly sworn, testified as follows:

*Direct-examination by Miss Lewitt:*

30 Q. Mr. Herbert, where were you born? A. Kingfish, Oklahoma.

Q. How old are you, Mr. Herbert? A. Forty-six.

Q. Where did you spend the first sixteen years of your life?

Mr. Paul: I object to it. I don't see the materiality of it at all. We are not concerned with this man's history from the time he was born.

*George Herbert, for Petitioner, Direct.*

Miss Lewitt: I want to establish something very definite.

The Court: I will allow it, although I do not see the materiality of it.

Mr. Paul: I ask an exception.

Q. For the first sixteen years of your life were you perfectly well, Mr. Herbert? A. Yes, ma'am. 10

Mr. Paul: I object.

The Court: "So far as I know," that is, of course; understand?

Q. During that period, between the ages of sixteen and eighteen, did you at any time contract a disease for which you were treated? A. Yes, but it didn't stay no time. 20

Q. Were you treated for the illness that you had at that time? A. Yes.

Q. Do you know whether you were treated for syphilis? A. I don't know; I know that I was treated for having sexual intercourse.

Q. You were treated for having a disease, is that right? A. Yes, but I don't know the name of it.

Q. From that time on, after you were treated, were you cured? A. Yes. 30

Q. To all intents and purposes you thought you were cured, didn't you? A. Yes.

Q. After that did you have any trouble whatsoever, physically? A. No, I had not; not until—

Q. And what were you doing during that time; say, for instance, when you were about eighteen or twenty years old, up until the accident; what have you been doing up until about a year ago? 40

*George Herbert, for Petitioner, Direct.*

A. All kinds of heavy work: blacksmith, shoeing horses, and riding bronchos.

Q. Were you in a circus? A. Yes, ma'am.

Q. And you did bare-back riding? A. Yes.

Q. Sharp shooting? A. Yes.

Q. Blacksmith work, carpenter work? A. Yes.

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Q. You did all kinds of heavy labor? A. Yes.

Mr. Paul: I think this has gone far enough. I do not see the connection between the man's having been in a circus and acute retention of the urine in 1927. Furthermore that syphiletic condition he says he was cured of: he doesn't know anything about that and that is not a proper method of proving that; he says this happened fifteen or twenty years ago. This case will last a week if we are going into all that and I ask that it all be stricken out.

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Miss Lewitt: The only reason I am bringing in this detailed information is to establish that for a period of thirty years this man has gone along without interruption in his daily work and never been laid up, never been home because of illness; then all of a sudden this accident happened, this accident interrupted him, and due to the accident, the latent condition, which gave him no trouble whatsoever during the course of thirty years, became awakened and causes the condition this man is suffering from.

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The Court: I will allow it.

Mr. Paul: I ask an exception.

The Court: Note an exception.

Q. Mr. Herbert, during the past thirty years  
40 have you been ill? A. No.

*George Herbert, for Petitioner, Direct.*

Q. Have you visited physicians often for serious ailments? A. Not for serious ailments.

Q. For instance, what did you have to see a doctor for, if you did? A. For a little rheumatism, or something like that, or a cold; that is about all.

Q. Nothing serious? A. Nothing serious. 10

Q. In the thirty years that have passed have you been obliged to remain away from your work for any length of time because of illness? A. No.

Q. At the time you were working for Mr. Meyers, when you received this injury, how long were you working for Mr. Meyers? A. This last time I worked for him about three years.

Q. During those three years how long were you out for illness? A. I wasn't out for no illness at all. 20

Q. Never lost any time while you were working with Mr. Meyers? A. Not for illness, no.

Q. You were receiving what, with Mr. Meyers, a week? A. Thirty dollars.

Q. When did you receive the hernia that you sustained; when did you get the hernia—that is, from the accident; when did you have this accident which resulted in the hernia? A. In July.

Q. July, 1927? A. Yes. 30

Q. Now, you were compelled to stop work immediately, were you not? A. Yes, sir.

Mr. Paul: Now, sir, this is most leading.

The Court: It is leading.

Q. What happened after the other fellow let go of his end of the stove? A. I got hurt; I bulged

*George Herbert, for Petitioner, Direct.*

out here and I couldn't stand up and I fell down (indicating abdomen).

Q. Could you go to work any more? A. No, sir, I didn't work any more.

Q. Where did you go? A. I went home.

10 Q. From that time on to the present day have you worked? A. No.

Q. Why haven't you worked? A. Ain't been able to.

Q. Mr. Herbert, at the time that you were obliged to stop working with Meyers & Company did you have any money upon which to live? A. No.

Mr. Paul: I object to that; I think it is immaterial.

20 Q. How did you manage to live?

Mr. Paul: I object to that as immaterial.

The Court: I don't see the materiality of that. He may not have had a cent; that very often happens in these cases.

(Further discussion.)

The Court: You might ask him a couple of questions if you have some basis for this.

30 Mr. Paul: I ask an exception.

The Court: Note an exception.

Q. During the time that you received this hernia and up to the present time, have you been an object of charity?

Mr. Paul: I object to that as immaterial, incompetent and irrelevant.

40 A. Certainly I have.

*George Herbert, for Petitioner, Cross.*

The Court: Note an exception. I have not passed on it at the present time and I am frank to say I do not quite see the materiality of it yet; although I am not passing on it at this time.

(Discussion between counsel.)

The Court: I think you should base your proof on a medical basis, only. 10

Q. Mr. Herbert, during the time you received the injury and up to the present time, you have been unable to work? A. Unable to work.

Q. What did the doctor tell you is the matter with you now?

Mr. Paul: I object to that.

The Court: Objection sustained. 20

Miss Lewitt: Cross examine.

*Cross-examination by Mr. Paul:*

Q. You say, Mr. Herbert, you didn't work at all since you got this accident, on July 30, 1927?

A. No, I have not—no electrical work, no.

Q. But you did go back to Meyers, didn't you?

A. Hung around the store, but I could not work. 30

Q. How many days were you back there? A. About two days, two or three days.

Q. How long were you out of work before you went back, do you know? A. No, I really do not know; I know I was out of work long enough to starve to death.

Q. If I read to you what you said before, would that still be true, do you think—at the other trial?

A. I don't know anything about any other trial. 40

*George Herbert, for Petitioner, Cross.*

Q. You don't remember having a hearing before in this case? A. I was here, but I know you gave me no satisfaction; I know that.

10 Miss Lewitt: Do not argue, Mr. Herbert; just answer. That was not the lawyer's fault.

Q. You don't know anything about the other trial? A. You might ask me, maybe I can recover something.

Q. I will ask you: do you remember saying, to my question—"How long were you out of work?"—"Answer: I was out of work five or six weeks"? A. Five or six weeks—and then?

20 Q. (Reading.) "Five or six weeks, and when you went back to work, what did the Newark Hardware Company say; did they take you on again? Answer. They took me on, but I couldn't work steady"; is that right? A. Yes; I couldn't work at all.

Q. So you were out about five or six weeks and then you went back to work again? A. But I didn't work.

30 Q. You went back to work but you couldn't work? A. No.

Q. When this stove—as I recall it, there were four men lifting the stove from the sidewalk up to the truck? A. Not four.

Q. How many? A. Three of them.

Q. You had one end and two other fellows had the other end, is that right? A. Yes.

Q. You got it from the sidewalk up to the truck and one fellow let go; is that right? A. Yes.

40 Q. And the weight fell on you? A. Yes.

*George Herbert, for Petitioner, Cross.*

Q. And the stove went this way and you went down this way and suffered pains in the groin (indicating)? A. Yes.

Q. You are sure about that? A. When the stove struck me I had to go down, I could not hold it up.

Q. Where was the stove—up against you fellows? A. Yes, we were lifting the stove and of course we had to get close to it. It weighed pretty nearly 400 pounds. When he let loose of that end, that threw the stove on me, because he was on the curb up here and I was down on the street and of course there was nothing else for me to do but to hold it. 10

Q. And you felt the strain? A. Yes, and I felt a swelling come right out here (indicating).

Q. The last time you were here didn't you testify you held onto the stove while Jenkle (?) let go? A. I had to. 20

Q. You had to? "What happened after he let go? Answer: After he let go, the other fellow came and lifted. Question: What happened to you? Did you feel any particular pain that day? Answer: Yes, I felt a pain, I felt that lump come out, and I went and sat down on the curb stone," is that right? A. Yes.

Q. Did you say anything before about this stove striking you in the chest? A. Did I say anything before? 30

Q. Yes. A. I couldn't say nothing till it hit me.

Q. I mean, at the other trial? A. Yes, I think I did.

Q. Did you have hold of the stove at each leg? At the bottom or the top? A. Had no legs on it.

*George Herbert, for Petitioner, Redirect.*

Q. Just a flat stove, flush to the ground? A. Yes.

Q. Where did you have hold—at the bottom of it? A. Yes.

Q. One hand at each corner? A. In the center; you couldn't get on each corner, it was too long.

10 Q. You had both hands in the center? A. Yes.

Q. Where was Jenkle (?) and the other fellow? A. The other fellow was in the back and Jenkle (?) was on the opposite side from me, on the curb.

Q. Then what happened? A. When he caught his hand on the stove, he let it along and the fellow in back—all he could do was hold it—and naturally, it came over.

20 Q. And you felt the strain and you sat down on the curb? A. Yes, sir.

Mr. Paul: That is all.

*Redirect-examination by Miss Lewitt:*

Q. Now, Mr. Herbert, you stated to Mr. Paul that you went back after five weeks to Mr. Meyers, but you could not work? A. That is right.

30 Q. You also said when Jenkle (?) let go his end, the stove fell on you? A. Yes.

Q. And naturally, you had it right alongside of you?

Mr. Paul: (To Miss Lewitt.) I object to your testifying.

The Court: That is leading.

*George T. Williams, for Petitioner, Direct.*

Q. Describe again to me what you told Mr. Paul right now about the stove falling on you.

Mr. Paul: I object to that as highly suggestive and improper. Miss Lewitt knows.

The Court: How did you say the stove fell? 10

Q. Describe how the stove fell on you.

Mr. Paul: I object to that; that is not proper at all, and Miss Lewitt knows it is not proper.

The Court: Why are we going back to the stove again? I thought that was all disposed of. You are not opening up the case as far as the accident is concerned? The question is whether his actions produced this injury. 20

Miss Lewitt: Here is an opinion filed by the Supreme Court which states this man sustained a hernia. Why go into the hernia again? Mr. Paul wishes to do so, and I am merely amplifying it.

Mr. Paul: I think I have amplified it sufficiently.

Miss Lewitt: That is all.

Mr. Paul: That is all. 30

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GEORGE T. WILLIAMS, a witness produced on behalf of the petitioner, being first duly sworn, testified as follows:

*Direct-examination by Miss Lewitt:*

Q. Mr. Williams, how long do you know Mr. Herbert? A. About nineteen or twenty years. 40

*George T. Williams, for Petitioner, Direct.*

Q. About nineteen or twenty years? A. Yes, not less.

Q. What was he doing when you first made his acquaintance? A. He was riding horse back and shooting—sharp shooting.

Q. With a circus? A. Up at Hillside Park.

10 Q. Do you know him now for a period of twenty years? A. Yes.

Q. During that time, Mr. Williams, what was Mr. Herbert's physical condition?

Mr. Paul: I object to the question; he is not qualified.

Q. As far as you can judge; whether he was well or whether he was sick.

20

Mr. Paul: I object to the question on the ground the witness is not qualified to answer it.

The Court: So far as you saw him yourself.

Q. So far as you could tell, was he in good health, a strong man, or was he a sick man, in bed most of the time? A. Well, from that time on now until now, this is the first time I heard him say he ever was sick or had been sick, except he had a little rheumatics or a cold, but outside of that I never knew him sick in bed.

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Q. In that twenty years you never knew of him home, sick? A. Never.

Q. Do you know whether he was a pretty steady worker? A. Well, he was always doing something; every time I met him he always said he could have more to do if he could get it.

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*George Herbert, for Petitioner, Recross.*

Miss Lewitt: That is all; cross examine.

Mr. Paul: No questions.

I would like to ask Mr. Herbert another question.

Mr. Herbert, you testified you didn't have any illness for the past thirty years until this accident in July, 1927, is that right? 10

(At this juncture George Herbert, the petitioner, previously sworn, testified further as follows:)

The Witness: Herbert: Yes.

*Recross-examination by Mr. Paul:*

Q. But you did have a hernia about two years and a half before that time, didn't you? A. No. 20

Miss Lewitt: I object to that, your Honor; that has been definitely decided and the opinion was handed down by the Supreme Court. I do not think we have to go into that question any more. This man had a compensable hernia; whether or not he had a hernia previous to that or not I do not care.

The Court: Well, there has been testimony to the effect he had a hernia before. 30

Miss Lewitt: Why go into it again, then?

Mr. Paul: Simply on the question of credibility. He said he had nothing else the matter with him in thirty years.

(Further discussion.)

The Court: It is agreed that he had been ruptured before? 40

*George Herbert, for Petitioner, Recross.*

Miss Lewitt: Yes, but it was not so bad; it was so mild he didn't think there was anything the matter with him.

Mr. Paul: I would like to place upon the record that testimony.

10 The Court: The testimony that he gave at the last hearing will speak for itself in that respect.

*By Miss Lewitt:*

20 Q. Mr. Herbert, at the time that you received the first injury—in fact, there is no definite information as to whether he received a hernia then or not, because this opinion as handed down the first time says he is not competent to tell whether he had a hernia then or not—at the time you received the first injury while working for Meyers & Company, were you out of work on account of that for any length of time? Were you sick because of that? A. No.

Q. How many times did the doctor see you then? A. For what?

Q. The first time, when you wore the truss? A. Never had no doctor.

30 Q. Did Mr. Meyers' doctor come and see you once? A. Yes, but he didn't come—that was after I got hurt.

Q. Oh! The second time or the first time? A. No, the first time.

40 Q. Mr. Herbert, in the original case that was tried you said that about two and a half years ago while working with Mr. Meyers you suffered a strain, a mild rupture, and wore a truss for a year and a half; do you remember that? A. Yes, but I didn't know it was a rupture; I didn't say it was a rupture.

*George Herbert, for Petitioner, Recross.*

- Q. You didn't know whether it was a rupture?  
A. No.  
Q. You were strained and you wore a truss? A.  
Yes.  
Q. And you thought it was not a rupture? A.  
Yes.  
Q. Were you obliged to stay away from work 10  
and in bed because of that strain? A. No.  
Q. Did you go right on working? A. Yes.  
Q. Did you lose any time? A. No.

Miss Lewitt: That is all.

Mr. Paul: That is all.

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*Dr. Leo Granger, for Petitioner, Direct.*

NEW JERSEY DEPARTMENT OF LABOR.

WORKMEN'S COMPENSATION BUREAU,

Newark, Essex County District.

10	<p style="text-align: center;">GEORGE HERBERT, Petitioner,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">NEWARK HARDWARE &amp; SUPPLY Co., Respondent,</p>	} Testimony of Dr. Leo Granger.
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Transcript of stenographic notes of testimony of Dr. Leo Granger, a witness on behalf of the petitioner in the above-entitled matter, as taken before Hon. Harry J. Goas, Deputy Compensation Commissioner, at the Department of Labor Building, 9-15 Franklin Street, Newark, New Jersey, on the sixth day of February, A. D. 1929, at 3:30 P. M. in the afternoon.

APPEARANCES:

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SARA LEWITT, for the petitioner.

JOSEPH C. PAUL, ESQ., for the respondent.

DR. LEO GRANGER, a witness on behalf of the petitioner, sworn.

*Direct-examination by Miss Lewitt:*

Q. Dr. Granger, how long have you been treating the Herbert family? A. About four years.

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Q. During the four years that you have been treating the family has Mr. Herbert personally

*Dr. Leo Granger, for Petitioner, Direct.*

ever seen you or call you in about anything? A. Not until this accident which he suffered.

Q. Not until the accident that he suffered and then you were called to the house? A. Yes.

Q. What did you find, doctor? A. I found a condition of hernia and acute retention of urine.

Q. Doctor, you have heard Mr. Herbert testify, have you not? A. Yes. 10

Q. You heard him say that he received a severe shock, strain, whatever it might be, when a combination gas and coal stove weighing approximately five or six hundred pounds fell on him, when another man let go his end, so that the weight of the stove was borne by him for a minute or two until assistance came? A. Yes.

Mr. Paul: I object to that question, it is not a proper hypothetical question, it is counsel's own interpretation of the testimony and does not refer to the testimony at all. There is no testimony whatsoever this man held the weight for a minute, a minute and a half or two minutes, and does not say anything about the stove falling on him. 20

(At this point the former testimony of Mr. Herbert with reference to this question was repeated by the reporter.) 30

Q. Now, doctor, you have heard the testimony as repeated by the stenographer. Assuming that that is so, would you say, doctor, that a latent condition of syphilis, which had not made itself apparent or in any way interfered with this man's work for thirty years, could from such a severe strain and injury re-awaken and cause the incapacity this man is at the present time suffering from? 40

*Dr. Leo Granger, for Petitioner, Direct.*

10 Mr. Paul: I object to the question on the ground it has not been shown this man ever had syphilis. He said he had intercourse and then had some treatment. He didn't know what he had, he may have had some other disease and if in the other case we didn't accept the man's testimony as to hernia we certainly cannot take the man's word now for a condition thirty years ago, if he didn't know what it was. I think there are competent ways of proving whether this man has syphilis or not, by a blood test.

The Court: I don't know what it is intended to prove, you'd better change it to "assuming he had a condition of syphilis."

20 Q. Doctor, have you examined Mr. Herbert? A. I have.

Q. What is he suffering from at the present time in your opinion? A. Tabes dorsales.

Q. What is that? A. Locomotor ataxia.

Q. Is that a syphilitic condition? A. That is a syphilitic condition of the spine.

30 Q. Assuming that the man is now suffering from a syphilitic condition of the spine and that some thirty years ago he had some trouble that is similar to this, would you say that this is the result of the earlier trouble he had? A. It could be.

40 Mr. Paul: I move to strike out the answer unless it is proven that this man did have this condition thirty years ago. We are not here to assume, we are here on facts and the doctor is quite indefinite in his answer, it could be, I think the point is too important to have passed over so lightly.

*Dr. Leo Granger, for Petitioner, Direct.*

(Further discussion.)

The Court: He has given the answer, assuming of course, that he had syphilis thirty years ago and secondly whether it is definitely connected up.

Q. Assuming that this man had a syphilitic condition thirty years ago or twenty-five years ago, whenever he testified he had it, would you say that the present condition, the man's present condition is the result of the injury that he received when he had this accident with the stove? A. That could be. 10

Q. It could be? A. Yes.

Q. Is it probable? A. It is very possible.

Q. It is very possible. Is it also probable that that would have been all the natural result of that injury? A. Under the circumstances it would be. 20

Q. Doctor, if this man had, as Mr. Paul contends, gonorrhoea some thirty years ago.

Mr. Paul: I don't contend he had gonorrhoea, sir, not at all.

Q. Let us assume, Dr. Granger that some thirty years ago Mr. Herbert was suffering from gonorrhoea, is it possible that the result of this gonorrhoea would not be tabes? A. No. 30

Mr. Paul: I object to that, that is not in the testimony at all that this man had gonorrhoea.

Miss Lewitt: I am simply asking a hypothetical question. It doesn't mean anything.

Mr. Paul: I object to the question then, it is too important. 40

*Dr. Leo Granger, for Petitioner, Cross.*

Q. The fact that this man now has tabes or locomotor ataxia, is that not the natural resulting cause of syphilis?

Mr. Paul: I object to the question as leading.

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The Court: I will allow it, it is a matter of almost common knowledge.

A. Yes.

Q. Doctor, even if this man had not suffered the hernia from the result of this accident that he received is it possible that this latent condition of syphilis would have re-awakened in his central nervous system? A. It is possible.

Q. Even without the actual hernia resulting?

A. Yes.

020

Q. And what would have produced this re-awakening? A. The shock to the nervous system.

Q. The shock to the nervous system would have produced this condition? A. Yes.

Q. Is this man at the present time, Doctor, totally incapacitated? A. Yes, he is.

Miss Lewitt: That's all.

*Cross-examination by Mr. Paul:*

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The Court: Will he remain so?

A. Yes, he will remain so.

Q. Doctor, how long have you been practicing?

A. Ten years.

Q. Where? A. In Newark, nine years, and one year in New York.

Q. Have you ever treated anybody for syphilis?

A. Yes.

40

*Dr. Leo Granger, for Petitioner, Cross.*

Q. Is there any cure for syphilis? A. Yes, there is a cure for syphilis.

Q. How long does it take to manifest itself—strike that out. How long does it take to cure a person from syphilis? A. It depends entirely upon the person and when he contracted the disease.

Q. What is the nature of the cure, doctor? A. At the present time intra-venous injections of sal-vasan, mercury, and bismuth. 10

Q. There is an absolute cure of syphilis? A. At certain stages.

Q. Syphilis, doctor, is simply a disease of the blood, is it not? A. Disease of the blood and the entire body.

Q. Thirty years ago what was the approved method of treating syphilitic conditions? A. Thirty years ago it consisted mainly of mercury. 20

Q. Was that a cure? A. No, it is not a cure.

Q. Have you ever treated a case where the person had hyphilis and thirty years after received a strain in the groin and that syphilis manifested itself? A. I don't recall whether it was in the groin or not, but in which they had a strain of some sort.

Q. Had the syphilis been of thirty years' standing? A. Yes. 30

Q. Did you, yourself treat the patient? A. Yes, I assisted in its treatment, it was in the hospital.

Q. Where was the strain, doctor, in the case you have in mind, where was the strain? A. The strain was in the back.

Q. The City Hospital? A. No, the Vanderbilt Clinic.

Q. In New York? A. Yes. 40

*Dr. Leo Granger, for Petitioner, Cross.*

Q. And the person was man or a woman? A. It was a man.

Q. Had the syphilis thirty years ago, and received traumatic strain of the back, was it? A. Yes.

10 Q. And as a result what happened to the man, what happened to him? A. He began to develop symptoms of tabes.

Q. And tabes is another name for locomotor ataxia, is it, doctor? A. Yes.

Q. The same thing, is it not? A. Practically the same thing.

Q. Is the man living today? A. I don't know, it is ten years ago.

20 Q. You say, doctor, in your answer to Miss Lewitt's question that assuming this man had syphilis thirty years ago and in the interim he was in good health, went about his work, and in July of 1927 he was lifting a stove and the stove fell—and he strained himself and since that time has not been able to work, you said it is possible that that condition be the result of the accident of July, 1927? A. Yes, provided—

30 Q. But you are not sure about it, are you, doctor, you said it could be, so are you positive, doctor? A. It is possible.

Q. But you are not positive, are you, doctor? A. That this is the direct result of it?

Q. Yes. A. No, I couldn't be positive.

Q. You are a physician? A. Yes.

Q. And you have regard for your practice and for your oath? A. Yes.

40 Q. And you wouldn't come in to court and absolutely swear that this man's condition today is the result of that accident on July 13, 1927, would you, doctor? A. No, I couldn't.

*Dr. Leo Granger, for Petitioner, Cross.*

Q. And doctor, isn't it possible that he might have contracted the syphilis between July 13, 1927, and today? A. Is it possible? In his condition?

Q. Yes. A. No.

Q. Why? A. Because it takes longer than that time for tabes to develop.

Q. How long does it take for tabes to develop ordinarily? A. Usually from five to ten years after infection. 10

Q. Is there any what we would call in law, statute of limitations on it? A. No, there is not.

Q. Doctor, in tabes what is the first manifestation of the development of tabes? A. Well, you can't say what should be first, it may show itself in different manners.

Q. How did it show itself in Herbert's case? A. By incoordination of the muscles. 20

Q. It is a form of paralysis, isn't it, doctor? A. Yes.

Q. How otherwise could it manifest itself? A. Through certain reflexes, which become exaggerated or lost.

Q. Could, in your opinion, tabes result from a blow where there was a history—strike that out.

Q. Could, in your opinion, tabes result from a strain where the patient gave a history of having had syphilis thirty years before? A. Provided the germs were in the spinal cords. 30

Q. Now, mind you, doctor, I am asking you about a strain or sprain, in your opinion it would make no difference at all? A. No.

Q. It wouldn't make any difference that the patient suffered a traumatic blow on the chest, as to the results, in other words what I want to do is this, could this syphilitic condition of thirty years ago be lighted up and result in the tabes. 40

*Dr. Leo Granger, for Petitioner, Cross.*

from one of three things, either a strain a sprain or a traumatic blow? A. A traumatic blow in the chest would not be likely to cause tabes.

Q. So you eliminate that from it? A. Yes.

Q. A traumatic blow in the chest would not light up a syphilitic condition and result in tabes?

10 A. It wouldn't that.

Q. That is out. Now, would a strain of the groin do it? A. Would a strain of the groin do it?

Q. Yes. A. The straining itself, you mean the force itself, could.

Q. A strain sufficient to bring on a hernia, a traumatic hernia, would that in your opinion be sufficient to light up a condition and bring tabes?

A. It would be, yes.

20 Q. Now, if this man did not have a hernia as the result of this accident of July 13, 1927, do you still think that his condition of today could be attributed to the accident of July 13, 1927? A. Only if we had a history of the accident.

Q. What other things, doctor, causes, could lighten up this alleged syphilitic condition of thirty years ago and bring the man to the condition he has got today, or resulting in tabes? A. Well, at times the disease itself might.

30 Q. With no fire to start it off at all, is that right, doctor? A. That is possible.

Q. It may just break out of its own accord, is that right, doctor? A. Yes.

Q. And it is not necessary in your opinion that there should be a traumatic injury or a blow or a strain, to lighten up a syphilitic condition of thirty years' standing to produce tabes, is it, doctor? A. I think it would be necessary to have some sort of shock after that period of time.

40

*Dr. Leo Granger, for Petitioner, Cross.*

Q. Some sort of shock? A. Yes.

Q. But you wouldn't say it was absolutely necessary, would you, doctor? A. No, you couldn't say it is necessary.

Q. Is this syphilitic condition the germ, has it anything to do with the spinal cord lesion? What is a spinal cord lesion? A. That is any injury to the spinal cord. 10

Q. And the syphilitic condition is a condition of the spine, isn't it, doctor? A. Not entirely.

Q. Now, doctor, what is retention of the urine? A. The patient suddenly becomes unable to pass water.

Q. Is that necessarily the result of trauma? A. Yes, a sudden acute attack would be the result of trauma.

Q. What kind of a trauma, doctor, a traumatic blow or just a strain would bring it on? A. A strain might bring it on. 20

Q. Might bring it on? A. Yes.

Q. You wouldn't say for sure, doctor, would you, that a strain might bring it on? A. Yes, I would say for sure that a strain might bring it on.

Q. Would a traumatic blow bring it on? A. It might.

Q. Wouldn't it depend on where the blow was administered? A. Yes. 30

Q. Where would it be administered to bring it on? A. Probably in the abdomen.

Q. Couldn't the retention of the urine in itself be sufficient shock to a person who had an alleged syphilitic condition for thirty years, be sufficient to bring on in later years tabes? A. If the nervous symptoms were sufficient, if the nervous symptoms were great enough.

Q. It could be done in that long? A. Yes. 40

*Dr. Leo Granger, for Petitioner, Cross.*

Q. If, doctor, this man didn't have a syphilitic condition of thirty years ago would you say that his condition today was the result of the hernia of July 13, 1927? A. If he didn't have his syphilis at all?

Q. If he didn't have any syphilis before? A. No.

10 Q. Why not, doctor? A. Because a germ is necessary to the disease.

Q. And the approved method today of ascertaining if a person has syphilis or not, doctor, what is it? A. Wasserman blood test is the most dependable.

Q. Did you ever make a Wasserman on this man? A. No.

Q. Why not, doctor? A. I didn't treat him.

20 Q. When did you first determine that he had tabes, after July 13, 1927? A. In the early part of last year.

Q. About when, doctor, give me some idea? A. I should say about April.

Q. About a year after this accident, is that right? A. I guess so.

Q. About ten months after the accident, it was then you first determined that he had tabes, is that right, doctor? A. Yes.

30 Q. Did you see him at all? A. No.

Q. Now you saw him at the hospital after this accident, didn't you? A. No, I didn't see him at the hospital.

Q. Where did you see him, doctor? A. He came to the office.

Q. About how soon after July 13th or after the alleged accident, do you know? A. It is about ten months.

40 Q. I know it is hard for your memory, doctor, probably I can help you out by what you said be-

*Dr. Leo Granger, for Petitioner, Cross.*

fore. (Referring to record of previous trial). "Q. Dr. Granger, on or about July 13th did you treat Mr. George Herbert? A. Yes. Q. The same day the accident happened did you treat him? A. I attended him. Q. Were you called to his home? A. I was called to his house. Q. What was Mr. Herbert suffering from, will you please tell the Court? A. From a hernia, inguinal hernia." Is that what you found, doctor, when you first saw him? A. Yes. 10

Q. You sent him to the hospital then, didn't you, the next day? A. The same day.

Q. Did you go to the hospital then too? A. No.

Q. Did you see him at the hospital at all? A. No.

Q. Did you advise an operation? A. I advised an operation. 20

Q. Was the hernia strangulated when you saw it? A. Not strangulated, but it was difficult to reduce.

Q. It was protruding, wasn't it, doctor? A. Yes.

Q. Beyond the first and second rings? A. Yes, it was entirely out.

Q. A mass on the outside? A. Yes. 30

Q. You could see it? A. Yes, and feel it.

Q. There are two rings in the inguinal region, are there not? A. Yes.

Q. And when the gut protrudes beyond the second ring or outer ring it then becomes a strangulated hernia, is that right, doctor? A. Not necessarily.

Q. You tell me when then. A. Strangulated when there is a congestion sufficient so that it cannot be reduced. 40

*Dr. Leo Granger, for Petitioner, Cross.*

Q. Do you call the outer ring the first ring or the second ring, doctor? A. The outer would be the second.

Q. But you could see the man in the second ring with the eye? A. Yes.

Q. Did you reduce it? A. I reduced it.

10 Q. How far did you reduce it, doctor? A. Entirely, into the abdomen.

Q. Beyond the first ring then? A. Yes.

Q. And the man then went to the hospital? A. Yes.

Q. Did you advise an operation? A. I advised an operation.

Q. You are still of the opinion that an operation is the only cure for a hernia? A. In an adult, yes.

20 Q. Is that right? A. Yes.

Q. Take Mr. Herbert for instance, in your opinion an operation was the only cure for the condition that he had, wasn't it? A. Yes.

Q. Had he had an operation, doctor, do you think it would have made any difference in the condition today? A. No, I don't think it would have.

30 Q. Is a hernia, doctor, in itself, a severe shock to the nervous system in your opinion? A. It might be.

Q. It might be, and it could not be, could it, doctor? A. Well, an acute hernia would be.

Q. If a man is raising a stove in this position, five or six hundred pound stove and someone else let go an end of it and the entire stove rests upon him, that is a strain? A. That is a great strain.

Q. Sufficient to bring on hernia? A. Yes.

40 Q. Would that, in your opinion, be sufficient—strike that out. Would in your opinion, that be

*Dr. Leo Granger, for Petitioner, Cross.*

a severe shock to the nervous system, in the manner as I described the accident in this case occurred? A. Yes, it would be.

Q. Why, doctor, where is the shock, what is the shock about? A. The hernia itself, the sudden protrusion of the gut and the tearing of the muscles would be the shock.

10

Q. A traumatic hernia is as we understand it, a tearing or puncturing of the abdominal wall, is it not, doctor? A. Yes.

Q. Was that done in this case? A. Yes.

Q. It was torn and punctured? A. The abdominal wall, yes.

Q. It was, are you sure? A. Yes.

Q. That is what you reduced? A. I reduced the hernia.

20

Q. But you are sure the abdominal wall was torn? A. Yes.

Q. How do you know, doctor? A. Because the intestines would not protrude unless the abdominal walls were torn.

Q. Ordinarily is a hernia, whereas only a strain is the history of the hernia, sufficient to cause a nervous shock to a man who is an ex-circus man, ex-cowboy and good red-blooded Indian? A. I believe it could be.

30

Q. Wouldn't it, doctor, perhaps make a difference in the individual as to the result or magnitude of the shock? A. In the individual it makes a big difference.

Q. You knew Mr. Herbert, didn't you? A. Yes.

Q. You wouldn't call him any weakling, would you, doctor? A. No.

Q. He could stand pretty good rebuffs, couldn't he? A. I think he could.

40

Q. Take care of himself pretty well? A. Yes.

*Dr. Leo Granger, for Petitioner, Redirect.*

Q. But you still think that a hernia as I described would be sufficient to give that man a nervous shock sufficient to aggravate and light up the alleged syphilitic condition of thirty years' standing which today would result in tabes? A. Along with the other trauma.

10 Q. Yes, you still think so? A. Yes.

Q. But you won't say absolutely that is so? A. No, we couldn't say that.

Q. But it is possible that might be so? A. It is possible, yes.

Q. Dr. Granger, could this tabes that you say Mr. Herbert has now, be incidental to the accident of July 13, 1927? A. Yes.

20 Q. It could be, and in your opinion the first manifestation that you observed of the tabes after July 13, 1927 was ten months? A. Yes, about ten months.

Q. And if a man received a shock to his nervous system which you describe as being sufficient to bring on these tabes wouldn't the tabes manifest itself quicker, doctor? A. It wouldn't be likely to.

Q. But it is possible it might, doctor? A. It is possible it might, yes.

30 Mr. Paul: Thank you, doctor.

*Redirect-examination by Miss Lcwitt:*

40 Q. Doctor, after having heard, although you told Mr. Paul that you wouldn't say positively that this man's present condition is due to the accident, yet, would you say from the history of the case as you have it and from the facts of the accident as you know it, that the present condition

*Dr. Leo Granger, for Petitioner, Redirect.*

that he is suffering from might not be the direct cause of the accident?

Mr. Paul: I object to the question, I think the doctor has fully answered the question, both on direct testimony and on cross-examination and it is not proper redirect at all. 10

Miss Lewitt: I simply want to clear that up.

(Discussion between counsel.)

The Court: Well, he has already answered it on his direct.

Miss Lewitt: I simply wanted that reconfirmed.

A. I believe it is.

Miss Lewitt: That's all. 20

Mr. Paul: That's all.

30

40



*Alice Herbert, for Petitioner, Direct.*

Q. Did he lose any time during those twelve years; during those ten or twelve years did he lose any time from work, was he obliged to stay home?

A. Well, two days sometimes, one or two days.

Q. Two days, when was that? A. In the winter, but never in the summer, he never lost.

Q. Do you know about how long ago that was? 10

A. About five or six years ago.

Q. About five or six years ago he lost two days during the winter? A. Yes.

Q. Outside of the slight things that you have discussed, headaches and rheumatism and things like that, have you known Mr. Herbert to be seriously ill at any time during the twelve years? A. No.

Q. After the accident which he received in July, 1927, when he got the hernia while working for Meyers, what was his general condition after that accident? A. He was not able to work. 20

Q. From the day that the accident happened was he incapacitated?

Mr. Paul: I think that is all conceded, your Honor, that since the accident he hasn't worked.

The Court: She may answer that. 30

Q. From the date of the accident he has not been able to work, is that right? A. He has been working off and on, but not steady; he hasn't worked a whole week at a time.

Q. Then after the accident he tried to work and he could not? A. He could not.

Miss Lewitt: Cross-examine.

*Alice Herbert, for Petitioner, Cross.**Cross-examination by Mr. Paul:*

Q. You mentioned rheumatism? A. Yes.

Q. In what part of his body did it bother him last? A. His leg.

Q. Both legs or one leg? A. The right leg.

10 Q. How often would he complain about it to you? A. When the weather was wet and he got his feet wet.

Q. At night time would it bother him more than the daytime? A. Yes.

Q. It would manifest itself more in the night than in the daytime? A. Yes.

Q. And would you say those pains bothered him every other night? A. No, no, not every other night.

20 Q. For about how long before July, 1927? A. About five or six years.

Q. He always complained of headaches during that time? A. Yes.

Q. Would he complain of those about every other day? A. No, not every other day, only when he had rheumatism it would affect his head.

Q. No other pains were complained of to you? A. No, sir.

30 Q. Did you do anything for rheumatism? A. I took him to Dr. Granger and he gave him treatments.

Q. What kind of treatment did he give, do you know? A. Medicine and things like that.

Q. Any massage treatment, anything like that? A. No, sir.

Q. No baking treatments? A. No, sir.

40 Q. After this accident you say he went back to work for a while? A. He couldn't go back

*Alice Herbert, for Petitioner, Redirect.*

to Mr. Meyers because Mr. Meyers said he didn't want him any more.

Q. He went to work somewhere else? A. Yes, for himself, jobbing around.

Q. How long did he do that? A. About six months.

Q. How often would he work during that six months? A. Whenever he could get a job. 10

Q. If he could get a job every day would he work? A. He would have worked.

Q. For six months after the accident? A. Yes, sir.

Mr. Paul: I think that's all.

*Redirect-examination by Miss Lewitt:*

Q. Mrs. Herbert, could Mr. Herbert, in the condition that Mr. Herbert was during those six months after the accident, could he have held a steady job? A. No, not a steady job. 20

Mr. Paul: I object to that.

The Court: That calls for a conclusion. Would he or did he?

Q. During the six months that Mr. Herbert was sick following the hernia or during the six months he was affected by it, did he hold any job steadily? A. He couldn't hold a steady job. 30

Mr. Paul: I move the answer be stricken out as not responsive.

The Court: Strike it out.

Q. What was Mr. Herbert's general physical condition as you observed it after this accident? 40

*Alice Herbert, for Petitioner, Recross.*

Mr. Paul: I object to that question; she is not qualified to testify.

The Court: I will allow it within limitations.

10 Q. What was his condition following this accident? A. He has never been a well man since.

Q. What was his general physical condition and how did it manifest itself, was he well, healthy, strong, the way he was before? A. No.

Q. Was he pale, was he sick? A. Yes, after the accident.

Q. Was he able to do a full day's work? A. Couldn't work a full day, he worked a couple of hours.

20 Q. What was your husband's work during this time, locksmith work? A. Locksmith work and plumbing work.

Q. Could he sit on a chair and fix up a few locks during that time? A. Yes, it was steady, maybe three or four hours steady.

Miss Lewitt: That is all.

*Recross-examination by Mr. Paul:*

30 Q. You tell me it was every day steady if he had work? A. But he didn't have the work.

Q. If he had the work to do he could have done it? A. Uh, huh.

Miss Lewitt: How can she testify to such questions? I object to the question on the ground she is not capable of answering that question.

40

The Court: It calls for a conclusion.

*Raymond Fix, for Petitioner, Direct.*

Q. But you say the reason he didn't work was because he didn't have any work to do? A. Well, he had it, but he couldn't go out because he was in pain; he could go out and work three or four hours and then he could not stand the pain, he came home and had to go to bed.

10

Mr. Paul: That's all.

Miss Lewitt: Mrs. Herbert, since when has Mr. Herbert been confined to his bed entirely?

Answer: Entirely, one year next month.

Miss Lewitt: That's all.

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RAYMOND FIX, a witness called on behalf of the petitioner, being duly sworn, testified as follows: 20

*Direct-examination by Miss Lewitt:*

Q. Mr. Fix, how long do you know Mr. Herbert?

A. About fifteen or sixteen years.

Q. About fifteen or sixteen years. And during that time that you knew him and prior to the accident that Mr. Herbert suffered in 1927, what was Mr. Herbert's general physical condition as you had observed? A. Good and strong, able-bodied man, that I know, working every day. 30

Q. He was an able-bodied man and worked every day?

Mr. Paul: I object to the question and the answer and ask that the answer be stricken out as not competent.

40

*Raymond Fix, for Petitioner, Cross.*

The Court: He appeared to be an able-bodied man and worked every day.

A. Every day.

Q. How often did you see Mr. Herbert during this time? Were you in close contact with Mr. Herbert or did you see him just occasionally? A. 10 Occasionally; about once a month, twice a month.

Q. Once or twice a month? A. Yes.

Q. Have you seen Mr. Herbert since the accident of July, 1927? A. Did I see him?

Q. Have you seen Mr. Herbert? A. At the time of the accident?

Q. Since the accident? A. Yes.

Q. How often do you see him now? Have you seen him for the past year and a half? A. I seen 20 him every day since last March.

Q. You have seen him every day since last March. In fact, are you helping to take care of Mr. Herbert at the present time? A. I am.

Q. Now, since last March, what appeared to be Mr. Herbert's physical condition to you?

Mr. Paul: Well, I think that is conceded on the record, that Dr. Granger said he was fully incapacitated for the last year and he has been confined to bed. 30

Miss Lewitt: All right. That is all.

*Cross-examination by Mr. Paul:*

Q. You say you saw Mr. Herbert about once every month prior to the accident of July 13, 1927?

A. Yes, sir.

Q. Did he ever complain to you about any rheumatism? A. Yes, once or twice. 40

*Raymond Fix, for Petitioner, Redirect.*

Q. He did tell you he had rheumatism, did he?

A. Yes.

Q. What did he call it, rheumatism or pain in the leg? A. Rheumatism; sometimes he had said, in the leg.

Q. Did he say he had headaches, too? A. Not that I know. 10

Q. How long a time would you say—about five years he told you about these pains in the leg and rheumatism? A. I couldn't just exactly say how long. Maybe about that.

Q. Maybe about five or six years, you wouldn't say for sure? A. No.

Mr. Paul: That is all.

*Redirect-examination by Miss Lewitt:*

20

Q. Mr. Fix, during the first twelve or fourteen years you had known Mr. Herbert before this accident, was Mr. Herbert a steady worker?

Mr. Paul: I object to that, as he is not competent to testify; he testified he only saw him once a month.

(Further discussion.)

The Court: Well, if he knows. I don't know how he can observe him to that extent if he only saw him once or twice a month. 30

Q. Mr. Fix, during the time that you saw Mr. Herbert before the accident, in the twelve or fourteen years you had known him, did you know, have you any definite knowledge as to whether Mr. Herbert was a steady worker and in a healthy condition, or whether he was not; whether he was out of work most of the time? 40

*Dr. Irving Willner, for Petitioner, Direct.*

Mr. Paul: I object to the question. The man is not qualified to testify. He testified that he saw him only once or twice a month.

The Court: Objection sustained, in that broad way.

10 Q. Mr. Fix, did he ever tell you during the time before the accident he was out of a job?

Mr. Paul: I object to that question as hearsay.

The Court: Objection sustained.

20 Q. Do you know of your own personal knowledge whether or not Mr. Herbert was working during the time you saw him?

Mr. Paul: Same objection.

The Court: Objection sustained.

Miss Lewitt: That is all.

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DR. IRVING WILLNER, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

30 *Direct-examination by Miss Lewitt:*

40 Q. Dr. Willner, answering the hypothetical question, I want to give you a slight history of the case that is now before the Court: The petitioner was injured in July, 1927, at which time a heavy stove, approximately weighing between four and five hundred pounds, fell on his abdomen when the man who was at one end let go his end of the stove, throwing the whole weight upon the

*Dr. Irving Willner, for Petitioner, Direct.*

petitioner, at which time the petitioner sustained a severe hernia. The testimony already in also bears out the fact that some twenty-five or thirty years ago the petitioner had contracted a venereal disease. The testimony also of the petitioner also alleges that during the twenty-five or thirty years following his contraction of this disease the petitioner has been a more or less able-bodied man, not sick at all except for slight headaches occasionally, that all of us have, or a slight attack of rheumatism, he testified he received five or six years, ago, outside of these very minor ailments Mr. Herbert had a life of hard work and bore up under it well and then when the accident happened, due to a great deal of social distress and the great strain put upon his central nervous system, Mr. Herbert as a result has developed a case of tabes and is at the present time totally incapacitated; would you say, from those facts, it is possible to have been caused by the accident? 10 20

Mr. Paul: I object to the question. It does not include the facts; it includes facts ruled out; it includes counsel's interpretation of slight ailments and social distress. 30

The Court: I do not think his social distress or economic distress he has been under has anything to do with the case.

Miss Lewitt: Very well, then, let us eliminate that.

The Court: Very well, then, it is to include he was bothered with rheumatism at various intervals and rheumatism and pain in the leg for a period of five or six years before the accident. That he apparently worked steadily before, that he worked in- 40

*Dr. Irving Willner, for Petitioner, Direct.*

termittently after the accident, and now is laid up apparently for the last year and a month with tabs. Now, with these additions can you answer the question?

A. I think I can. It would appear from the history that he—

10

Mr. Paul: I object to that. I think the question should be answered and not a speech given by the doctor as to what appears from the history.

Miss Lewitt: The doctor must take into consideration what he has heard, and that is the history.

The Court: No, the hypothetical question.

20

Q. Very well. As it was outlined to you in what I said, supplemented by what the Commissioner said, would you say the man's present condition is the possible result or the probable result of the accident? A. That aggravation is the probable result, yes.

30

Q. In other words, had this accident not happened this man may or may not have gone on for years and years; is it possible? A. It is probable the condition would have taken a longer period to come on. Syphilis itself is a progressive disease, and passes into the primary, secondary and tertiary and fourth stages. However, a trauma, especially a direct trauma, may aggravate and bring on with increased rapidity the approaching stages.

40

Q. Then, doctor, assuming this man has worked steadily on for twenty or thirty years without interruption or evidence of physical disability except the few minor things testified to, would you

*Dr. Irving Willner, for Petitioner, Direct.*

say this man could have gone on working for years and years to come?

Mr. Paul: May it please the Court, I object to that question. I object to Miss Lewitt reviewing the testimony, which from our side of the case is very important, and referring to it as "minor." Let her ask the question without giving her interpretation of it. 10

(Further discussion.)

The Court: Repeat the question. That may be concomitant with the conditions years ago. You should not interpret what the symptoms are.

Q. Doctor, do you think it is unusual for the average individual to be suffering occasionally with headaches? 20

Mr. Paul: I object to that question as highly improper.

The Court: Objection sustained. Let the doctor answer the hypothetical question in the proper manner.

Miss Lewitt: I think he has answered it. 30

The Court: Well, then, we are finished.

The Witness: I think you referred to the question as to whether it would take a longer period of time for the disease if the trauma had not taken place. I think it would.

Mr. Paul: I don't know of any question before the witness.

The Court: None at the present time. It is tantamount to saying that, doctor—that if his trauma had not come on his condition 40

*Dr. Irving Willner, for Petitioner, Direct.*

would have still progressed to its present condition, but possibly have taken a longer time?

10

Answer: Yes, that is it, the disease itself is progressive and would most likely have brought on all the complications that have been reached, but I am of the opinion that the traumatic injury, especially a direct traumatic injury, will bring on the phases more rapidly and aggravate it to a certain extent.

20

Q. Doctor, could you say that this man might have gone on with his daily occupation and worked for another ten, fifteen or twenty years before this disease manifested itself? A. Before the tabes? It is possible.

30

Q. Have you in your experience ever known of people having a latent condition of syphilis going on into a ripe old age without the condition ever manifesting itself? A. There are many of them, I see a great many elderly people with positive Wassermans who are working and apparently have no discomfort.

Q. And is it also possible that if they are in the latter years and evidence of the conditions still exists, that with proper treatment conditions may be arrested till the person suffers no discomfort at all? A. I don't think there is ever a cure in the latter years.

Q. No cure, but arrest, relief? A. Yes, I think that so.

40

Q. So, if this accident had not have happened it is possible this man may have reached a ripe old age? A. Yes.

Miss Lewitt: That's all.

*Dr. Irving Willner, for Petitioner, Cross.*

*Cross-examination by Mr. Paul:*

Q. Doctor, did you examine this man at all? A. No, sir, I have never seen him.

Q. Did you ever see the hospital chart in this case? A. No.

Q. Do you know whether he went to the hospital? A. I do not, I know nothing but the question that has been put to me in your presence. 10

Q. What are the symptoms of the oncoming of tabes? A. Disturbance of the nervous system, irregularity of the gait, so-called tabetic gait or halting gait, the patient's knee-jerks become absent after a time.

Q. That is the reflexes you mean, doctor? A. The knee-jerks, I was speaking of, and the so-called disturbance in the pupil, the Argyle-Robinson pupil. General nervous manifestations may come on, general irritability, nervousness, twitching of all the various types, irregularity in the general mental state of the patient. 20

Q. How about the absence of reflexes? A. Well, the tabes is there then; you said "oncoming." When they are absent I believe the tabes is already present.

Q. If the patient shows—about how long does it take for the reflexes to disappear entirely, in tabes? A. There is no definite time, it varies with different individuals, it varies with the rapidity of the disease. 30

Q. Could it appear in twelve hours, do you think, doctor? A. I do not.

Q. It would take a longer time than twelve hours? A. I have never seen anything like twelve hours, I cannot surmise anything occurring as rapidly as all that, in a slow, progressive disease 40

*Dr. Julian Sobin, for Petitioner, Direct.*

which takes years and which may last a lifetime without symptoms.

Q. But you say, doctor, that if the man had no reflexes and they are entirely absent, that you think the tabes were there then? A. Yes, sir.

Mr. Paul: That is all.

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Miss Lewitt: That is all.

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DR. JULIAN SOBIN, a witness called on behalf of the petitioner, being duly sworn, testified as follows:

*Direct-examination by Miss Lewitt:*

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Q. Dr. Sobin, did you see the patient, did you see the petitioner, George Herbert, some time in September— A. I did.

Q. —1928. Did you examine him, doctor? A. I did.

Q. What was the condition that you found, doctor? A. The man was suffering from tabes.

Q. Without going through—was he totally incapacitated at the time you saw him? A. He was.

30

Q. Without going through a recital of all the facts again—because I think the doctor has heard the testimony of the petitioner himself and the other witnesses—would you say, doctor, that it is possible for a trauma such as the petitioner received to reawaken and aggravate a latent condition of syphilis?

Mr. Paul: I object to the question, sir. I don't know of any question before the witness. I cannot believe Miss Lewitt intends

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*Dr. Julian Sobin, for Petitioner, Direct.*

to have this doctor answer a question of another witness. This doctor saw the patient and I believe he should testify from his own knowledge what his condition is.

The Court: Let him give his opinion on the condition he found.

Q. What was your opinion of the condition of this man, his present condition? A. I think at the present time he is totally disabled from the point of view of doing any work and that is what my examination led me to believe.

10

The Court: Considering you have heard the hypothetical question, what is your answer?

Q. You have heard the testimony given in court by the petitioner and by the witnesses—

20

The Court: No, you are adding something else to it. The hypothetical question only.

Q. Assuming that this man had a disease or contracted a venereal disease some twenty-five or thirty years ago—doctor, you heard the hypothetical question as propounded to the preceding witness, Dr. Willner? A. I did.

30

The Court: What is your opinion as to the connection, if any, between his present condition and the condition that he had before?

Answer: The injuries which he had received aggravated and hastened the onset of the tabes.

40

*Dr. Julian Sobin, for Petitioner, Cross.*

Q. Doctor, do you think that if this man had not received the trauma, that he may have gone on working and may have gone on living until he arrived at a considerable age? A. I do believe that.

10 Q. And you really and sincerely believe the trauma and injury he received to his central nervous system reawakened and aggravated the former condition that existed? A. Yes.

Mr. Paul: I object to that question as to the dormant condition. There is no evidence the condition was dormant.

(Discussion.)

The Court: Assuming that he had a dormant condition.

20 Q. Assuming, doctor, that the man had a dormant condition, would you say that the injury reawakened that condition? A. I do, yes.

Q. You know, doctor, that the trauma the man received was to the abdomen, to the region surrounding the abdomen? A. Yes.

Q. Do you sincerely believe that it is possible for that injury to have reawakened this condition? A. I do; I believe that.

30 Miss Lewitt: That is all.

*Cross-examination by Mr. Paul:*

Q. Doctor, have you ever examined any cases of tabes? A. Yes.

Q. About how long after a trauma should a case of chronic syphilis develop? A. There is no stipulated time.

40 Q. Chronic syphilis or tabes is a slow, progressive disease, is it not? A. Yes.

*Dr. Julian Sobin, for Petitioner, Cross.*

Q. It may come on at any time? A. A number of years after the initial infection.

Q. Say the infection has been contracted thirty years ago: wouldn't it be possible for the tabes to manifest itself at any time after the thirty-year period? A. It may manifest itself at any time after the thirty-year period.

Q. And it may not manifest itself as the result of trauma, either, need it? A. Not necessarily. 10

Q. And a manifestation of tabes by trauma—if there was one made by trauma—is instant? A. Are you speaking of this particular case or any case?

Q. I am speaking of this particular case. A. I do not think it is instant in this case.

Q. Why, doctor? A. Because there is a direct trauma, a direct shock to his nervous system. 20

Q. And what nerves does tabes affect, doctor? A. What nerves?

Q. Yes. A. Tabes affects mainly the columns known as Gaul and Burdoch and also affects the meninges covering the spinal cord. It also affects—there are numerous other things it will take about a half an hour to tell you about, what possible nerves it will affect.

Q. What happens, doctor, to the columns of Gaul and Burdoch? A. There is a sclerosis, an affection of the nerves, of the neurons lodged in that part of the spinal cord. 30

Q. In the spinal cord, you say? A. Yes.

Q. Would a trauma to the abdomen affect the spinal cord? A. A trauma here commences the process and the process goes on.

Q. In what way, doctor; what does it commence? What process commences? A. That is a matter of experience and it is very difficult to 40

*Dr. Julian Sobin, for Petitioner, Cross.*

tell just how the process commences, whether it is spirocheete, or a jar, or just what happens. It is hard to tell just what process commences.

Q. Did you ever see a case, doctor, where tabes developed after an injury or trauma other than this case? A. Yes.

10 Q. How long ago? A. I am constantly handling such cases in my practice.

Q. Tell me about one case you have seen or treated? A. Well, there was a case tried here before Commissioner Goas—

Q. I am not talking about any trials, I am asking about cases. A. I am mentioning about this particular case I happened to treat; the name was Hamilton. He developed tabes following an injury.

20 Q. What was the injury? A. He sustained a fall.

Q. What part of his body did he land on? A. On his legs.

Q. You say tabes developed? A. Yes.

Q. How soon? A. In that case I think it developed about six or seven months after the injury.

30 Q. Doctor, do you think tabes could develop or manifest itself within twelve hours after a trauma? A. I do not believe it.

Q. You know it could not, don't you, doctor? A. Yes, I know it could not.

Q. In your opinion, it couldn't be done, could it? A. I don't think a full tabes would develop immediately after an injury, no.

Q. Are not, doctor, the symptoms of tabes the absence of knee-jerks? A. One of the manifestations.

*Dr. Julian Sobin, for Petitioner, Redirect.*

Q. And the absence of reflexes? A. That is one of the reflexes that is lost and there are others that are lost.

Q. Negative Romberg? A. The negative Romberg is present.

Q. And the pupil of the eye, that does not react to light; wouldn't that be one of the symptoms? A. That is the symptom that is known as the Argyle Robinson which is sometimes associated with tabes, but not always.

10

Q. If you have that symptom, combined with the absence of knee-jerks, negative Romberg and the absence of reflexes, would you then say that that was one of the symptoms of tabes? A. I would.

Q. In other words, if that one was there, the rest would be there, too? A. Not necessarily.

20

Mr. Paul: That is all, doctor.

*Redirect-examination by Miss Lewitt:*

Q. Mr. Paul asked you the question whether the tabes could develop twelve hours after an injury is sustained. Now, is it possible—although it is improbable—is it just possible that such a condition might develop twelve hours after an injury? A. It is a question I really couldn't answer. The condition may exist, but there may be no particular manifestation of the tabes coming on. Tabes has certain definite signs such as have been enumerated—Romberg, Argyle-Robinson pupil, absence of reflexes—and those things may exist, but not be manifested as yet.

30

Q. Doctor, the history of the man shows that he was suffering at one time from headaches, some years ago—and rheumatism; would you say that

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*Dr. Julian Sobin, for Petitioner, Recross.*

those were absolute evidences of the fact that the man was suffering from tabes? A. No, I would not.

Q. It is possible that he may have developed those symptoms from an entirely different cause?

A. It is possible.

10 Q. You would not say, would you, doctor, that simply because he had occasional headaches and had an occasional attack of rheumatism that that was the result of a condition of dormant syphilis?

A. Not necessarily.

Q. It is possible those things are absolutely irrelevant? A. That is possible.

Mr. Paul: I object. Who is testifying here? Let him testify.

20 Miss Lewitt: That is all.

*Recross-examination by Mr. Paul:*

30 Q. Doctor, if a man has a syphilitic condition of thirty years' standing and has a trauma and has the absence of knee-jerks and his pupils do not react to light and he has a negative Romberg, and in addition to that, five years prior he suffered shooting pain in the leg, commonly called rheumatism, and headaches, would you then say, doctor, those shooting pains in the legs were symptoms of tabes? A. You would have to tell me what kind of shooting pains.

Miss Lewitt: Your Honor, I object to the question as entirely irrelevant; there is no evidence there were any shooting pains or any other kind of pains, and I submit the attorney for the respondent is injecting into the testimony something that never existed.

40

(Discussion.)

*Alice Herbert, Recalled, for Petitioner, Direct.*

Q. Leaving out the shooting pains, he had rheumatism for five years every other day prior to the date of the accident; that is the testimony.

The Court: I don't recall "every other day"; periodical rheumatism, off and on for five or six years.

10

Miss Lewitt: It is periodical.

Q. It is further testified that the pains are worse at night than in the daytime; with that information, doctor, or history, would you then say that the rheumatism or pain was a symptom of tabes? A. No, I would not.

Q. You would not? A. No, because those rheumatic pains are worse at nighttime there is no reason for concluding that.

20

Mr. Paul: That's all, doctor.

Miss Lewitt: That is all.

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ALICE HERBERT, a witness on behalf of the petitioner, having been previously duly sworn, recalled, testified further as follows:

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*Direct-examination by Miss Lewitt:*

Q. Mrs. Herbert, who was your family physician for the past five or six years? A. Doctor Granger, and his father, before his father died.

Q. How long has Dr. Leo Granger been your family physician now? A. About five or six years.

Q. For the past five or six years have you ever had any other physician for your family, either

40

*Dr. Leo Granger, Recalled, for Petitioner, Direct.*

for you or for Mr. Herbert, other than Dr. Leo Granger? A. No, no other doctor.

Q. Do you know, of your own personal knowledge, whether Mr. Herbert ever went to Dr. Leo Granger to be treated for rheumatism? A. Yes, I called him and he used to go there.

10 Q. That is Dr. Leo Granger? There are two doctors Granger. I say this—listen carefully to my question: did Mr. Herbert ever go to Dr. Leo Granger to be treated within the past few years, say five years or so, for rheumatism, of your own personal knowledge? If you don't know it, say so; if you do, say so. A. Yes, he was up there.

Q. For rheumatism? A. Yes.

20

Miss Lewitt: All right; that is all.

Mr. Paul: That is all.

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DR. LEO GRANGER, recalled, testified further as follows:

*Direct-examination by Miss Lewitt:*

30 Q. Dr. Granger, have you been treating the Herbert family for the past five or six years? A. For the past four years.

Q. How many times have you treated Mr. Herbert for rheumatism or for anything else? A. I don't recall ever treating Mr. Herbert personally.

Q. You personally did not? A. No.

Q. Did he ever come up to you for examination? A. Yes, about two years ago.

40 Q. Two years ago he came to you for examination? A. Yes.

*Dr. Joseph Koppel, for Respondent, Direct.*

Q. But he never came to you for any treatment other than physical examination? A. No, I don't recall ever treating him.

Miss Lewitt: That is all.

Mr. Paul: No questions.

Miss Lewitt: Now, your Honor, that is our case, except for Dr. Bieling and Dr. Dowd. 10

PETITIONER RESTS.

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RESPONDENT'S CASE.

DR. JOSEPH KOPPEL, a witness on behalf of the respondent, being duly sworn, testified as follows: 20

*Direct-examination by Mr. Paul:*

Mr. Paul: I might say, your Honor, before I open my case, I move to dismiss the amended petition of the original petition before the Court, on the ground that, if I recall aright, two weeks ago it was opened upon the original petition, amended to include acute retention of urine, only, and I have not heard a word of testimony by any doctor as to that feature of the case, but it has gone on a different theory entirely—on the theory of aggravation of a syphilitic condition known now as tabes. 30

(Discussion between counsel.)

The Court: I will consider it has been reopened on the general theory of aggravation, primarily, of syphilis. 40

*Dr. Joseph Koppel, for Respondent, Direct.*

Mr. Paul: I ask an exception.

The Court: Note an exception.

Q. Doctor, where is your office? A. Jersey City.

10 Q. You are a practicing physician of the State of New Jersey? A. Yes, sir.

Q. For how long, doctor? A. Twenty-four years.

Q. Do you specialize in any particular line of work? A. Venereal diseases; genito-urinary system.

Q. How long are you doing that kind of work? A. Fifteen years.

Q. Of what institutions are you a graduate, doctor? A. Western Reserve University.

20 Q. Are you connected with any institutions or have you been connected with any institutions? A. Been connected with the Jersey City Hospital as chief of the venereal division for fourteen years.

Q. Any other hospital, doctor? A. I have been on the United States Public Health Service in their Venereal Division. Lecturer on venereal diseases at the training school of the Jersey City Hospital and lecturer at the College of Jersey City—used to. It is closed now.

30 Q. On venereal diseases? A. On venereal diseases and genito-urinary system.

Q. At the present time, doctor, do you do any kind of work other than treat venereal diseases? A. No, sir.

Q. Did you examine Mr. Herbert? A. I saw him Monday, yes.

Q. Where did you see him, doctor? A. At his home.

*Dr. Joseph Koppel, for Respondent, Direct.*

Q. Did you examine the hospital chart in this case? A. I did.

Q. Have you treated and seen cases of tabes?

A. Quite a few, sir.

Q. Tabes is another form—is the same as locomotor ataxia, isn't it, doctor? A. The same thing.

Q. Is it possible, doctor, that a case of chronic syphilis may develop a locomotor ataxia immediately after or as the result of a traumatic injury, in your opinion? A. No, sir. 10

Q. Why, doctor? A. Because locomotor ataxia or so-called tabes is a progressive, chronic disease, and does not develop as an acute condition immediately after an injury.

Q. What, doctor, are the symptoms of tabes? A. Tabes is really divided in a few stages. The first stages of tabes you may overlook as a disease entirely, but for certain symptoms such as pains in the body—shooting pains—that the patient, as a rule, claims rheumatism. I have never heard of one yet with the early stages of tabes with a shooting pain—which is a condition of locomotor ataxia—that would not call it rheumatism. These pains, aggravated at night, may appear in any part of the body, mostly in the limbs, and at that time the patient has a slight disturbance of the reflexes that disappears after a while when the disease progresses to a certain extent. They may be exaggerated or may be more than normal at that time. It is called the irritative stage, that is when the disease makes more progress and the parts begin to degenerate or become affected, being destroyed. Then such symptoms as the abolition or disturbance of the reflexes takes place. Then the eye symptoms, such as the pupil reacting to accommodation, but not to light; the patient cannot stand 20 30 40

*Dr. Joseph Koppel, for Respondent, Direct.*

erect, he sways with the eyes closed. Then the Rhomberg sign, then the progress goes on further and the patient becomes paralyzed. That is the condition this patient is in now; that is the last stage of locomotor ataxia, and it takes years to develop.

10 Q. If the petitioner in this case, Mr. Herbert, had those rheumatic pains for five years prior to July 13, 1927, and on that date he sustained a hernia and the next day at the hospital on examination the hospital chart showed that he had no knee-jerks, negative Rhomberg, no reflexes present, and his eye pupils—one was larger than the other—and do not react to light, would you say, then, that on July 13, 1927, that that man had tabes? A. Was a Wasserman taken?

20 Q. There was, yes. A. What did it show?

Q. It showed a four-plus? A. Yes, sir.

Q. Could tabes such as you found in this man develop within twelve hours after a trauma? A. Absolutely not.

Q. In your own experience, doctor, did you ever meet with a case of syphilis which developed locomotor ataxia as the result of an injury? A. No, sir.

30 Q. Did you ever treat, among the cases in your own experience, a case of chronic syphilis that was operated on or received injuries without developing locomotor ataxia? A. Oh, yes, quite a few. We have men in the wards, cases come in for operation either due to injury or any acute injury that require immediate operation and the patient is a chronic syphilitic and I receive notice to call upon the patient and as soon as it is found he has a four-plus Wasserman, I call upon the patient.

40 The patient is operated on and makes probably a

*Dr. Joseph Koppel, for Respondent, Direct.*

slower recovery—some of them do; some of them receive treatment after the operation for syphilis; but I have never seen one of them develop locomotor ataxia right away.

Q. As a matter of fact, if a person has a four-plus Wasserman, a syphilitic condition has been there for a period of thirty years, wouldn't the tabes be likely to come on any time? A. I do not get the question.

10

(The question was repeated by the Court reporter.)

Answer: Oh, yes; certainly.

Q. And what would bring it on, doctor? A. Well, there are two theories, as far as tabes are concerned or wherever syphilis is concerned, in that there is a special strain of spirocheete in syphilis that does do the damage to the nervous system, and has nothing to do with the other cases of syphilis—the first, second or third stages of syphilis. But no matter what the theory is, it is the germ of syphilis, and it has a reaction that induces the locomotor ataxia.

20

Q. Do you say, doctor, that it is possible and probable that this man's condition today of tabes could be incidental to the alleged injury of July 13, 1927? A. No doubt it was.

30

Q. Would you say, in your opinion from the history of the case and from the hospital chart, that this man was suffering from tabes on July 13, 1927? A. He was.

Mr. Paul: Take the witness. I offer the hospital chart in evidence, sir. It is here under subpoena from the Newark City Hospital.

40

*Dr. Joseph Koppel, for Respondent, Direct.*

*By Mr. Paul (resuming) :*

Q. Doctor, is tabes a slow, progressive disease?

A. Yes, sir.

Q. And what stages are there of the reflexes to indicate the coming on of tabes? A. First is the irritative stage, the second stage is where the reflex is abolished, and the third is the paralytic stages. That is an arbitrary division, but just to see how far advanced the patient is, we divide him into these three stages.

Q. Is there any definite time between the various stages? A. No.

Q. The day after the accident, according to the hospital records, this man was in the second stage — A. Second stage?

Q. —and that was indicated by the abolition of the reflexes? A. Abolition of the knee-jerks, knee reflexes, deep reflexes, and by his pupil.

Q. Would it have been possible, doctor, for the man to have worked with the first stage? A. Oh, yes.

Q. And the fact he did work up until the time of this accident, would that indicate that it was not in the first stage—the fact he did work up until the time of this accident of July 13, 1927; would that indicate that he was not in the first stage? A. The fact that he did work?

Q. He did work, yes; the testimony is he worked up until the time of this accident. Could he have worked and still be in the first stage of tabes? A. Certainly.

Q. What stage of syphilis, as a rule, does the rheumatic pain come in? A. They usually come as prodromal symptoms in the first stage. Of course, they may continue all the way through, but they are most pronounced in the first stage, when

*Dr. Joseph Koppel, for Respondent, Cross.*

there is an irritation; it is the irritative stage.

Q. And now the man is in the third stage? A. He is in the paralytic stage now.

Q. And you cannot give me any idea of the time between the different stages, can you, doctor? A. Well, it depends upon the push and virulence and progress of the disease; there will be two or three years between one stage and another; that is about the average, I should judge. 10

Mr. Paul: That is all, doctor.

*Cross-examination by Miss Lewitt:*

Q. Doctor, have you seen this hospital report? A. I have.

Q. You see the very last word in this hospital report is "Syphilitic" and a question mark after that? A. I will explain that, if you wish. 20

Q. Yes. A. If the records of the City Hospital in Newark are kept the same as our hospital records—

Q. We cannot have that; that is only an assumption. In other words, doctor, after a thorough examination of this man and after a Wasserman, it was the opinion of the doctor making this report that probably this man is a syphilitic? A. No. 30

Q. Isn't that the evidence? A. No. This question mark was put there before the Wasserman was taken, before the report was made. The interne has no right to make the diagnosis.

Q. At the same time this diagnosis was made the question mark was put after "syphilitic"? A. Perfectly proper. 40

*Dr. Joseph Koppel, for Respondent, Cross.*

Q. Meaning that this man is syphilitic until they made a Wasserman and found it was four-plus, then they were convinced that he was syphilitic? A. Yes.

Q. The mere fact that the Wasserman was four-plus is no indication that that person has tabes, is it, doctor? A. No.

10

Q. By the way, in order to definitely determine whether a man has tabes, you as a first-class practitioner, as I may say after hearing all the things you are connected with, we rate you as a very competent practitioner, would you say a person has tabes without making a test of his spinal fluid? A. Yes, I would.

20

Q. Isn't it a fact that at all the first rate hospitals, before any diagnosis is made, a spinal test is taken to determine whether that man has tabes? A. Yes.

Q. In this case was it done? A. I haven't seen any test there.

Q. This doesn't disclose that was done; the only thing we can assume from these records is, the man was syphilitic? A. No, tabetic, not syphilitic.

30

Mr. Paul: The record speaks for itself, your Honor, and is in evidence.

Q. Is it not the logical thing to assume that if the hospital authorities thought this man was tabetic, there would have been a spinal fluid test made?

Mr. Paul: I object to that question. How can this witness testify to that?

40

The Court: Objection sustained.

*Dr. Joseph Koppel, for Respondent, Cross.*

Q. Isn't it probable that would be the logical thing for them to do?

Mr. Paul: I object to that on the same ground.

The Court: He cannot testify to that.

Q. Now, doctor, you have explained the tabes—first of all, you said that you had, in the course of your practice, several cases where people having the condition in their systems were operated, having received an injury, were operated on and were perfectly all right; is that what you said, doctor? A. Yes. 10

Q. Doctor, did you follow up those cases until the very end to see whether those people actually developed tabes? A. I did not.

Q. So you really couldn't say, doctor, whether those people developed tabes or not? A. They might have, later on. 20

Q. They might have, later on; it is possible they may have, later on. Isn't tabes a disease of very slow progress? A. Very slow.

Q. It takes sometimes years: a patient goes through the first, second and third stage, does he not? A. Yes.

Q. When an individual has symptoms of rheumatism, as in this case, you deduct that because he has this rheumatism that the man is in the first stage of tabes, because you assume that this rheumatism is the first evidence of tabes? A. If a man comes to me with the symptoms as outlined in this court and gives me a history of shooting pains at night—rheumatic pains—I am quite certain that these pains— 30

Q. Just a minute. That is not the history of this case at all. 40

*Dr. Joseph Koppel, for Respondent, Cross.*

Mr. Paul: Oh, yes, from the chart in evidence.

Miss Lewitt: But all that evidence is in after the man was injured; that is not the testimony the doctor had to base his answer on; it is the evidence after the man was injured.

10

The Court: Well, that is the history on the case that he evidently gave at the hospital. The wife testified that he had rheumatic pains or rheumatism; now the question is whether that is the same thing—synonymous, reading between the lines.

(Discussion.)

20 Q. Let us assume, doctor, for the past five years or so—or three years—this man did have sharp shooting pains in his legs, would you assume that that is evidence of the first stages of tabes? A. Not unless combined with the findings outlined in this record.

30 Q. What findings do you have—what history do you have to base that conclusion on? There is only this evidence that the man had sharp pains after he was examined in the hospital; so to say he had pains in his legs at night, you assume from that that he had the first stage of tabes?

40 Mr. Paul: If it please the Court, if the question is now complete, the record stands and the entire sheet here should be read as one. The doctor cannot take this report in halves. It says rheumatic pains in the legs the last four or five years, especially at night; pains sudden and sharp, and absence of reflexes. That is all a part of the record.

*Dr. Joseph Koppel, for Respondent, Cross.*

The Court: Give the complete picture as shown there.

(Discussion.)

Q. Doctor, if this man, as you say, had the first stages and evidences of tabes three or four years ago, and he kept on working and he was working in the same particular place for three consecutive years without losing time, a capable worker; would you say he was in the first stages of tabes and yet he was in such apparently good health and yet all of a sudden a year and a half later when you examine him, he is in the very last stages of this disease: would you then say the traumatic injury this man suffered went to increase and aggravate the predisposition of the condition called tabes? 10

Mr. Paul: The question is not complete in that it only refers to the rheumatic condition which we all know the doctor testified that in itself was nothing, but I say she must submit the other part of the chart; you cannot divide it in two parts. 20

The Court: You see you are asking for an opinion with a lot of things left out in between.

Miss Lewitt: You mean this man's condition as the chart reveals it? 30

The Court: Yes.

Q. Assuming, as you say, that this man was in the first stages of this disease, was working all of the time until the very day of the accident, when a stove of about five or six hundred pounds fell on him for a short period of time and the weight, with terrible force, came up against this man's body, rup- 40

*Dr. Joseph Koppel, for Respondent, Cross.*

tured his intestines and there was a tearing, a definite tearing of the wall there, would you say that the force that caused the hernia could also have been the same force that increased the existing condition of tabes?

10 Mr. Paul: If the Court please, I object to that question. Miss Lewitt has a habit of interpolating into her questions her own thought as to the condition of things—"terrible force," "severe shock." I object to the question.

(Discussion.)

20 Q. Assuming that the man received a severe strain from lifting the stove, five or six hundred pounds, and that strain was sufficiently severe to produce a hernia and that one of the doctors testified and said it caused a tearing of the wall, would you say that that strain was also severe enough to reawaken or produce a sufficient shock to the central nervous system to reawaken a latent condition of syphilis?

30 Mr. Paul: Now, if it please the Court, the testimony by this witness is that the man had tabes the day this heavy stove was lifted by this man; nothing to awaken, it was already there.

40 Q. Very well, supposing it was already there, would you assume, doctor, that would have increased the condition, aggravated or made worse, the pre-existing condition you have described or do you think that would have had no effect whatever on the central nervous system? A. This question is very difficult to answer in the nega-

*Dr. Joseph Koppel, for Respondent, Cross.*

tive or positive. Nervous shock—when you ask me about nervous shock—is more or less of a molecular upset of the equilibrium of the nerves, and tabes is a definite organic disease. I do not see how I can connect the nervous shock with tabes.

Q. Doctor, doesn't tabes have its seat in the central nervous system, in the spinal column? A. 10  
Yes, tabes has its seat in the central nervous system in the spinal column.

Q. Isn't the spinal column the central nervous system, doctor? A. Yes, certainly.

Q. Then wouldn't any shock that would have upset the central nervous system also have a definite effect upon the condition that lays there? A. 20  
What do you mean by upsetting the central nervous system: a definite injury to the system or a molecular effect?

Q. Both. A. If there was a direct injury, of course it would have a bearing upon it, but not a nervous shock.

Q. I don't mean a nervous impression shock, I don't mean that you had some very bad news when you went back to your office—which I certainly hope you don't have; I don't mean that kind of nervous shock, I mean if you suffer severe strain, severe enough to have caused a hernia and that same strain be severe enough to affect your central nervous system, one that incorporates the abdominal muscles which are closely aligned, together with the back muscles and the central nervous system? A. Any shock affects the central nervous system, but I don't believe it has any bearing on tabes. 30

Q. But from your own testimony you say this man some three or four years before this accident 40

*Dr. Joseph Koppel, for Respondent, Cross.*

when he had this shooting pain, was in the first stages of tabes? Right? A. Yes.

Q. How many years apart do you think it takes for a person to develop the first, second and third stages? A. I can't answer that question.

Q. It is problematical? A. Problematical.

10 Q. In other words, you may go on for five years, ten years or twenty years? A. Yes.

Q. Now, if a man is in the first stages of this disease and is able to go on working and there are no ill effects he is suffering and then all of a sudden the accident happens and the man immediately, fourteen hours after the accident, develops a definite degree of tabes within the second stage and within a year he develops the last stage, would you say that the shock that he received or the injury aggravated the condition of tabes that he had that some few years ago was in the first stages? A. You assume, then, that the man was in the first stage when the injury happened?

20

Q. Yes, exactly. A. Why, he may have been in the second stage, then.

Q. We haven't any evidence of that; I am basing my assumption on your own testimony that this man must have been in the first stage of tabes then? A. I understand that was years ago.

30

Q. Tabes is the last stages of syphilis, is it not? A. No, I believe that this is a separate and distinct form of syphilis.

Q. It is a separate and distinct form of syphilis, but it is one of the family? A. Yes, one of the family.

Q. And if this man had sharp shooting pains some three to five years before this record was made, you assume he was in the first stages of

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*Dr. Joseph Koppel, for Respondent, Cross.*

tabes; you do not assume he was syphilitic, but that he was in the first stages of tabes? A. Yes.

Q. Now, doctor, your own statement is, that when he was in the first stages and then received the accident which gave his central nervous system such a shock, it immediately developed the second stage and now he is in the last stage; would you say that that injury and that shock helped to aggravate that condition? A. I thought I answered the question for Mr. Paul, I said two years to three when he pressed for a definite time as to the stages, but this is not definite. Now, the man had these shooting pains five years ago. Assuming that at that time those pains were related to the condition and he was in the first stage, he was no doubt in the second stage when the accident happened and his paralytic stage would come on just the same whether he had an accident or not.

Q. Doctor, when a man is in the second stages of this terrible disease—

Mr. Paul: I object to those interpolations —“terrible,” “horrible,” and so forth.

Q. All right. Say the man is in the second stage of this disease, is he incapacitated or would he be hale and hearty? A. He might be hale and hearty, as far as that is concerned, and do work. In fact, that is one of the treatments of the disease, to make them work.

Q. Well, doctor, you haven't answered the one question I have been asking you, and that is, do you think that if the man received a very definite injury of such seriousness as to produce a hernia—do you think that that pain and shock that produced that injury could also have aggravated a

*Dr. Joseph Koppel, for Respondent, Cross.*

pre-existing condition of tabes? Answer it yes or no. A. I don't know of any condition, healthy or diseased, that will not be aggravated by an injury.

Miss Lewitt: That is all.

Mr. Paul: I would like to read into the record the hospital chart:

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"CHART REPORT:

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116596. Date of admission—July 14, 1927. 9:25 P. M. Provisional diagnosis—inguinal hernia. Retention of urine. Dr. Granger, attending physician. Ten weeks ago, while doing heavy plumbing work, suffered sharp pains in groin. Intestines came down. Easily pushed back. Wore belt for ten years. Last night came down and could not be replaced until doctor pulled on it and lessened it. Rheumatic pains in leg last three to five years, especially at night. Pains heavy and sharp. Poor appetite, past two years. Eyes: both pupils irregular, left pupil is larger than right. Pupils do not react to light. Nystagmus. Abdominal: lower abdomen is distended and bladder is apparently dilated to level of umbilicus. Dull over that area. No rigidity, no spasms. Inguinal region has impulse on coughing. No mass present. Extremities: No edema; no deformities. Reflexes: abdominal—both present; preastatic—right present, left absent. Romberg negative. Babinsky negative. Blood test shows Wasserman four plus. Signed release. on 16th of July."

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*Dr. Henry H. Kessler, for Respondent, Direct.*

DR. HENRY H. KESSLER, a witness on behalf of the respondent, being first duly sworn, testified as follows:

*Direct-examination by Mr. Paul:*

Q. Dr. Kessler, you have examined Mr. Herbert in this case? A. I did. 10

Q. About when, doctor? A. About a week ago.

Q. Are you a practicing physician of the State of New Jersey, doctor? A. I am.

Q. How long? A. Ten years.

Q. Are you associated now with any public work? A. Public work?

Q. State work I meant to say. A. Medical director of the Rehabilitation Clinic.

Q. Any hospital, doctor? A. I am consulting orthopedic surgeon at the Essex County Hospital, Overbrook, and associate orthopedic surgeon at the Beth Israel Hospital. Orthopedic staff of the Newark City Hospital; orthopedic staff of the Home for Crippled Children. 20

Q. Have you examined the hospital chart in the Herbert case? A. I have.

Q. What is Mr. Herbert's condition today, doctor? A. He is completely paralyzed and totally disabled. 30

Q. Have you been in court most of the morning, doctor? A. Yes.

Q. Did you hear Dr. Kopple testify? A. I did.

Q. Did you hear Dr. Sobin? A. I didn't hear him testify.

Q. The hospital chart showed Herbert had a four plus Wasserman, didn't it, doctor? A. It did. 40

*Dr. Henry H. Kessler, for Respondent, Direct.*

10 Q. And the testimony is that he had syphilis about thirty years ago and on July 13, 1927 while lifting a stove weighing about four or five hundred pounds one of the other men let go their end and the weight of the stove rested against Mr. Herbert's abdomen, as a result of which he sustained a hernia and was taken to the hospital the following day; that being the history of the case, doctor, and your examination of the man as of last week, would you say, in your opinion, also bearing in mind the hospital chart and findings, that his condition today had anything to do with the alleged accident of July 13, 1927? A. By taking into consideration his history and the hospital chart and the physical condition, I would say that the alleged injury was incidental to the condition from which he is now suffering.

20 Q. What are the symptoms or first manifestations of the oncoming of tabes? A. The so-called lightning pains, sometimes refer to the region about the chest and abdomen, sometimes refer down the posterior aspect of both legs.

30 Q. Ordinary people call that rheumatism, don't they, doctor? A. That might be called rheumatism; the lay term of rheumatism covers a multitude of diagnoses.

Q. That is one of the first symptoms of the development of tabes? A. It may be one of the first symptoms of the development of tabes.

40 Q. With that symptom and with the absence of any reflexes and where the pupils of the eye do not react to light and with the knee-jerks being absent and with the sharp shooting pains, those four or five symptoms coupled together, is that, in your opinion symptoms of tabes? A. They are symptoms of tabes.

*Dr. Henry H. Kessler, for Respondent, Direct.*

Q. That is tabes, is it not, doctor? A. It is tabes.

Q. And you divide the stages into three degrees or three stages, don't you? A. It is divided by some; it is pretty difficult to differentiate and make a hair line distinction between one stage and another.

Q. There is such a thing as the reflexes being partly gone or absolutely gone? A. Well, it may be diminished or may be entirely absent. 10

Q. At the time of his admission they were absent? A. At the time of the admission to the hospital they were absent, both knee-jerks; one pre-astatic jerk.

Q. At the time of the admission to the hospital, bearing in mind the chart and findings and the history of the rheumatic pains in the legs at night, would you say he had tabes? A. At which time? 20

Q. At the time of the admission to the hospital? A. Yes.

Q. Now, doctor, would you say that he had been in that condition or had the tabes? A. I just say a long time, I couldn't say definitely.

Q. Tabes is what kind of a disease, doctor? A. A chronic disease.

Q. Progresses slowly or rapidly? A. Chronic progressive, an insipiently progressive disease. 30

Q. Is it possible for tabes to manifest itself within twelve hours of a trauma? A. No.

Q. Did you ever hear of a case occurring that way, doctor? A. I have seen a lot of injuries of syphilitics here in the last ten years, but I have never heard of such a case.

Q. And if a man, doctor, is working fairly regularly for the past four or five years and has these sharp pains in his legs at night and has 40

*Dr. Henry H. Kessler, for Respondent, Cross.*

headaches occasionally with these pains coming every two or three days and the reflexes are diminished, could he work in that condition? A. He could.

Q. He could. In fact, isn't working a cure? A. I don't know.

10 Q. Not a cure, but a help for the man's condition? A. I don't know; I never cured them that way.

Mr. Paul: That is all.

*Cross-examination by Miss Lewitt:*

20 Q. Dr. Kessler, tabes is a form that syphilis takes, isn't it? A. It is a form of syphilis sometimes known as the tertiary stage, the last stage of syphilis.

Q. Did you hear the testimony of the doctor who was on before you? A. I think I heard most of it.

30 Q. He divides it into three stages. He assumes between three and five years ago when this man had the so-called syphilis he was probably suffering from the first stages of tabes. That was his testimony. This is a question taking the record as it stands? A. The hospital record?

Q. No, taking the record as it stands, the testimony. We have this: this man was working during all of this period steadily, in fact, he was working three years with the same firm where he received this injury, without any trouble, sustained a severe nervous shock to his central nervous system, produced by a very heavy weight, approximated at 500 pounds—an iron stove that this man

*Dr. Henry H. Kessler, for Respondent, Cross.*

had to bear himself when the man at the other end let go of his end, the strain and shock produced at that time, the strain on Mr. Herbert to the muscles producing a hernia—the strain was severe enough, omitting other testimony that we have that the stove actually fell on him? A. Produced a hernia?

Q. Produced a hernia? There was severe enough of a shock to produce a hernia; would you say that that same shock could have produced or reawakened or aggravated this condition of tabs from which this man was suffering? 10

Mr. Paul: I object to the question. I do not think it is proper, as the testimony is not necessarily that it produced a shock. Dr. Granger stated it produced a strain. Furthermore, it includes in the question that the entire stove was supported by Mr. Herbert and that is not so; there were four men on the stove; one man let go, and the three remained holding it. 20

Miss Lewitt: No, the testimony is that one man was at one end and Mr. Herbert was at the other end and the stove was being lifted on the wagon and another man was in the middle, on the board. 30

The Court: Well, one man let go his hold and the petitioner was obliged to sustain the increased share of the burden—share of the load.

*By Miss Lewitt:*

One of the men was directing the one on the wagon, and when one man let go the weight was on this man. 40

*Dr. Henry H. Kessler, for Respondent, Cross.*

The Court: You left out two important things: first, this man had syphilis thirty years ago, and second, this man had a hernia ten years ago.

10 The Witness: I am making my opinion based on the history chart of the hospital and the history of the case as disclosed from the testimony in the case.

20 Q. No, that is not the evidence; the evidence as we have it here is that some thirty years ago this man apparently had some venereal disease and for the past thirty-one years he did everything, from breaking horses, riding horses, and everything—did bareback riding, everything that requires a fine nervous system, that requires a man to be on his guard all the testimony; but the testimony as adduced at the previous trial is that some two and a half years before the accident the man sustained a hernia—he don't know whether he sustained a hernia or not; there is no evidence, as the Supreme Court record shows. Here is what the Supreme Court, *en bloc*, in giving its opinion, says—

30 Mr. Paul: I think that is immaterial, what the Supreme Court says.

(Discussion).

The Court: You can give the history without reading that. He had a hernia at that time, as the decision recites. He is not interested in the Supreme Court decision. He had a hernia ten years ago from which, apparently, he recovered—discarding his truss.

40 The Witness: I am basing it on the hospital record. The hospital record says he had a lump in his groin ten years ago.

*Dr. Henry H. Kessler, for Respondent, Cross.*

Q. Assuming what you know of this man's case, will you say that this strain and shock of the central nervous system aggravated or could have aggravated or may have aggravated this condition of tabes? A. No, for the following reasons: First of all, he had tabes in apparently the second stage at the time he was admitted to the hospital; that paralytic stage didn't come on until ten months afterwards. Second, that there was no direct injury to the spinal cord; that he had a hernia ten years ago which, in a light manner, was just as injurious to the disease he had in his central nervous system. 10

Q. Doctor, would you say, if this man had an injury to his back—would this injury to his back, assuming he had an injury to his back, would this injury have caused an aggravation of this pre-existing disease? 20

Mr. Paul: I object to that question because it is not in the case. Why go all over?

(Question repeated by the reporter).

The Court: Why inject that? There is no history of any injury to his back. I think it is irrelevant, as there is no history of any injury to his back. 30

Q. Dr. Kessler, if an individual, irrespective of this particular case, has a condition of tabes or syphilis, and that particular individual receives an injury to his head or shoulder or back, would that injury that he has received increase or aggravate the condition that he had? A. All other things being equal, if he had a direct blow to his spine I would say the possibilities are it would aggravate a pre-existing condition of tabes. 40

*Dr. Henry H. Kessler, for Respondent, Cross.*

Q. Now, are the muscles of the back, doctor, connected with the abdominal muscles and the muscles of the arm and all the muscles necessary in lifting a very heavy weight—are they connected? A. They are all connected, yes.

10 Q. They are all connected. Then if an individual say, for instance, uses his hands to lift something very, very heavy, isn't it a strain on the muscles of the back as well as the muscles of the abdomen? A. In any lifting effort you have to use the muscles of the back.

Q. Then you do have to use the muscles of the back when you do any heavy manual labor? A. Yes.

20 Q. Especially when you are lifting a weight of say five or six hundred pounds? A. Of course you do, anybody knows that.

30 Q. Then if that is so doesn't it follow as a matter of course that if a man uses his muscles to the extent of lifting a five or six hundred pound stove and there is an accident and the man uses his muscles to such an extent he is so injured that he receives a hernia, wouldn't you say the same muscular force necessary to produce a hernia would have had some effect on his back muscles? A. I say no. In the first place, logic and medicine do not mix. In the second place, those muscles are not in any way connected with the spinal cord, which is enclosed in a bony column by itself.

Q. Doctor, is it not a matter of fact—a matter that medical science is undivided on—that any strain of the spinal column is a strain of the spinal cord? A. No; I have seen too many of those cases to say definitely about it.

40 Q. You won't say definitely? A. I won't say definitely. This is why: the spinal cord is con-

*Dr. Leo Granger, In Rebuttal, Direct.*

tained within this bony column, so it wouldn't be subject to these muscular strains; it is contained within a covering and has fluid about it so it would always be free from the normal strains we are subjected to in workaday life.

Q. If it is, as you say, protected against ordinary strains of human life—ordinarily speaking, as we go on, if there is an injury to any part of the body, ordinarily it wouldn't affect the spinal cord because it is protected by the vertebrae surrounding it; but would you say that if a man received such a severe shock it was sufficient to have caused this particular condition, that it may not have affected his spinal cord? A. It could not have affected his spinal cord. 10

Q. Then you are definitely of the opinion that it could have no relation to the matter at all? A. No strain from lifting, no. 20

Miss Lewitt: That is all.

Mr. Paul: That is all.

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PETITIONER'S REBUTTAL TESTIMONY.

DR. LEO GRANGER, a witness on behalf of the petitioner herein, previously sworn, recalled, testified further as follows: 30

*Direct-examination by Miss Lewitt:*

Q. Doctor, you heard the testimony of Dr Kessler? A. Yes.

Q. Now, I want to ask you, is it not a matter of fact that any injury that would have been severe enough to have caused the hernia now complained of would also have been severe enough to 40

*Dr. Leo Granger, In Rebuttal, Direct.*

have affected the spinal column? A. I believe it would.

Mr. Paul: I object to the question as not proper rebuttal.

The Court: I will allow the question.

Mr. Paul: I ask an exception.

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Q. Doctor, in your own way, will you please explain the medical workings of the injury that caused the hernia and its relationship to the injury now complained of—that this man is now suffering from? A. It is my opinion—(interrupted).

Q. Excuse me. With whom were you working in New York at the hospital? A. Dr. Tilney and Dr. Jaegel.

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Q. Drs. Tilney and Jaegel. Were those doctors specializing in venereal diseases? A. In neurology and syphilis.

Q. And you have had ample opportunity to observe these cases?

Mr. Paul: That calls for a conclusion.

Q. Doctor, have you had opportunity to observe syphilitic cases under the tutelage of brilliant men such as these men are?

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Mr. Paul: If your Honor please, that calls for a conclusion.

Q. With what institution were these men connected? A. With the Vanderbilt Clinic.

Q. They are the heads of staff on venereal diseases? A. Yes.

Q. You worked with these men? A. Yes.

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*Dr. Leo Granger, In Rebuttal, Cross.*

Q. Did you have the opportunity of observing numerous cases along those lines? A. For two years.

Q. Now, doctor, explain in your own way the medical relationship between a hernia and a back injury.

Mr. Paul: If it please the Court, that is not proper redirect; it should have been brought out on the main case and gone into and is not proper rebuttal. 10

The Court: I will allow it. It was brought out on the redirect-examination and this is rebuttal.

(Question repeated by the reporter).

A. It is my opinion that the same force which caused the hernia would also cause such a strain to the muscles of the back as would affect the spinal cord to such an extent that it would be a direct trauma on the spinal column. 20

Q. In lifting a heavy weight, doctor, of say five hundred pounds, would you necessarily have to use all the muscles of the back, shoulders, arms and abdomen? A. You would.

Miss Lewitt: That is all.

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*Cross-examination by Mr. Paul:*

Q. Doctor, did you ever see a case of a man having a hernia and sustaining a spinal lesion from it or spinal trouble from it? A. Not from a hernia.

Q. I am talking about a hernia now; you never saw one, did you? A No.

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*Dr. Leo Granger, In Rebuttal, Redirect.*

Q. Why do you say now that, in your opinion, a hernia could produce a shock to the spinal cord muscles?

10 Miss Lewitt: I object to that. The doctor did not say that; the doctor said that a severe strain that would produce a hernia would also produce that.

The Court: That is right.

Q. Doctor, did you ever see a case of the disease where a severe strain resulted in a hernia and caused an injury to the spinal cord muscles?

A. Not as the result of a hernia, but a severe strain on the back.

20 Q. But in this case there was a hernia, wasn't there; in the Herbert case there was a hernia?

A. In the Herbert case the hernia was also produced.

Q. Did you ever see a case where a man had a hernia as a result of a strain that would interfere with the spinal cord muscles? A. No, I have not.

Mr. Paul: That is all, doctor.

*Redirect-examination by Miss Lewitt:*

30 Q. Doctor, could the strain that produced the hernia have also produced a strain on the central nervous system and the cord in the spinal column?

A. In my opinion, it did.

Q. Was it the hernia that produced it or the strain that produced it? A. The strain.

Q. It was the strain that also produced the hernia, wasn't it? A. Yes.

*Dr. Leo Granger, In Rebuttal, Redirect.*

Q. But the hernia did not produce nor aggravate the condition of tabes, it was the strain that produced it? A. Yes.

Miss Lewitt: That is my case with the exception of Dr. Dowd.

Mr. Paul: I rest my case, but I have the right to reopen my case if Dr. Dowd's testimony develops any surprise. 10

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NEW JERSEY DEPARTMENT OF LABOR,  
WORKMEN'S COMPENSATION BUREAU.  
Newark, Essex County District.

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GEORGE HERBERT,  
Petitioner,

vs.

NEWARK HARDWARE Co.,  
Respondent.

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Transcript of stenographic notes of the testimony taken in the above-entitled matter before Hon. Harry J. Goas, Deputy Compensation Commissioner, at the Compensation Department of the Workmen's Compensation Bureau, 9-15 Franklin Street, Newark, New Jersey, on the 27th day of February, A. D. 1929, at 10:30 o'clock in the forenoon.

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APPEARANCES:

Sara Lewitt (Schwartz & Lewitt), for petitioner; 40

Joseph C. Paul, Esq., for respondent.

*Dr. Ambrose F. Dowd, for Petitioner, Direct.*

DR. AMBROSE F. DOWD, a witness on behalf of the petitioner herein, testified on the case in chief by consent of counsel, after having been first duly sworn.

*Direct-examination by Miss Lewitt.*

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Q. Assuming, Dr. Dowd—for the purpose of the record, I want to get the doctor's qualifications?

A. I am a specialist in nervous and mental diseases and have practiced medicine nineteen years in this city.

Mr. Paul: What kind of diseases, doctor?

The Witness: Nervous and mental.

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Q. Are you attached to any hospital, doctor?

A. Yes.

Q. What hospital is that? A. The City Hospital, St. James' Hospital, Mountainside Hospital, Irvington General Hospital, Bethany Home, New Jersey Department of Labor (as consultant in nervous and mental diseases).

Q. Doctor, do you make a specialty of nervous and mental diseases? A. Yes.

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Q. Doctor, assuming the petitioner, who is at the present time forty-six years of age, who when a young man about sixteen or eighteen years of age contracted a venereal disease, apparently, to all intents and purposes he was cured—never had any further trouble during the following thirty years of his life, he had continued at hard work, manual work, a horse breaker, a circus rider; the man had to do the most strenuous work and he never felt, as a result, any illness; about a year and a half ago—some time in July, 1927—while working in a certain hardware store in which

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*Dr. Ambrose F. Dowd, for Petitioner, Direct.*

place this man had been working for the past three years without interruption except possibly a day or two out from a cold or a headache, the man continued his work in a satisfactory manner; at a certain specified time—at some time in July, 1927—suffered an accident; as a result of this accident, this man sustained a hernia, the accident happening in this way; he and another man were lifting a combination gas and coal stove onto a truck; the stove was approximately between five and six hundred pounds in weight; the man at one end of the stove let go of his end and threw the entire weight of the stove on the petitioner; the doctor who treated him at that time for the hernia testified that there was a ripping and tearing of the wall at the time he examined him for the hernia, which he reduced, and sent him to the City Hospital; right after the accident happened this man's health began to fail continually and he at the present time is entirely incapacitated and from the testimony of the physicians the man is now suffering from locomotor ataxia; would you say doctor, that the accident that he sustained at the time he received the hernia could have contributed or re-awakened or aggravated the old dormant condition of syphilis from which he was suffering?

Mr. Paul: If it please the Court, I object to the question on the ground it does not include the testimony. There is a lot of testimony not given in the question: for instance, the hospital records, which are most important, and the man's condition of health before the accident, which is also quite important.

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*Dr. Ambrose F. Dowd, for Petitioner, Direct.*

Q. In the summary I guess you can also include this, doctor: that the petitioner testified that some three or four years previous to this accident he had suffered with rheumatism—that is the only testimony we have, your Honor, from the petitioner and from his wife, that he was suffering from  
10 rheumatism intermittently, on and off.

The Court: Well, the hospital records, I think, were offered and received in evidence.

Miss Lewitt: Yes, the hospital records are in evidence; but at the same time, I want to say right here and now, we must look upon the hospital records with very grave doubts.

(Discussion.)

20 The Court: That is the hospital record and we must accept it.

Q. Taking the facts as follows: at the time this man was sent to the hospital suffering from a hernia he told in the history of the case that he had shooting pains at intervals through his legs, which became more intense in the evening—that is the testimony that Mr. Paul wants to bring in—but at no time, Dr. Dowd, was this man forced to remain away from his work, at no time did he evidence any illness, at no time was this man's condition such that he was a sick man.  
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Mr. Paul: I object to that question as palpably improper.

The Court: Put it in the form of a statement; don't make it argumentative. The petitioner testifies that he worked up to the time of the accident and beyond, being sick  
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*Dr. Ambrose F. Dowd, for Petitioner, Direct.*

before; the testimony was, having a cold once in a while; he testified that he was not seriously sick and did not stay away from work as a result of sickness.

Q. Taking the statement of what Commissioner Goas said the testimony was, the petitioner said in three years he was only out a few days for a cold: having that as a basis, would you say that this accident he suffered has reawakened or aggravated the old condition? 10

Mr. Paul: May it please the Court, the question is not complete yet; it does not set forth the hospital record in detail as it should be set forth.

The Court: What do you have in mind? 20

Mr. Paul: The hospital record shows the man had no reflexes, his pupils did not react to light, he had shooting pains in the legs which were worse at night for a period of five years before his admission; that his Rhomberg was negative; also, there was no spinal fluid test made.

Q. And all of these symptoms were developed after the accident happened, not before; the only thing we can state positively existed before was this man's statement he had shooting pains; outside of that, there is no testimony that this condition existed before the accident. 30

Mr. Paul: I object to the question entirely now. I do not think counsel should argue with the doctor as to what existed or did not. 40

*Dr. Ambrose F. Dowd, for Petitioner, Direct.*

The Court: That is the point, Miss Lewitt; let the doctor answer the question.

(Discussion.)

10 Q. Very well, then; assume that the hospital records indicate that this man had shooting pains some three or five years before; that there was no spinal fluid test but there was a Wasserman which was four plus and apparently they are the only indications that this man was suffering from syphilis; now, would you say that the injury which he received that caused the hernia also affected, aggravated or reawakened the pre-existing disease from which he was suffering?

20 Mr. Paul: I object to the form of the question as improper.

The Court: I think it is the best we can do under the circumstances. I will allow that.

Mr. Paul: I pray an exception.

The Court: Note an exception.

A. Yes.

Q. Then the accident did have an effect upon his condition?

30 Mr. Paul: If it please the Court, that is not proper; he answered the question.

Q. Explain the effect this injury would have.

A. It would aggravate, intensify, accelerate, the pre-existing syphilis through his nervous system.

Q. How do you account for that, doctor? A. How do I account for it? The accident, plus the pain, plus the disturbance and so-called distress

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*Dr. Ambrose F. Dowd, for Petitioner, Direct.*

that follows those things intensify any degree of syphilitic disease or any nervous symptoms.

Q. Dr. Dowd, I want to show you this book by Dr. Libinco (?) A. Libinco is the publishing firm.

Q. The publisher is Dr. Libinco and the doctor is Dr. George Rehrberger of Johns Hopkins University. Here is an excerpt on locomotor ataxia, tabes dorsalis: will you please read a part of that, doctor, and let us have your opinion, sir, on that? 10  
A. (After reading.) I think he is setting forth—

Mr. Paul: I object to the doctor answering the question in this form. I think the doctor is qualified to testify of his own knowledge without testifying as Dr. Libinco or anybody else. 20

Miss Lewitt: Dr. Dowd is an authority.

The Court: He may know text book or he may not.

The Witness: I know the text book and it sets forth well-known facts about the disease.

The Court: All right. Then he testifies that that is an authority—

The Witness: I don't say it is an authority; I do not think any text book is an authority, it is an expression of a man's opinions and experiences. 30

Mr. Paul: The same as a law book?

The Witness: I don't know, but I think the compiled statutes are more controlling.

The Court: Very well, then; I think we will rely on the doctor's opinion.

(Discussion.)

*Dr. Ambrose F. Dowd, for Petitioner, Cross.*

Mr. Paul: I object to it most strenuously. It seems to me if the doctor rates the book as the writer's opinion, then it can't be his own opinion; he must be confined to this case.

The Court: I will rule that book out.

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Miss Lewitt: That is all.

*Cross-examination by Mr. Paul:*

Q. Doctor, did you ever examine this petitioner? A. Never.

Q. You never saw him at all? A. Never at all.

Q. You are simply testifying from a hypothetical question which you are construing? A. That is right.

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Q. And the only knowledge you have of the matter is what that question embodied? A. Right.

Q. Doctor, have you ever treated a case of tabes? A. Many of them.

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Q. What are the first symptoms of it? A. The first symptoms are variable: they are usually disturbance of gait, disturbance of pupillary action, loss of achilles reflexes, loss of knee-jerks, negative Romberg, lightning pains, abdominal crises, cardiac crises, and other crises.

Q. Those are all evidences of the oncoming of tabes? A. Those are all evidences of the oncoming of tabes.

Q. As a rule, tabes is a slow, progressive disease, isn't it, doctor? A. Always.

Q. When a man has a syphilitic condition for thirty years, would you say tabes could develop in twelve hours after a trauma? A. No, of course not.

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*Dr. Ambrose F. Dowd, for Petitioner, Cross.*

Q. So if this man shows a history and the facts are shown from the hospital records—strike that out. By the way, how many stages of tabes are there? A. Three or four, usually.

Q. The first stage is when the man has shooting pains and slight reflexes? A. Yes.

Q. The second is the absence of any reflexes? A. Yes. 10

Q. The third stage is paralysis? A. Yes. The fourth stage is sometimes insanity.

Q. Now, if this man's history is that five years prior to July 13, 1927 he had shooting pains in his legs, particularly severe at night, that he had headaches and on this day he received a hernia from a strain, was taken to the hospital, it was reduced by the insertion of a finger in the rings, and the hospital chart showed— 20

Miss Lewitt: Your Honor, I object to that; there is no such testimony, that it was reduced by inserting the finger. Dr. Granger testified that he worked on this man and manipulated it so that it was reduced, but he didn't testify how.

The Court: Well, I don't think it is important any way.

Miss Lewitt: Well, the doctor is led to believe the hernia could be reduced that way. 30

Q. Doctor, how do you reduce a hernia? A. In various ways.

Q. You can do it by the insertion of a finger? A. Yes, that is one way in a simple case.

Q. Leave out the insertion of a finger, then. The hernia was reduced and the same day the hospital chart shows he complained of night 40

*Dr. Ambrose F. Dowd, for Petitioner, Cross.*

10 sweats on and off for two years, he had those shooting pains or rheumatic pains as he calls them for five years, both pupils irregular, the right being larger than the left, they reacted neither to light nor accommodation; there was an absence of the cremastatic reflexes on the left side, absence of both knee-jerks and four plus Wasserman the day after the alleged trauma or hernia; doctor, in your opinion, did that man then have tabes? A. Yes.

Q. And in the second stage? A. Certainly, yes.

Q. The second stage? A. Practically.

Q. So that at the trauma he had the tabes? A. Yes.

20 Q. Because, as you said before, tabes could not come on within twelve hours after trauma? A. Tabes could not come on in twelve hours.

Q. Doctor, isn't it possible and isn't it what you would prescribe for a man in that condition that he work, as a rule? A. I think it is a good thing for all men to work, tabetic or non-tabetic.

Q. And isn't it possible for a man to work and have that absence of reflexes, in the first place? A. Of course.

30 Q. Nothing unusual about that? A. No.

Q. Then it is your opinion the man was in the second stage at the time? A. If you want me to divide it into stages, yes.

Q. And as a matter of fact, without the intervention of the trauma, he would have gone on through the third stage, wouldn't he? A. Not as a matter of course; they sometimes are arrested in the second stage or even the first.

40 Q. For how long, doctor? A. For a long period; ten or twelve years.

*Dr. Ambrose F. Dowd, for Petitioner, Cross.*

Q. Ten months, would you say? A. Yes, sometimes.

Q. But it comes, as a rule, doesn't it, as sure as death? A. In about fifty or sixty per cent. of the cases.

Q. And without the intervention of any trauma, too? A. Without anything happening. 10

Q. Just in the usual course of events? A. Yes, of syphilitic events.

Q. If, doctor, bearing in mind the history of the case, this paralytic stage came on ten months after the trauma alleged in July, 1927, and bearing in mind the history and the hospital record that the man was then in the second stage of tabes, would you say that it was possible that the paralytic stage was hastened or aggravated by the trauma? A. I would say it was possible but highly improbable. The second stage is a very prolonged stage of tabes—the stage goes over years—during which the man in it is usually employed. 20

Q. But you cannot tell, doctor, for how long this man had been in the second stage; you only know that for five years he had been suffering those shooting pains in the legs? A. I would like to know if the man using the term was referring to "shooting" pains or "lightning pains." Shooting pains is a very common term; lightning pains is not. 30

Q. Well, the layman describes them as rheumatism, don't they? A. I think everything is ascribed to rheumatism.

Q. In this case if the man said he had rheumatism in the legs, you would say there was a beginning of tabes? Wouldn't you—on the testimony? A. I was going to exclude everything else; of course, it is quite possible for a tabetic to have 40

*Dr. Ambrose F. Dowd, for Petitioner, Cross.*

rheumatism and other illnesses and diseases.

Q. Did you ever see a case, doctor, of chronic syphilis where a trauma intervened and no development of locomotor ataxia? A. Chronic syphilis of the nervous system?

10 Q. Chronic syphilis? A. You can have syphilis without having syphilis in the nervous system. I have never seen a case of syphilis in the nervous system that was not aggravated by a trauma.

Q. You have never seen a case of syphilis in the nervous system that was not aggravated by a trauma? A. Where there was a pre-existing syphilis of the nervous system, I have never seen a case that was not aggravated by a trauma.

20 Q. But you have heard of them and read of them, haven't you, doctor? A. Oh, you can hear of anything.

Q. You wouldn't say it couldn't happen? A. Oh, no, I don't deny it is possible.

Q. You are only stating from your own experience? A. That was your question.

Q. But you wouldn't deny that it cannot possibly happen? A. It is possible.

30 Q. Doesn't the syphilitic condition arise in the spinal fluid or spinal column? A. Its existence is usually evident in the cerebral spinal fluid in about eighty-five or ninety per cent. of the cases; about ten to fifteen per cent. of the examinations of spinal fluid are absolutely negative.

Q. Is it possible for a man to have a trauma such as a hernia, which would be a sufficient strain to awaken a pre-existing syphilitic condition and to bring that on? A. Oh, yes.

40 Q. But if he already had that tabes it was manifesting itself and it was there five or six

*Dr. Ambrose F. Dowd, for Petitioner, Redirect.*

years, would your answer be the same? A. Well, a slight trauma would be more likely to do it.

Q. How soon would the tabes develop after that? A. It was already there.

Q. It was already there? A. Yes.

Mr. Paul: That is all.

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*Redirect-examination by Miss Lewitt:*

Q. Dr. Dowd, have you in your experience treated any cases in which the trauma aggravated or reawakened the pre-existing condition of syphilis or tabes? A. Yes.

Q. Doctor, what will your charge be? A. There isn't any in this case.

Miss Lewitt: Thank you very much. That is all. 20

Mr. Paul: That is all.

(Case closed).

(Decision reserved).

I hereby certify the foregoing to be a true and accurate transcript of the testimony taken in the above-entitled matter, at the times, dates, and place hereinbefore set forth. 30

WILLIAM C. O'BRIEN,  
Court Reporter.

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**Opinion.**

## NEW JERSEY SUPREME COURT.

No. 210, May Term 1930.

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GEORGE HERBERT,  
Petitioner-Defendant,

vs.

NEWARK HARDWARE & PLUMB-  
ING SUPPLY Co.,  
Respondent-Prosecutor.

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Submitted May 16, 1930; decided September 1930.

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The payment by the employer of a judgment in a workmen's compensation case after litigated hearing, appeal, and affirmance on certiorari in the Supreme Court, is not a "last payment of compensation" in the intendment of P. L. 1918, p. 431, Sec. 5, amended by P. L. 1921, p. 731, or of P. L. 1919, Chapter 93 at p. 214, paragraph 23 (h), which will permit the opening of the case for consideration of an additional claim of disability within a year after payment of such judgment.

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On certiorari to judgment of Essex Common Pleas, affirming award in a workmen's compensation case.

Before Justices PARKER, CAMPBELL and BODINE.  
For the prosecutor, JOSEPH C. PAUL.  
For the defendant, SAMUEL PRESS.

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*Opinion of New Jersey Supreme Court.*

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

The controlling question in this case, which must be resolved in favor of the petitioner below if the other questions raised are even to be considered, is whether after a year has expired from the date of the injury without any voluntary payment of compensation by the employer or any agreement to pay such compensation, and within that year there was a petition filed pursuant to the statute, trial before the commissioner, appeal to the Common Pleas and affirmance in that court, review by certiorari in this court and judgment of affirmance here after the year had expired (*Herbert v. Newark Hardware &c. Co.*, 142 Atl. 343) and payment of the judgment as affirmed, the statute permits the whole matter to be reopened and readjudicated on the theory of increased disability. 10 20

The accident occurred on July 13, 1927; the petition was sworn to on August 4th, and award made September 30, 1927. After appeal to the Common Pleas and affirmance by that court, the case came here on certiorari, was argued at May term 1928, judgment of affirmance was entered about August 1, 1928, and paid on or about October 15, 1928. On November 7, 1928 petitioner filed an "amended petition" setting up further disability altogether different from the hernia claimed in the original petition and of a much more serious character, claiming it had not been discovered until that time. We need not stop to consider whether the claim was supported by the evidence. The commissioner properly dismissed the "amended petition" as in effect a new petition. (see *Benjamin & Johnes v. Brabban*, 90 N. J. L. 355) but 30 40

*Opinion of New Jersey Supreme Court.*

entertained and granted an application to reopen the original proceeding on the theory that such application was made "within one year from the date of the last payment of compensation as provided in the (supplement to the) Workmen's Compensation Act, Chapter 149, par. 5 of P. L. 1918" (p. 431). The award based on this ruling was affirmed in the common pleas, and is now before us.

We conclude that there was error in entertaining the second application, as we are of opinion that it came too late.

As the matter is important, it is worth while to note the history of our legislation on this phase of the Compensation Act, and the decisions applying and construing it.

In the original act, the second clause of paragraph 21 (P. L. 1911 at p. 143) read as follows:

"An agreement or award of compensation may be modified at any time by a subsequent agreement, or *at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished.*" Later, the legislature, not satisfied with the clause that we have italicised, eliminated it. P. L. 1919, p. 211, par. 21, clause (f). As modified, the clause reads: "(f) An agreement or award of compensation may be modified at any time by a subsequent agreement, or reviewed upon application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished." It was held by the Court of Errors and Appeals in *Luszy v. Seaboard By-Products Co.*, 101 N. J. L. 170, that the words "at any time" in the 1919 act, *supra*, did not apply to the "review"

*Opinion of New Jersey Supreme Court.*

but only to the "modification by subsequent agreement", and the "review" was limited in time by the provisions of Section 5 of the supplement of 1918, (P. L. p. 431) and of clause (h) of paragraph 23 as amended in 1919. P. L. at p. 214, presently to be considered. The language of that court is significant, and may well be quoted: 10

"In 1918, when the Compensation Bureau was created, the act contained a provision similar to 23 (h) of the original Compensation Act. In 1919 section 23 (h) of the Compensation Act was changed in conformity with the similar provision of the Compensation Bureau Act in order to make it conform to and harmonize with the change made in section 21 (f). From this it seems that the whole purpose of the change in section 21 (f) was to limit and not extend the time in which an agreement could be reviewed by the Compensation Bureau. The limiting section of the act having been passed subsequent to the passage of the section providing for a review at any time, and containing a repealer of inconsistent legislation, must control." This decision was cited, and of course followed, by this court in *Deslauriers &c. Co. v. Jackson*, 127 Atl., 798, 3 Misc. 258. 20

At the risk of prolixity, but in the interest of clarity, Sec. 5 of 1918, and clause (h) of 1919 are quoted verbatim: 30

Sec. 5 (as amended by P. L. 1921, p. 731).  
 "Every claimant for compensation under the act to which this act is a supplement, or its supplements or amendments, shall, unless a settlement is effected or a petition filed under the provisions of section four, file a petition in duplicate with the secretary of said bureau in his office, at the State House, in Trenton, within one year after the date 40

*Opinion of New Jersey Supreme Court.*

on which the accident occurred, or in case an agreement for compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation. A payment, or agreement to pay by the insurance carrier, shall for the purpose of this section be deemed a payment or agreement by the employer.”

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Clause (h). “In case of personal injury or death all claims for compensation on account thereof shall be forever barred unless a petition is filed in duplicate with the Secretary of the Workmen’s Compensation Bureau, at the State House, in Trenton, within one year after the date on which the accident occurred, or in case an agreement of compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation.”

30 These provisions were held in the Court of Chancery to be jurisdictional, and not mere statutes of limitation. *Miller v. Beller Electric Supply Co.*, 100 N. J. Eq., 444.

40 The acts cited and quoted above all in *pari materia*: and as we read them are not, nor is any of them, directed to the situation of a contested claim litigated and reduced to judgment, and the judgment paid and satisfied. They point to three, and only three, dates as setting the running of the year

*Opinion of New Jersey Supreme Court.*

in motion: (a) the occurrence of the accident, not followed by any petition, or voluntary payment by employer, or agreement for compensation: (b) failure of employer in making payment after agreeing to do so: (c) cessation of payment by employer either after agreement or voluntarily without agreement. The case at bar is not within any of these classes but is simply an attempt to increase the damages after judgment and review on the ground of newly discovered evidence. No such procedure is contemplated by the statute; and we think the case of Benjamin & Johnes v. Brabban, *ubi supra*, is in point and controlling. As remarked by Mr. Justice Swayze in that case, "It is important that a case solemnly adjudicated should not be reopened for the purpose of allowing a party to make a new and distinct case."

We hold therefore that the payment of the previous judgment was not such a "last payment of compensation" in the intendment of the statute, as would support an application to "review the award" within a year after such payment of the judgment.

The judgment of the Common Pleas and the award of the commissioner under review will accordingly be set aside, with costs.

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**Notice and Grounds of Appeal.**

Filed April 17, 1931.

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10	GEORGE HERBERT, Defendant-Appellant,  vs.  NEWARK HARDWARE AND PLUMB- ING SUPPLY COMPANY, Prosecutor-Appellee.	}	On Appeal. Notice and Grounds of Appeal.
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20 To: JOSEPH C. PAUL, ESQ., Attorney for Prosecu-  
tor-Appellee, 60 Park Place, Newark, N. J.

Sir:

Please Take Notice that the defendant-appellant in the above entitled cause hereby appeals to the Court of Errors and Appeals the Court of last resort in all causes in New Jersey, from the whole of the judgment entered in this case on the following ground:

30 Because the Supreme Court erred in giving judgment for the Prosecutor-Appellee, instead of for the Defendant-Appellant.

Respectfully yours,

SARA M. LEWITT,  
Attorney for Defendant-Appellant.

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**Notice of Argument.**

Filed May 1, 1931.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

<p style="text-align: center;">GEORGE HERBERT, Defendant-Appellant,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">NEWARK HARDWARE &amp; PLUMBING SUPPLY COMPANY, Prosecutor-Appellee.</p>	}	<p>10</p> <p>On Appeal.</p> <p>Notice of Argument.</p>
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To: JOSEPH C. PAUL, Esq., Attorney for Prosecu- 20  
tor-Appellee, 60 Park Place, Newark, New Jer-  
sey.

Sir:

Please Take Notice that we shall move the Ar-  
gument of the Appeal in the New Jersey Court of  
Errors and Appeals in the above entitled cause  
before the New Jersey Court of Errors and Ap-  
peals at the State House, Trenton, New Jersey on  
the third Tuesday of May next, to wit: May 19th, 30  
1931, at ten o'clock in the forenoon on said day or  
as soon thereafter as Counsel can be heard.

SARA M. LEWITT,  
Attorney for Defendant-Appellant.

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119	General History of the Police of Alabama
	On Appeal
	Police of
	Newark, New Jersey
	Police of
	Philadelphia

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## New Jersey Court of Errors and Appeals

GEORGE HERBERT, Defendant-Appellant.	}	On Certiorari.
vs.		On Appeal
NEWARK HARDWARE AND PLUMB- ING SUPPLY COMPANY, Prosecutor-Respondent.	}	from Supreme Court.

### BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from the Supreme Court on a certiorari proceeding by Newark Hardware & Plumbing Supply Company to review a judgment of the Court of Common Pleas, affirming an award in the Workmen's Compensation Bureau to George Herbert. The judgment of the common pleas and the award of the deputy commissioner were set aside by the Supreme Court (151 A. 502), and the defendant in certiorari appeals.

#### Facts.

On or about July 13, 1927, the defendant-appellant, George Herbert, while in the employ of the prosecutor-respondent, Newark Hardware & Plumbing Supply Company, suffered an accident during the course of his employment, while lifting a heavy combination gas and coal stove, when the man who was helping him put the stove on a truck, let go his end, throwing the entire weight upon Herbert. Herbert's injury at this time manifested itself by a hernia.

A petition, sworn to August 4, 1927, and declaring on the above facts, was filed with the Workmen's Compensation Bureau, and, after answer and hearing had, an award was entered in said Bureau, September 30, 1927, for hernia, consisting of twenty weeks' compensation at the rate of seventeen dollars per week, and counsel fee. The award was affirmed by the common pleas on appeal and by the supreme court on certiorari; judgment in the latter was entered about August 1, 1928, (*Herbert v. Newark Hardware, etc., Co.*, 142 A. 343, 6 N. J. Misc. R. 647), and paid on or about October 15, 1928.

In April, 1928, the disability of Herbert had progressed and Herbert was then suffering from locomotor ataxia or tabes dorsalis and acute retention of the urine. The accident on July 13, 1927, at which time Herbert suffered a severe strain of his abdomen and back, had directly affected his central nervous system and precipitated the reawakening of a dormant condition of syphilis. These facts were not ascertainable at the time of the original hearing, because this condition did not develop and did not come to light until an examination of Herbert's physical condition was made in April of 1928, as stated. Herbert is now totally disabled.

On November 7, 1928, a petition was filed alleging increased disability due to the accident on July 13, 1927. Several weeks later an amended petition was filed. On February 6, 1929, the deputy commissioner dismissed the petition filed November 7, 1928, together with the amended petition, but allowed the original petition of 1927 to be reopened on the ground of increased disability. An award was entered in favor of Herbert for compensation for permanent disability of four hundred weeks, together with some temporary disa-

bility. The company appealed to the common pleas, who affirmed the award. The company then sued out a writ of certiorari to the supreme court, where the judgment of the common pleas and the award of the deputy commissioner were set aside. (151 A. 502).

**The Deputy Commissioner acquired jurisdiction over the present reopening by the filing of the original petition for hernia, and retained jurisdiction over the present reopening by the allegation, upon the application for reopening, of sufficient facts to show that the present condition of the petitioner was attributable to the accident for which the original petition was filed.**

P. L. 1919, c. 93, p. 211, section 23 (h), provides: "In case of personal injury or death *all claims for compensation on account thereof shall be forever barred* unless a petition is filed in duplicate with the secretary of the Workmen's Compensation Bureau, at the State House in Trenton, within one year after the date on which the accident occurred, or in case an agreement of compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation." (Italics mine.)

On a careful reading of the above section, with particular reference to the italicized portion thereof, the conclusion is inescapable that in order for compensation to be payable for *any* consequences arising from an accidental injury, a petition therefor must be filed within the prescribed time, and that when such petition has been duly filed, then

compensation is payable for *all* consequences arising from the same accidental injury, premising, of course, that further claims for compensation other than that on the petition filed are properly brought, within the purview and intendment of the Act. The filing of such petition within the prescribed time is a jurisdictional prerequisite, without which the Workmen's Compensation Bureau cannot hear *any* claims for compensation on account of an accidental injury. *Miller v. Beller Electre Supply Co.*, 100 N. J. Eq. 444, 136 A. 342.

P. L. 1919, c. 93, p. 210, section 21 (f), provides: "An agreement or award of compensation may be modified at any time by a subsequent agreement, or reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished."

Chapter 149, Laws of 1918, section 10 provides:

"The Commissioner of Labor, each deputy commissioner and each referee is hereby authorized to hear and determine the matter in dispute in a summary manner, and each shall have power under the act to which this act is a supplement, to modify any award of compensation and to provide for the commutation of any such award."

When it appears in a case where an award has been made that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court upon a proper application to interfere and grant relief. *Safety Insulated Wire & C. Co. v. Court of Common Pleas*, 90 N. J. Law, 114, 100 A. 846, 848. By the same token, when it appears in a case where an award has been made that the incapacity upon which the award was based had *increased*, there also it be-

comes the duty of the court upon a proper application to interfere and grant relief.

Jurisdiction having already been acquired, by the due filing of the original petition in this case based upon the accident of July 13, 1927, over all claims properly brought on account thereof, the only jurisdictional question on the application for review, saving, perhaps, the one of time brought (of which more hereafter), was whether or not there were sufficient facts before the Deputy Commissioner showing that the condition of the petitioner at the time of the application for review was attributable to the accident for which the original petition was filed. Even if such facts were in dispute, yet if the Deputy Commissioner, after a consideration of the evidence, found the facts that vested jurisdiction in him, he had the right to grant the relief sought. *Boyle v. Van Splinter*, 101 N. J. Law, 89, 127 A. 257, 258. Such facts there were, in this case (of which also more hereafter).

**There was no evidence to support the finding of the learned Justice (State of the Case, page 140, top) that the Commissioner "entertained and granted an application to reopen the original proceeding on the theory that such application was made 'within one year from the date of the last payment of compensation as provided in the (supplement to the) Workmen's Compensation Act, Chapter 149, Par. 5 of P. L. 1918' (page 431)."**

The province of appellate courts, except in equitable actions, is limited to the correction of errors of law, and they cannot review the findings of fact of juries or of trial courts. 4 *Corpus Juris*, Appeal and Error, section 2537, page 645, and cases cited. But it is a question of law whether there is any evi-

dence to support the verdict or findings. *Ibid*, section 2539, page 648, and cases cited.

In *Luszc v. Seaboard By-Products Co.*, 101 N. J. Law, 170, 127 A. 212, Justice Katzenbach, speaking for the Court of Errors and Appeals, says, on page 214 of 127 A. :

“The statement contained in the Supreme Court opinion that ‘at the time of his death the deceased was receiving compensation under an existing agreement with his employer’, is not borne out by the record, as the only payment made to Luszc was in November, 1921, for his temporary disability.”

In this case, the petitioner sought review by filing a new petition for increased disability (later amended). On a motion to dismiss the petition, made January 9, 1929, the Deputy Commissioner said (State of the Case, pages 35 & 36).

(Page 36) : “My present thought is, the old petition can be reopened, not expressing an opinion as to the medical side of it—I think that is a matter of proof—but I rather think you can reopen for a condition that possibly existed at that time although it was not brought to the fore, and I think you can bring that in now if you can bring in proof that the accident did bring that thing to light at any time. I think I will decide now to reopen the case to give you an opportunity to put in that proof and hold it in abeyance until the time of the hearing as to whether it is to be on the petition filed recently or on the original petition. The original petition can be reopened if it is within the statutory time and this can be reopened, and I think you have established at least a *prima facie* case to reopen this question of medical proof to connect it up. I will consent to have it reopened and decide later as to whether it will be on the old one or on the new one.”

The amended petition referred to was entitled "A petition to reopen the old petition, originally filed." On a motion to dismiss such petition, made February 6, 1929, the Deputy Commissioner, pages 41 & 42, State of the Case, says:

(Page 43): "Of course, so far as the amended petition is concerned, you cannot convey any greater right than what the petition and subsequent testimony developed at that time; so I am not so solicitous as to whether to take it on this amended petition or simply on the motion; because, after all, it refers back to the original petition and to the testimony that developed following."

And on page 44, State of the Case, he further says:

"I think I will rule the petitioner may go on with his case, with the addition made to it at this time, on the ground of increased disability and at the most, the respondent can claim prejudice—at the most—for not being apprised earlier. So on that premise we will go on."

The above excerpts from the Deputy Commissioner's rulings sum up his theory of the reopening at the actual hearings.

*The technical form of the procedure on which a reopening may be had is not important.* Benjamin & Johnes v. Brabban, 90 N. J. Law, 255, 258, 103 A. 688, 690. A mere formal defect, therefore, in pleading the jurisdictional facts could not bar the cause from the forum. It was thus immaterial in what form the petitioner applied for review, whether orally, by amendment of the original petition, by rule to show cause, by petition for further disability, by petition to reopen the original petition, by petition to review the award, etc., etc. So long as sufficient jurisdictional facts were actually present-

ed to the Deputy Commissioner for his consideration and determination, he had a right to grant the relief sought.

The only basis of the finding of the learned justice contained in his opinion, above recited, is the language of the Deputy Commissioner in his determination of facts and order for judgment, (State of the Case, page 11:

“Commissioner Goas after hearing the arguments of both sides, dismissed the new petition as filed on November 7, 1928, together with the amended petition, but allowed the above captioned matter to be re-opened on the ground of increased disability, since the application to re-open the original case was made within one year from the date of the last payment of compensation as provided in the Workmen’s Compensation Act. Chapter 149, Paragraph 5, of the Pamphlet Laws of 1918, page 31, Amended and Supplemented 1927 Edition.”

As a matter of fact, on the question as to which theory the Deputy Commissioner pursued in entertaining and granting the application to review, a choice is presented between the language of his rulings at the actual hearing and the language of his determination of facts and order for judgment. As a matter of law, the theory upon which he did act is not material here, if his action was legally correct.

Where there is no error in the judicial action under review, the fact that the reason given for it was untenable affords no justification for a reversal. *Sadler v. Young*, 78 N. J. Law, 594, 75 A. 890, Err. & App. A judgment will be affirmed, if correct on any legal ground, though another reason was relied upon in the court below. *Meisel v. Merchants’ Nat. Bank of Newark*, 85 N. J. Law, 253, 88 A. 1067, Err. & App.; *McMichael v. Horay*, 90 N. J.

Law, 142, 100 A. 205, Err. & App. The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. *McCarty v. Town of West Hoboken*, 93 N. J. Law, 247, 107 A. 265, Err. & App. The duty of the Court of Errors and Appeals is to inquire whether there is any error in the judgment or order or decree appealed from, and not whether the reasons given for the conclusion reached are tenable. *Shauinger v. Apter*, 96 N. J. Eq. 302, 125 A. 31, Err. & App.

**There is no express limitation upon the time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished.**

A review of the apposite legislation will clarify the issues.

The original Workmen's Compensation Act of 1911 contained no provision as to the time within which petitions for compensation should be filed, but it did contain the following provision (P. L. 1911, p. 143, section 21) :

"An agreement or award of compensation may be modified at any time by a subsequent agreement, or *at any time after one year from the time when the same became operative* it may be reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished." (Italics mine).

In 1913, a provision was added to the act pertaining to the filing of petitions. P. L. 1913, c. 174, p. 314, section 23, says: "In case of personal injuries or death all claims for compensation on account

thereof shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under this act, or unless within one year after the accident one of the parties shall have filed a petition for adjudication of compensation as provided herein."

In 1919, both sections were amended to their present wording. See P. L. 1919, c. 93, p. 210, section 21(f), and P. L. 1919, c. 93, p. 211, section 23(h), *supra*, page        of this brief.

*The case of Luszes v. Seaboard By-Products Co. does not impose any limitation upon the time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished.*

The Court of Errors and Appeals, speaking through Justice Katzenbach in the case of *Luszes v. Seaboard By-Products Co.*, 101 N. J. Law, 170, 127 A. 212, minutely reviewed the two sections in their present import and correlative application.

In that case L., an employee of the S. B. Co., was in the month of October, 1921, injured while at work. He was disabled for 16 days, and then returned to work. For this temporary disability he was paid compensation. On April 24, 1923, L. died. On October 2, 1923, his widow filed an *original* petition for compensation, claiming that his death was due to the accident in October, 1921. An award in her favor was removed by certiorari to the Supreme Court and there affirmed. The company appealed.

The main question in the case was whether the petitioner was barred from obtaining compensation for her husband's death by the fact that her petition was not filed within one year from either the

date of the accident or from the date of the last payment of compensation.

It must be noted and kept in mind in the consideration of the legal principles enunciated in the *Luszcz* case, that the vital features of distinction between that case and the instant one are these: (1) that there never was a duly filed petition in that case, whereas in this case there was, and (2) that the review of an *award* was not involved there, as is the case here.

To proceed. Justice Katzenbach assumed *arguendo*, in considering the contention of the respondent alleging such facts, that the petition was filed to review an agreement for compensation. The respondent's argument was that a petition of this nature can be filed at any time, and is not subject to the statutory limitation stated in section 23(h). The contention was overruled for the following reasons: (Pages 213 and 214 of 127 A.).

"Section 21 (f) further provides that an agreement or award may be modified at any time by a subsequent agreement, or reviewed upon the application of either party. The words 'at any time' are only applicable to a modification of the agreement by the parties, and are not applicable to the review provided for. The review cannot be made 'at any time.' Section 21(f) must be read with section 23(h). Under this latter section, if it can be held that *Luszcz*' death resulted from the accident, the case is clearly one where a part of the compensation had been paid, and therefore under the provisions of section 23(h) any claim for further compensation would be forever barred, unless the petition for such compensation was filed within one year after the date of the last payment of compensation. The scheme of the Legislature is clear. All claims for compensation are to be made

by the filing of a formal petition within one year after the accident, unless the employer admits his liability to pay compensation, and agrees to pay it. In case thereafter he fails and refuses to pay the compensation as agreed, the petition must be filed within one year from the date of such refusal and failure to pay. In case the agreement is only for part of the compensation which ought to be paid, and the employer lives up to his agreement and pays the compensation therein provided, a claim for any additional compensation must be filed within one year of the last payment made. Any other construction would result in a situation in which a person injured might apply at any time later to have an additional award made. For, if such an application is not subject to the limitation contained in section 23 (h) it is subject to no limitation at all. Such a situation would never have been intended by the Legislature. No employer would ever know when his liability was ended. He could probably obtain no insurance for such outstanding risks."

The legal implications of the distinguishing features of the instant case are interposed at this point, lest the effect of the language above quoted be extended beyond its judicial intendment.

The legislative intention in the enactment of the two sections should be enlarged upon. Agreements between employer and employee to compromise compensation claims are evidently favored, as eschewing the burdensome necessity of litigation. The aid of the tribunal in determination or review, contemplating in its course rendition of judgment and execution thereof, is to be resorted to only in the event that the medium of compromise offers no adequate solution, in which case provision is made for the filing of petitions with the Workmen's Com-

pensation Bureau absolutely prerequisite to its jurisdiction. *Miller v. Beller Supply Co.*, 100 N. J. Eq. 444, 136 A. 342.

An agreement arrived upon between the parties, or an award of the Bureau, either of which fixes the liability of the employer, may be modified at any time, for any reason, by a subsequent agreement of the parties. No right of the employer can be prejudiced thereby, since his participation in such agreement is wholly voluntary. But where the employer either never does, or ceases to, agree with the employee as to the former's liability, then the latter's only remedy is to institute litigation for the determination of *all* his claims on account of the accidental injury. In order, therefore, as the *Luszc*s case implies, that the employer may know definitely whether or not the intervention of the tribunal is to be invoked by the employee, if ever, the legislature has mandated that as a prerequisite of the jurisdiction of the Bureau to hear *any and all* claims for compensation on account of personal injury or death, a petition must be filed within one year after the date on which the accident occurred, etc. There the intention to protect the employer from untimely claim rests, completely satisfied. Neither an agreement nor an award of compensation may be reviewed, unless and only unless a petition invoking the jurisdiction of the bureau was duly filed.

We are now considering the case of a review of an *award*, based upon a duly filed petition. The filing of such petition provided notice to the employer that the bureau now had jurisdiction over all claims for compensation on account of the accidental injury, and that an award on such petition could be reviewed upon the application of either party on the ground that the incapacity of the injured employee had subsequently increased or dim-

inished. An award for compensation having been made, and the employer having been apprised and constructively notified of the status of his legal liability, the bureau had jurisdiction to entertain and grant a proper application for the review of such award.

The remainder of the Luszcs opinion is entirely compatible with the foregoing. Justice Katzenbach continues on page 214 of 127 A.:

“The view that the one-year limitation applies to a case where there has been an agreement for part of the compensation, but not all, which agreement has been fully performed, is not inconsistent with the provisions of section 21(f). When the right to review an agreement for compensation was originally given by the Legislature, the right could not be exercised until after the expiration of a year from the making of the agreement or award. P. L. 1911, p. 143, section 21.

“In 1918, when the Compensation Bureau was created, the act contained a provision similar to 23(h) of the original Compensation Act. In 1919 section 23(h) of the Compensation Act was changed in conformity with the similar provision of the Compensation Bureau Act in order to make it conform to and harmonize with the change made in section 21(f). From this it seems that the whole purpose of the change in section 21(f) was to limit and not extend the time in which *an agreement* could be reviewed by the Compensation Bureau.” (Italics mine).

The section suprajacently referred to, 21(f), originally provided that an agreement or award could be reviewed at any time after one year from the time when the same became operative, without reference to whether or not a petition was duly filed at all. Such a state of affairs left the employer

wholly unprotected from the evils of untimely litigation. The change made by the legislature was to prohibit the review of an agreement or award of compensation unless a petition had been duly filed. The converse has already been amply discussed.

The case of Benjamin & Johnes v. Brabban, 90 N. J. Law, 355, 103 A. 688, which is cited by Justice Parker in his opinion in the instant case with approval, has no material legal bearing upon the issues here involved.

In that case Florence M. Brabban was injured on May 1, 1913, while in the employ of Benjamin & Johnes. On April 30, 1915, nearly two years afterward, she filed a petition setting up that there was a dispute between her and the employer concerning her claim for compensation, and praying that the dispute might be determined in accordance with the act. To this petition an answer was filed claiming that her right was barred by the lapse of the year allowed by the statute, and obviously this defense was valid.

Thereupon, on June 16, 1915, she filed an amended petition in which she stated that about two weeks after the accident an agreement was entered into between her and the employer by which it was agreed and understood "that the petitioner should receive no compensation for the injury which she sustained by reason of the fact that she had returned to her employment on the sixteenth day after the occurrence"; that in November, 1914, she discovered that her incapacity had increased, and she therefore requested the court to review the agreement, and to adjudge compensation to her under the act. The Judge of the Common Pleas dismissed the petition, holding that, on such facts, he could find no agreement such as is contemplated by the act.

On November 13, 1915, Miss Brabban filed a second amended petition, in which she recited that two weeks after the accident an agreement was entered into between her and the employer, in which it was agreed that the employer should pay or reimburse her for the amount she had become indebted to a physician for medical attendance made necessary by the accident. The petition stated that more than one year had elapsed since the agreement became operative; that the statement in her former petition that it was agreed that she should receive no compensation for the injury was made by inadvertence and mistake, and without the knowledge of the petitioner (although it was sworn to). She prayed that the agreement be reviewed. Thereupon the judge set aside his former judgment, reheard the case, held that the agreement to pay the physician's bill was an agreement for compensation, and that he had the right to review it. He did review it, and made an award in favor of the petitioner. This award was removed to the Supreme Court on certiorari.

Justice Swayze held that neither the payment by the employer of the physician's bill for attendance during the first two weeks of disability, nor an agreement that there shall be "no compensation," can properly be called an agreement such as may be reviewed by the Court of Common Pleas, under the authority of paragraph 21 of the act, on the ground that the incapacity of the injured employee has subsequently increased or diminished.

Justice Swayze went on to say, on page 690 of 103 A.:

"As the trial judge said in his original opinion, the statement of facts which was agreed upon (that there had been an agreement that there should be no compensation) showed that there was no agree-

ment such as was contemplated by sections 21 and 23. His adjudication on that petition and statement of facts was undoubtedly correct, and we think he ought not, after he had adjudicated the matter, to have allowed the case to be reopened for the purpose of making a new and different case in contradiction of the petitioner's own averments under oath."

Another case might be suggested as analogous, but not, however, as controlling, in point of law, viz., *De Lucca v. Vezzetti*, 128 A. 545, unofficially reported.

On July 20, 1920, Michael De Lucca was injured in the course of his employment and by agreement between himself and his employer received on April 10, 1922, compensation in gross and executed a release of all claims. On February 17, 1924 (marked on the petition July 17, 1924) a petition was filed under the Workmen's Compensation Law (P. L. 1911, p. 134) claiming that the disability had increased. At the inception of the proceedings the employer moved to dismiss the case because not brought within a year after the accident or last payment.

On certiorari by the employer, the Supreme Court, on page 546 of 128 A., says:

"On the face of the petition it would appear that the petition was filed out of time, and this motion should have been allowed unless it appears in the case that, as contended by the respondent, this was an application in a case which was then pending and undetermined. Remarks of counsel and of the referee would indicate that at an earlier period a formal petition seeking compensation had been filed and partially heard by the bureau, and that pending its disposition the parties had settled the case between themselves as above indicated. At

one stage of the trial of the present case, it would appear from remarks of court and counsel that the earlier case had been disposed of by a discontinuance or 'being closed.' At a later stage the referee seems to have regarded the first case as still pending and subject to his control. The petition and answer present on their face the ordinary case of a proceeding de novo without reference to any pending cause. It was therefore incumbent on the respondent to establish that the original case was still pending and that the present petition was a part of that case; otherwise, the limiting provisions of the act of 1911 and its supplements clearly barred the claimant from the right to be heard \* \* \* \* The record of the first proceeding was not offered in evidence in the present trial, nor is it brought up in the record before us. The case does not differ from the ordinary original petition filed too late."

The Brabban and De Lucca cases are easily distinguishable from the instant case. In the Brabban case a petition was never duly filed. The case hinged upon the review of so-called "agreements" which were not in law such as are reviewable under section 21 (f). Assuming that they did fall within the class so reviewable, yet the Bureau could have no jurisdiction to review them, since the necessary original petition was not duly filed within a year after either the accident or the so-called "agreements." Of course, the question of the review of an award was not even touched upon in the Brabban case.

In the De Lucca case there was nothing in the record to show that an original petition for compensation ever was duly filed. Assuming, however, that it was so filed, nevertheless, the compensation having been adjusted by an agreement of the parties, and the cause having apparently been with-

drawn from the jurisdiction of the tribunal, the employer was again, as he had before been, subject to the evils of untimely litigation, and entitled to the protection of the mandate prescribing the time for filing petitions.

There is another aspect of the De Lucca case to be considered. The Supreme Court, in holding as it did in the De Lucca case that it was incumbent on the respondent to establish that the original case was still pending and that the present petition was a part of that case, did not thereby intend to establish as a precedent for all future cases that whenever a review of an agreement or award should be sought, that the original case must still be pending or else the review could not be had. In the De Lucca case it was the *contention* of the respondent that the original case was still pending, and, of course, if such were indeed the case, then it was the duty of the court to grant the application for the review, as presenting a most proper situation. But the Legislature did not actually intend to limit the scope of the reviewing power in such cases to situations where the original case was still pending before the Bureau. The enactment certainly comprehended cases in which the litigation was actually closed after an award upon the duly filed petition. The language of the enactment itself provides for the review of an award, and an award is surely the determination of the litigation instituted by the due filing of the petition.

The arguments presented above, as to when there may be a review of an award based upon a duly filed petition, are not entirely without judicial sanction and approval in this state. We refer to the case of *Safety Insulated Wire & C. Co. v. Court of Common Pleas*, 90 N. J. Law, 11, 100 A. 846.

On or about April 1, 1912, Philip Kress, who was in the employ of the presecutor, received an injury in his employment. *Within the year* Kress filed a petition for compensation, which was awarded to him March 8, 1913. In February, 1916, almost *four* years after the *accident* and almost *three* years after the entry of the *award*, an application based upon a petition was made by the employer for a rehearing to determine whether the order awarding compensation theretofore entered in the cause should be modified. An order dismissing the application was removed to the Supreme Court on certiorari.

Justice Kalisch, on pages 847 and 848 of 100 A., says:

“The essential new fact which was disclosed to the court below was that what appeared in the condition of the petitioner in the original proceeding to be a total disability has proved in the course of time not to be so, as evidenced by the fact of the ability of the petitioner to perform labor at higher wages, than at the time of his injuries.

“By section 21 of the Workmen’s Compensation Act of 1911, p. 143, it is, among other things, provided that an award of compensation may be modified at any time after one year from the time when it became operative, and may be reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished.

“It must be borne in mind that the basic principle of the compensation act is indemnity. Therefore when it appears in a case where an award has been made that the incapacity upon which the award was based had diminished or ceased, it be-

comes the duty of the court upon a proper application to interfere and grant relief."

Upon reading the above quotation, the query presents itself as to whether, had the clause "at any time after one year from the time when it became operative" been then absent from the apposite section, as it is now, the Supreme Court would have come to a different conclusion, and have affirmed the order dismissing the application for review. We think not. Even the inclusion of the clause mentioned would not have rendered the section incompatible and inconsistent, to all present intents and purposes, with the section providing for the filing of petitions within one year, etc. So long as the petition was duly filed, then the reason for the pronouncement in the *Luszc* case, viz., that the employer would be subject to the vicissitudes of untimely litigation, would not be apparent, and under such circumstances the review of an agreement or award could actually be had at any time after the same became operative. In other words, had the facts in the *Safety Insulated* case been presented to the Court of Errors and Appeals at the time of the *Luszc* decision, it is safe to say that the Court of Errors and Appeals would have pronounced the application for review a timely one, since the petition for compensation in the original instance had been duly filed, and the Bureau had jurisdiction to entertain and grant the application, although made four years after the accident and three years after the entry of the award. At all events, the *Safety Insulated* case cannot be regarded as overruled by the decision in the *Luszc* case, and the former case may be availed of by us as at least an arguable precedent in our favor, if not directly on all fours, in legal contemplation, with our arguments.

*The fact alone that the Legislature did not place any limitation within section 21 (f) proper is strongly persuasive that none was intended.*

The case of *Baur v. Essex County Court of Common Pleas*, 88 N. J. Law, 128, 95 A. 627, may, by analogy, cast helpful illumination upon the point now raised. The *Bauer* case finds no better exposition than the opinion of the Supreme Court, per Justice Kalisch, on page 628 of 95 A.:

“The present case presents this situation that before the amendment of 1913 the petitioner, in a case arising under the act of 1911, was not limited in time within which to inaugurate a proceeding for compensation, and that, if we should give retroactive effect to the amendment, the petitioner will be deprived of a right to compensation which inured to him under the act of 1911. This right was a vested one of which he could not be lawfully deprived.

“It is a matter of no importance in the case *sub judice* whether or not the statutory limitation of six years applicable to actions upon contract applies to this proceeding under the act of 1911, for, if it does, then the petitioner had four years, approximately, more in which to institute the proceedings, but, if it does not, then the petitioner had unlimited time within which to do so.

“It will not be out of place, however, to call attention to the fact that the proceeding under the act of 1911 is one unknown to the common law, and clearly in derogation of it. It can hardly be said to fall within the classification of any of the actions enumerated in the statute, and contemplated by the Legislature. The proceeding is neither an action upon contract nor one of tort, but rather what the statute creating it makes it; that is, a

proceeding to enforce a statutory duty or obligation arising out of the relations of the parties, the basis of which is a contract express or implied. The views expressed result in the conclusion that the limitation in the amendment of 1913 did not affect the petitioner's right to compensation and to file a petition therefor under the act of 1911, even though the limitation within which a petition shall be filed, as fixed by the amendment, had expired."

Just as the act of 1911 had no limitation upon the time within which to inaugurate a proceeding for compensation, so has the present section 21 (f) no limitation upon the time within which to inaugurate the review of an award based upon a duly filed petition. Had it not been for the limitations expressed in the 1913 and subsequent amendments, petitioners would have had unlimited time within which to file petitions, the nearest plausibly operative limitation, viz., the Limitations of Actions Act, having no application to compensation cases.

In the Baur case, the question as to the retrospective character of the 1913 act having been disposed of, the reason for the holding that the time for filing petitions under the 1911 act was unlimited was, in the final analysis, that *there was no express limitation in the 1911 act.*

And so here. In the instant case, the question as to the jurisdictional character of section 23 (h) having been disposed of by the due filing of an original petition for compensation, the time to apply for a review of the award was unlimited, *there being no express limitation in Section 21 (f).* The force of the limitation in section 23 (h) upon the time for filing petitions, so far as concerns "all claims for compensation on account thereof," was spent upon the due filing of the original petition,

and the legislative intent, contemplating only a single, and not a plural, operation of the limiting section, was satisfied; and the omission of any limitation, in the section pertaining to applications for review of awards, is tantamount to the express declaration that there shall indeed be no arbitrary limitation.

**The time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished, is not governed by section 23 (h).**

It is quite evident from a reading of the opinion in the instant case that the Supreme Court rested its decision upon the case of *Luszcz v. Seaboard By-Products Co.*, 101 N. J. Law, 170, 127 A. 212, 214, already quoted *supra*. We requote from the opinion the quotation from the *Luszcz* case:

“It was held by the Court of Errors and Appeals in *Luszcz v. Seaboard By-Products Co.*, 101 N. J. Law, 170, 127 A. 212, 214, that the words ‘at any time’ in the 1919 Act, *supra*, did not apply to the ‘review’, but only to the ‘modification by subsequent agreement’, and the ‘review’ was limited in time by the provisions of section 5 of the supplement of 1918 (P. L. p. 431) and of clause (h) of section 23, as amended in 1919 (P. L. at page 214), presently to be considered. The language of that court is significant, and may well be quoted:

“‘In 1918, when the Compensation Bureau was created, the act contained a provision similar to 23(h) of the original Compensation Act. In 1919 section 23(h) of the Compensation Act was changed in conformity with the similar provision of the Compensation Bureau Act in order to make it conform to and harmonize with the change made in

section 21(f). From this it seems that the whole purpose of the change in section 21(f) was to limit and not extend the time in which an agreement could be reviewed by the Compensation Bureau. The limiting section of the act having been passed subsequent to the passage of the section providing for a review at any time, and containing a repealer of inconsistent legislation, must control.”

Justice Parker then went on to quote and construe section 23 (h), and held “therefore that the payment of the previous judgment was not such a ‘last payment of compensation’ in the intendment of the statute as would support an application to ‘review the award’ within a year after such payment of the judgment.”

We, too, at the risk of prolixity, but in the interest of clarity, requote section 23 (h) verbatim:

“In case of personal injury or death all claims for compensation on account thereof shall be forever barred unless a petition is filed in duplicate with the secretary of the Workmen’s Compensation Bureau, at the State House, in Trenton, within one year after the date on which the accident occurred, or in case an agreement of compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation.”

Justice Parker evidently considered that the *Luscys* case, in holding that the “review” was limited in time by section 23 (h), meant that a review could be had only in one of the three situations outlined above in section 23 (h). In other words, the rule to be deduced from the justice’s opinion

is as follows: In the event that the incapacity of the injured employee has subsequently increased or diminished, any application, on account thereof, for the review of an agreement or award of compensation shall be forever barred unless such application is made within one year after the date on which the accident occurred, or in case an agreement of compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation.

With such rule as a premise, then the question, whether the payment of the prior award, after appeal and certiorari, is such a "last payment of compensation" as is contemplated by section 23 (h), becomes of prime and exclusive importance, since it finds no foothold in the rest of the section.

We revert again to the finding of the learned justice (State of the Case, page 140) that the commissioner "entertained and granted an application to reopen the original proceeding on the theory that such application was made 'within one year from the date of the last payment of compensation as provided in the (supplement to the) Workmen's Compensation Act, Chapter 149, par. 5 of P. L. 1918' (Page 431)."

That this was actually the theory upon which the commissioner decided as he did has already been denied; however, assuming arguendo that such was indeed the theory of the commissioner, we then respectfully suggest that the Supreme Court accepted the issue as such and proceeded to determine whether or not the application for review was made "within one year from the date of

the last payment", pivoting the case upon this point alone. In other words, the learned justice apparently was constrained to hold that an application for review, such as in the instant case, could only be made within the same period and under the same rules as petitions for compensation, and that, such being the case, the "last payment of compensation" provision was the only possible factor to consider, the others being necessarily ruled out; that, the application for review having been made within a year after the payment of the above mentioned judgment, the crux of the case was whether or not the payment of judgment was such a "last payment of compensation."

*We respectfully urge that the learned justice fell into error in taking such a constrained view of the situation.*

The proposition, that the time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished is limited to the three situations in section 23 (h), is untenable both in theory and in fact.

Assuming, but not conceding, that an arbitrary limitation upon the time to apply for such review must be sought in the act, section 23 (h) is particularly inapposite in theory. Section 23 (h) pertains entirely and exclusively to events all of which are antecedent to and look toward the filing of a petition. *The petition is the inauguration of proceedings looking toward an award or judgment. How can there ever be a review of an award, when the time to apply for the review of such award, which is the determination of the proceedings initiated by the petition, is limited to a period or periods clearly previous to the filing of the petition?*

The legislature could never have intended that the period for applying for the review of an award should be concurrent and concomitant with the period for the filing of petitions.

Again, assuming that the periods *are* concurrent, the limitation would be utterly impracticable. We have seen that an award is the determination of litigation instituted by petition. The limitation being that of one year after any of three situations, then upon and after the occurrence of any of the three events there would have to be, within less than the year, the filing of the petition, the necessary litigation and the final judgment thereon. So that, if the filing of the petition, the litigation thereon and final adjudication should consume more than a year in the aggregate, in the ordinary conceivable course of litigation, then the right to review the award on the ground of increased or diminished incapacity would be forever barred, regardless of how meritorious the grounds for review might be. This would be especially true in cases where, as frequently happens, the petition is filed barely within the allotted year from any of the three situations.

Justice Parker's construction would make the right of review of an award practically impossible, because the right could always be rendered nugatory by the institution and continuation of proceedings for more than a year. Thus, the provision for review in section 21 (f) would be meaningless. The Legislature in creating the right intended that it should be practicably available. A statute should not be so construed as to destroy or impair the right it expressly confers. *City of Pittsburgh v. Pittsburgh & L. E. R. Co.*, 263 Pa. 294, 106 A. 724.

The learned Supreme Court holds that the payment of a litigated judgment for compensation is

not the payment of compensation within the meaning of the act. We regret that we cannot accept this view of the court as applied to the Workmen's Compensation Act. There are too many examples to the contrary, in law and in equity to permit the acceptance of this doctrine. In equity for illustration alimony is reduced to a decree, even after litigation, and when the decree is paid certainly no one would argue that the alimony was not paid. The alimony is merged in the decree just the same as compensation is merged in the judgment. If the doctrine enunciated by the Supreme Court were the law then it would be a simple matter to defeat the spirit and purpose of the Workmen's Compensation Act. A respondent need merely to dispute and litigate each claim for compensation. Ordinarily it takes about two years before litigation is finally completed when appealed to our highest court. If this were done then there never could be a claim for increased disability. We respectfully urge that the merger of the compensation into the form of a judgment does not take from the judgment the character of compensation. The judgment is made up of so many weeks compensation at a certain rate per week plus the costs and expenses of litigation and the interest thereon. If an employee sued his employer for wages which accrued from time to time and these wages were reduced to judgment, when the judgment was paid the wages would be paid and there are numerous other illustrations that might be made covering this point.

Even were the court's construction plausible, if another construction is possible of equal or greater weight, which would more feasibly carry into effect the legislative intent, it should be preferred to one which defeats such intent. If a superficial interpretation of the terms of a legislative act leads to

a result that is obviously subversive of the main object of the act, and there is a permissible construction of the language employed that will effectuate such object, the latter will be deemed to be the expression of the legislative will. *Moore v. Johnson*, 85 N. J. Law, 40, 88 A. 699.

In the construction of statutes the intention of the Legislature is to be derived from a view of the whole act. The real intention, when ascertained, will prevail over the literal sense of terms; and when words are not explicit the intention is to be collected from the context and the occasion and necessity of the law and from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. *In re Merrill*, 88 N. J. Eq. 261, 102 A. 400.

In interpreting a statute, regard should be had to the condition which it was intended to remedy. *State v. Scott*, 86 N. J. Law, 133, 90 A. 235.

Where the legislative intent is to deal with all phases germane to the subject-matter of the act, due regard must be had to the old law, the mischief resulting therefrom, and the enacted legislative remedy for the eradication of the evil. *Holt v. Akarman*, 84, N. J. Law, 371, 86 A. 408.

A statute must be so construed as to suppress the mischief and to advance the remedy. *Soden v. Trenton & Mercer County Traction Co.*, 101 N. J. Law, 393, 127 A. 558.

It was said, in the case of *Mayor, etc., of Jersey City v. Borst*, 90 N. J. Law, 454, 101 A. 1033, that the workmen's compensation statute is a remedial law of prime import. It should be liberally and broadly construed. *Fisher v. Tidewater Building Co.*, 96 N. J. Law, 103, 114 A. 150, affirmed 97 N. J. Law, 324, 116 A. 924; *O'Mara v. Kirch*, 7 N. J. Adv. R. 1099, 147 A. 511.

Where two statutes are under consideration, they should be so construed that both, if possible, may be sustained. *Baird v. Board of Recreation Com'rs. of Village of South Orange*, 154 A. 204, official citation unavailable.

As was stated above, the Supreme Court evidently considered that the *Luscys* case, *supra*, in holding that the "review" was limited in time by section 23 (h), meant that a review could be had only in one of the three situations outlined in section 23 (h), "within one year after," etc. What the *Luscys* case actually meant was that section 21 (f), providing for the review of an agreement "at any time" did not extend the time for filing of petitions, but must be considered in connection with section 23 (h), and that the latter, so far as the two are inconsistent, is controlling, thus preserving the compatible operation of both sections. For that to be so, a petition must be filed within one of those three periods or *no* claim can ever be made for the adjudication of compensation by judicial award. If more than a year in each of said periods were permitted to elapse, then not only could a petition not be filed for adjudication of compensation (agreements, of course, whether for compensation or modification thereof, could always be made, since, in such cases, volition neither requires nor desires limitation), but judicial review of either agreements or awards would also be barred. To that extent the "review" was limited by section 23 (h). That requirement being satisfied, as here, there is, as has already been amply advocated, no arbitrary limitation upon the time to apply for review.

**There being no statutory limitation upon the time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished, the time for such application is governed by the same rules as in applications for new trials at common law on the ground of newly discovered evidence.**

Where upon an application for a new trial on the ground of newly discovered evidence, it satisfactorily 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, that such testimony is material to the issue, goes to the merits of the case, and is not cumulative, the application will be granted. *Dundee Manufacturing Co. ads. Van Riper*, 33 N. J. Law, 152; *Kursheedt v. Standard Bleachery Co.*, 77 N. J. Law, 99, 71 A. 39; *Ellis v. F. L. C. Martin Auto Co.*, 77 N. J. Law, 339, 72 A. 438.

The analogy between an application for a new trial on the ground of newly discovered evidence and an application for the review of an award of compensation is permissible. For a more practical juxta-position, we requote section 21 (f) at this juncture:

“An agreement or award of compensation may be modified at any time by a subsequent agreement, or reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished.”

The review of an award is in effect a new trial. The ground for the review of an award, that the incapacity of the injured employee has *subse-*

quently increased or diminished, is certainly the subject of evidence which, if discovered since the former trial, and, by the use of reasonable diligence, could not then have been obtained, may well be classed as newly discovered evidence legally sufficient to bring about the result desired, viz., the review of the award, or a new trial.

We again refer to the case of Safety Insulated Wire & C. Co. v. Court of Common Pleas, 90 N. J. Law, 11, 100 A. 846, wherein Justice Kalisch, on pages 847 and 848 of 100 A., says:

“The essential new fact which was disclosed to the court below was that what appeared in the condition of the petitioner in the original proceeding to be a total disability has proved in the course of time not to be so, as evidenced by the fact of the ability of the petitioner to perform labor at higher wages, than at the time of his injuries.

“It must be borne in mind that the basic principle of the compensation act is indemnity. Therefore when it appears in a case where an award has been made that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court upon a proper application to interfere and grant relief.”

By the same token, when it appears in a case where an award has been made that the incapacity upon which the award was based had *increased*, there also it becomes the duty of the court upon a proper application to interfere and grant relief.

The objection may be made that, since workmen's compensation law and procedure are entirely statutory, resort can not be had to the common law for extraneous assistance in substantive and adjective construction. This objection is frivolous. The workmen's compensation statute is a remedial law of prime import. It should be liberally and broad-

ly construed. *Jersey City v. Borst*, *Fisher v. Tidewater Building Co.*, and *O'Mara v. Kirch*, *supra*. A statute such as the Workmen's Compensation Act can hardly be all-comprehensive in its provisional effect. Sufficient illustration of its dependence upon the common law and other statutes is shown by two specific examples.

First. The rules of evidence in the conduct of formal hearings are not contained in a self-sufficient code adapted entirely and solely to workmen's compensation litigation. They are the same as in all other courts of law, with the exception of a perhaps ambiguously paternal permission to be lax in the observance of the strict rules of evidence.

Second. In the section providing for appeals, there is appended at the end thereof a proviso retaining to the Supreme Court the right to review by certiorari. There is no provision in the act as to the procedure in certiorari, nor even any indication as to how, when any where the writ may be sued out.

There may be quoted many other instances in which the Workmen's Compensation Act would be bound hand and foot by its own futility because of the necessary omission of practical details, were it not for the fact that such details are supplied by the extraneous assistance of the common law and other statutes. The fact that certain details were omitted, without which certain functions could not be carried out, does not militate against the validity and enforceability of those functions, the details being extraneously available.

And so here. The Workmen's Compensation Act being liberal in its intendment, there is nothing to bar intercourse with other statutes in *pari materia* or with the common law. If to effect a liberal rather than strained construction of one of its provis-

ions, resort is necessary to the common law for analogy or apposition, such resort should not be denied.

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. But the rule of limitation above mentioned has been abrogated. 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 the 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. *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 A. 1045, 1046.

The fact alone that the legislature did not place any limitation within section 21 (f) proper is strongly persuasive that none was intended. *Baur v. Essex County Court of Common Pleas*, *supra*. There being no limitation in terms, and it fully appearing by the rules of statutory construction that the legislature intended the right to review an award based upon a duly filed petition to be completely available, *Luscys v. Seaboard By-Products Co.*, *City of Pittsburgh v. Pittsburg & L. E. R. Co.*, *Moore v. Johnson*, and *Baird v. Board of Recreation Com'rs. of Village of South Orange*, *supra*, then resort may be had to the common law for a criterion. Of such criteria, the rules governing new trials at common law on the ground of newly discovered evidence compose the best material.

The case of *Safety Insulated Wire & C. Co. v. Court of Common Pleas*, *supra*, is entirely in accord with this view. In that case an application

was made to review an award based upon a duly filed petition. The application was made four years after the accident and three years after the entry of the award. Justice Kalisch evidently considered the application as timely, or, it is safe to say, the order of the court below dismissing the application, would not have been reversed. Justice Kalisch, it is also safe to say, considered that the application, in other words, had been made within a reasonable time, since there was no measure within the act by which to adjudge any limitation.

We respectfully urge, therefore, that, just as new trials may be had on the ground that evidence has been discovered since the former trial, which, by the use of reasonable diligence, could not then have been obtained, the application for which new trial may be made within a reasonable time after such discovery, so may there be a review of an award based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased, which incapacity has been discovered since the former hearing, and, by the use of reasonable diligence, would not then have been discovered, and the application for such review may be made within a reasonable time after the discovery of such increased incapacity.

Justice Parker, in his opinion in the instant case, practically conceded that there may be a reopening within a year after the "last payment of compensation," although such reopening is more than a year after the accident. Since the latter is so, why limit it to the question of payment? Payment may be made indefinitely after the accident, as equally indefinitely as the period for reopening on the ground of newly discovered evidence. One theory is as good as the other, and, since the reopening provision has no express limitation, why con-

fine it by ambiguous analogy to an arbitrary limitation, when one based upon reason and justice more fitly carries out the basic idea of the entire legislation, an industrial insurance plan?

The Supreme Court in its opinion in the instant case, places strong reliance upon *Benjamin & Johnes v. Brabban*, 90 N. J. Law, 355, 103 A. 688, in two instances. In the first it says: "The commissioner properly dismissed the 'amended petition' as in effect a new petition." In the *Brabban* case the petition for compensation had never been duly filed. The first petition that was filed was late, and was dismissed. Then an amended petition was filed to review a so-called "agreement" that there should be no compensation. The court held that the amended petition was in effect a new petition, because the earlier one had not been duly filed and had been dismissed therefor. The instant case is readily distinguishable on this point, since, by whatever name the application for review might have been called, it was surely not in effect a new petition, as a petition for compensation had originally been duly filed, and the application was in substance, though perhaps not in form, made to review the award on such duly filed petition, on the ground that the incapacity of the injured employee had increased. The form of the application, as has been before stated, is not material, the substance being the controlling factor. *Benjamin & Johnes v. Brabban*, *supra*.

Justice Parker also says, quoting from the *Brabban* case: "It is important that a case solemnly adjudicated should not be reopened for the purpose of allowing a party to make a new and distinct case."

To revert to the facts in the Brabban case, the first amended petition was dismissed, the court holding that there was no "agreement" under the act. A second amended petition was thereupon filed, reciting that the facts in the first amended petition were inserted by inadvertence, and reciting a new so-called "agreement" to pay for medical attendance. The petition was filed to review such "agreement." The court set aside the former judgment, reheard the case, and made an award in favor of the petitioner.

The Supreme Court, reviewing his action, held that neither of the so-called "agreements" was a reviewable one under section 21 (f). Justice Swayze said, on page 690 of 103 A.:

"As the trial judge said in his original opinion, the statement of facts which was agreed upon showed that there was no agreement such as was contemplated by sections 21 and 23. His adjudication on that petition and statement of facts was undoubtedly correct, and we think he ought not, after he had adjudicated the matter, to have allowed the case to be reopened for the purpose of making a new and different case in contradiction of the petitioner's own averments under oath."

Under the facts in the Brabban case, it cannot be questioned that the trial judge, after solemnly adjudicating the case reopened it for the purpose of allowing a party to make a new and distinct case. In the instant case, admittedly, the commissioner made a solemn adjudication of compensation, but, however, the legislature has provided that such solemn adjudications may be reopened, not for the purpose of allowing a party to make a new and distinct case, but where, as here, the incapacity of the injured employee has subsequently increased.

**The facts in the present application present a proper case for review of the award in the Workmen's Compensation Bureau upon the petition duly filed for hernia.**

At the time of the accident on July 13, 1927, the injury manifested itself by a hernia and acute retention of the urine. (State of the Case, page 59). An award was made for twenty weeks of compensation, the maximum allowable for this type of hernia under the statute. (Page 10). In the early part of April, 1928, it was discovered that the disability from the accident had increased and for the first time that the petitioner was suffering from locomotor ataxia or tabes dorsalis. (Page 68, line 20). At that time, appellate proceedings on the first petition were still in progress and it was not until about August 1, 1928, that judgment of affirmance was rendered in the Supreme Court, and about October 15, 1928, that the judgment was paid. (Page 139, line 30). On November 7, 1928, the petitioner initiated proceedings to review the award on the ground of increased incapacity. (Page 139, line 30).

Although the original petition and award were for hernia, the proceedings to review said award are for increased incapacity due to the activation, by the injury which produced hernia, of a dormant condition of tabes dorsalis. (Pages 35 and 36; pages 41 and 42).

The objection may be raised that, the original petition having been solely for hernia, and the maximum statutory recovery therefor having been allowed, there can now be no additional recovery on a review of said award. Granting that the petitioner has obtained all that is possible for a hernia,

he is still not limited in seeking additional compensation.

The statute, section 21 (f), is again requoted with all due apologies: "An agreement or award of compensation may be modified at any time by a subsequent agreement, or reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished." It does not say "the specific disability" of the injured employee, but the "incapacity," without more.

The words "incapacity" and "disability" are interchangeable in meaning. See Webster's International Dictionary, Merriam Edition, 1931. "Disability" or "incapacity" contemplates the body as a unit, and not the function of a member or organ, so far as increase or decrease is concerned. *Burbage v. Lee*, 87 N. J. Law, 36, 93 A. 859; *Safety Insulated Wire & C. Co. v. Court of Common Pleas*, 90 N. J. Law, 114, 100 A. 846; *Hercules Powder Co. v. Morris County Court*, 93 N. J. Law, 93, 107 A. 433. The incapacity which the Legislature had in mind was the incapacity to perform labor. *Safety Insulated Wire & C. Co. v. Court of Common Pleas*, *supra*. Disability is a permanent impairment of the physical entity. Justice Minturn in *Hercules Powder Co. v. Morris County Court*, *supra*.

Twenty weeks' disability for hernia of this type is the legislature's arbitrary computation of incapacity to perform labor or impairment of the physical entity. The review in this case is sought because of the increase to totality of Herbert's incapacity to perform labor or the impairment of his physical entity. Beside the hernia, there was also an acute retention of the urine, which induced and aggravated the latent condition of tabes and caused it to flare up. At the time of the first hearing

for hernia Herbert's body had a certain per cent of incapacity or disability, due to the accident. The same accident aggravated the latent tabes condition, which has since become open, and his body now suffers an increased incapacity or disability over and above the twenty weeks of hernia. Such were the jurisdictional facts before the Deputy Commissioner both on the petition, amended petition, etc., for reopening, and on the hearing of the motion to dismiss the application. There was sufficient to show that the bodily incapacity due to the accident had increased, which was all that was required on the application to review the award. Section 21 (f), *supra*.

When allowing the original petition for compensation to be reopened on a motion for increased disability, the Deputy Commissioner said:

"I notice that in the testimony of Dr. Leo Granger, taken December 23, 1927, which decision in the former case is based on, mentions, among other things: 'I sent him to the hospital on account of his hernia and acute retention of water,' so you see that was in evidence at that time, but not being particularly pressed then, and the hernia testimony seemingly to predominate, I decided on the basis of a hernia, and made no mention of the retention of the urine. Whether it has any connection with it at the present time or not, I do not know; I think that remains to be seen, so I think we will go ahead and hear the testimony." (Pages 41 and 42, State of the Case).

The decisions in this state have uniformly allowed recovery of compensation for the aggravation of a pre-existing disability due to an injury arising out of and in the course of the employment. *Voorhees v. Smith Schoonmaker Co.*, 86 N. J. Law, 500, 92 A. 280; *Lundy v. George Brown & Co.*, 93

N. J. Law, 469, 108 A. 252; Geizel v. Regina Co., 96 N. J. Law, 31, 114 A. 328; Pisko v. Nelson, 4 N. J. Misc. R. 154, 132 A. 301; New York Live Poultry Co. v. Schwartz, 5 N. J. Misc. R. 178, 135 A. 775.

Justice Parker, in Voorhees v. Smith Schoonmaker Co., *supra*, says, on page 281 of 92 A.: "But it was quite plain, and the trial court was fully justified in finding, that the rupture occurred while the deceased was in the very act of doing some unusually heavy work. So that, even if deceased was suffering from internal cancer, it was quite within the province of the court to find that the proximate cause of death was the unusual and forcible pressure on parts weakened by disease, which but for the unusual strain would have held out for a considerable period."

*The question to be determined on a claim is whether the incapacity is in fact the result of the injury.* Lundy v. George Brown & Co., *supra*.

In a proceeding under section 2 of the Workmen's Compensation Act (P. L. 1911, p. 136), death may be found as having been caused by an accident, although there was a diseased bodily condition prior to the injury without which death would not have ensued, and where it may be inferred the undeveloped and dangerous physical conditions are set in motion producing such result. Geizel v. Regina Co., *supra*.

"While it was true that Pisko suffered prior to the accident from the ailments mentioned above, yet there was medical testimony offered to the effect that the accident had aggravated the pre-existing heart trouble of Pisko, and that his death had been accelerated by the accident. In other words, the accident produced his death at the time which

it occurred. It is well settled that, where a person has an ailment, yet by reason of an accident the ailment is so aggravated as to cause death, the death is the result of the accident." *Pisko v. Nelson, supra.*

"It is doubtless true that the petitioner was suffering from venereal disease and its resultants, but on the evidence the court was entitled to find that the disease was more or less dormant until wakened by the accident; which, in such case, may be said to have caused the injury in a legal sense." *New York Live Poultry Trucking Co. v. Schwartz, supra.*

Retention of the urine was apparent at the first hearing, but there was nothing to show that the man was suffering from tabes dorsalis, or syphilis. (Page 59, state of the case). The reopening was not for the retention of the urine, but for syphilis, the accident which produced the hernia having also been the efficient factor in aggravation of the latent syphilis. (Page 62).

The essential new fact which was disclosed to the Deputy Commissioner was that what appeared in the condition of the petitioner in the original proceeding to be a twenty weeks' disability for hernia has proved in the course of time to be a total disability. The application to review the award was therefore properly granted by the Deputy Commissioner. *Safety Insulated Wire & C. Co. v. Court of Common Pleas*, 90 N. J. Law, 11, 100, A. 846.

The increase of Herbert's incapacity was discovered since the former hearing, and, by the use of reasonable diligence, could not then have been discovered. *Dundee Manufacturing Co. ads. Van Ripper*, 33 N. J. Law, 152; *Kursheedt v. Standard*

Bleachery Co., 77 N. J. Law, 99, 71 A. 39; Ellis v. F. L. C. Martin Auto Co., 77 N. J. Law, 339, 72 A. 438.

Such application for review may be made within a reasonable time after the discovery of such increased incapacity. *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 A. 1045.

At the time the condition of *tabes dorsalis* or syphilis was discovered, (April, 1928), appellate proceedings on the first petition were still in progress and it was not until about August 1, 1928, that judgment of affirmance was rendered in the Supreme Court, and about October 15, 1928, that the judgment was paid. On November 7, 1928, the petitioner initiated proceedings to review the award on the ground of increased incapacity. We respectfully urge that the application for review in the instant case was made within a reasonable time after the discovery of such increased incapacity, taking into due consideration the intervention and continuation of the appellate proceedings on the first petition for compensation.

**Although all of the foregoing questions raised were not raised in the lower tribunals, they are nevertheless available to the defendant-appellant on appeal to the Court of Errors and Appeals, as being correct expositions of the law, appropriate to the facts involved, and necessary to determine the issues raised at the hearings below.**

New arguments or authorities may be presented on appeal, although no new questions can be raised. 3 *Corpus Juris*, Appeal and Error, page 742, section 634, and cases cited. A legal principle, though not suggested by either party at the trial, should be adopted in order to dispose of a cause on appeal, if this impels the speedy enforce-

ment of a right or redress of a wrong, and, as a correct exposition of the law, is appropriate to the facts involved. *Patty v. Salem Flouring Mills Co.*, 53 Ore. 350, 100 P. 298. An issue not pleaded nor raised at the trial will be passed upon, if necessary to determine the issue raised. *Craig v. Higgins*, 32 Wyo. 58, 228 P. 802.

An examination of the reasons for reversal in certiorari of the prosecutor-appellee (*State of the Case*, pages 30 and 31) will show that all of the questions raised in the foregoing brief are germane to the issues raised in such reasons for reversal.

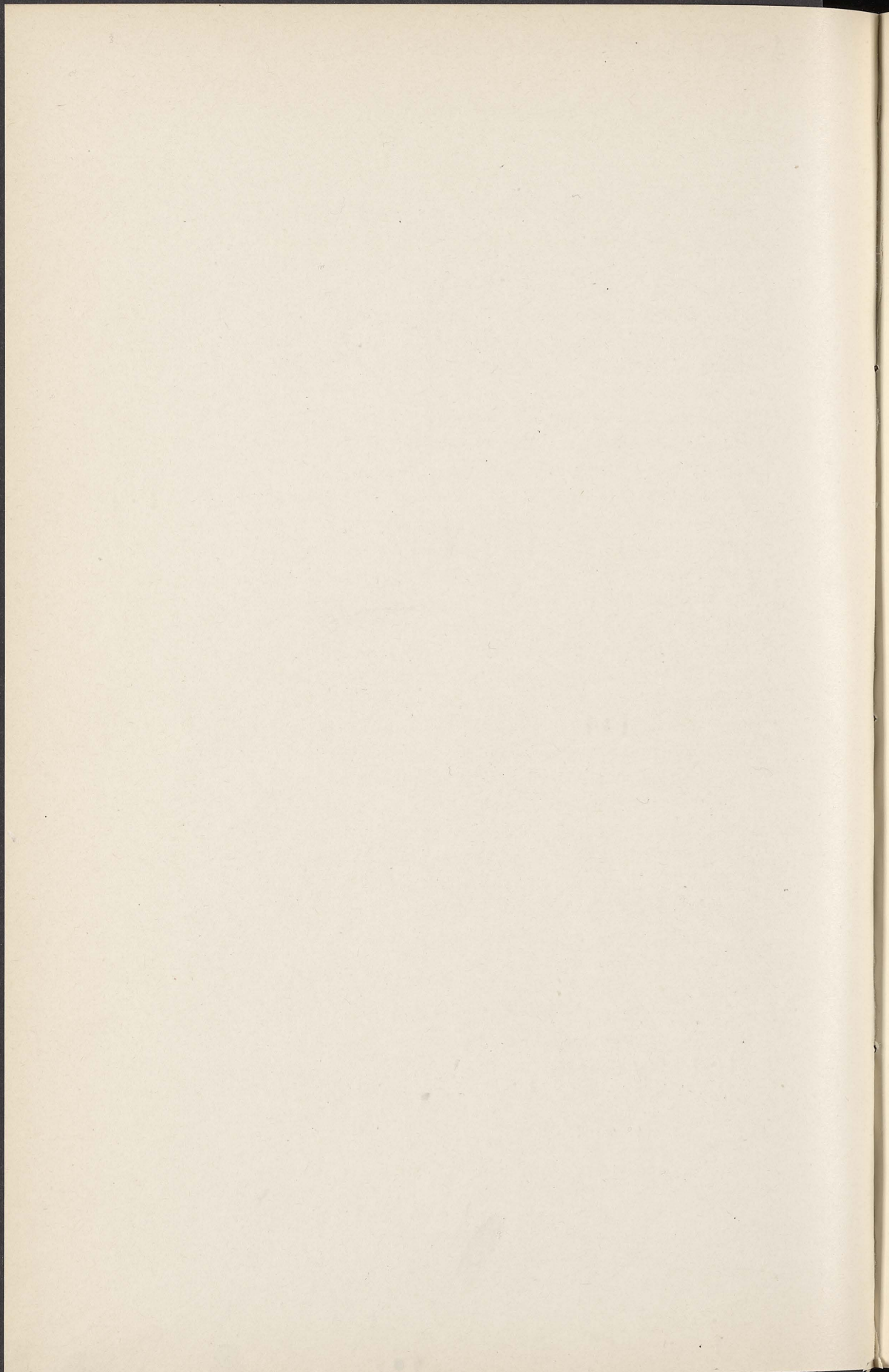
The defendant-appellant therefore respectfully urges that the judgment of the Supreme Court on certiorari, setting aside the judgment of the common pleas and the award of the dupty commissioner, be reversed, and that the proceedings be remanded to the Supreme Court for a consideration and determination upon the facts. Where the Supreme Court has failed to weigh the evidence upon certiorari and to render such a decision as it thought proper according to the view it entertained of the evidence, the case will be remanded by this court to the Supreme Court for the purpose of having determined the disputed questions of fact. *Gibbs v. State Board of Taxes and Assessments*, 101 N. J. Law, 371, 129 A. 189; *Certiorari Act*, section 11, P. L. 1907, p. 95.

Respectfully submitted,

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## New Jersey Court of Errors and Appeals

GEORGE HERBERT,  
*Defendant-Appellant,*

*vs.*

NEWARK HARDWARE & PLUMBING  
SUPPLY COMPANY,  
*Prosecutor-Appellee.*

### BRIEF ON BEHALF OF PROSECUTOR-APPELLEE.

#### Facts.

The petitioner in this case sustained an accident on July 13, 1927 while in the employ of the respondent and for which a formal petition was filed in the Compensation Bureau on August 4, 1927, wherein the only injury alleged was:

“Petitioner, while lifting a stove, sustained a double rupture.”

Thereafter the case was tried and an award entered on September 30, 1927, signed by Deputy Commissioner Goas to the effect that the hernia of which the man complained arose out of and in the course of his employment, and an award for twenty weeks' compensation at \$17.00 per week, amounting to \$340.00 was made and counsel fee of \$50.00. This award was carried to the Common Pleas Court by the respondent where it was affirmed and from there it was carried to the Supreme Court where it was affirmed, in an opinion dated August 1, 1928. The award of the Compensation Bureau made September 30, 1927 was paid to the petitioner's attorney in August, 1928.

On November 7, 1928, the petitioner made a motion to amend the original petition to include the following disabilities:

“Acute retention of urine and aggravation of pre-existing syphilitic condition.”

This motion was granted over the objection of the respondent and exception allowed.

The case was subsequently set down for trial and medical testimony was offered by the petitioner and the respondent and after hearing the argument of counsel, the Deputy Commissioner of Compensation made an additional award to the petitioner of 400 weeks at \$17.00 per week and 25 weeks' temporary disability and counsel fee of \$500.00 making a total award of \$7,385.00. This award was appealed to the Essex County Court of Common Pleas where it was affirmed in an opinion by Judge Flannigan (p. 18, State of Case). A writ of certiorari was allowed by the Chief Justice to review the order of Judge Flannigan. The following reasons were assigned for the writ:

1. That the petitioner's claim of compensation is barred by the Statute of Limitations.

2. That the Deputy Commissioner of Compensation allowed the original petition as filed to be amended so as to bring in new disabilities after the original petition had been adjudicated by the compensation court, on appeal affirmed by the Common Pleas Court and on certiorari, affirmed by the Supreme Court and judgment paid.

3. That the Deputy Commissioner of Compensation had no jurisdiction for allowing the amendment 1½ years after the accident for the reason that the amendment was not based on newly discovered evidence.

4. That under the Hernia Section of the Statute, it is provided that, upon paying the

compensation due for a hernia, the respondent's obligation shall cease and terminate unless death results from the hernia, and the petitioner in this case is still living.

5. That the Essex County Court of Common Pleas was in error in finding that petitioner was entitled to additional compensation for the reason that locomotor ataxia or tabes, is not the result of aggravation of a previous existing condition, but that it is a slow, progressing disease and that the hernia which petitioner sustained on June 13, 1927, had nothing whatever to do with the petitioner's present condition.

6. That the award is against the weight of evidence and the petitioner did not sustain the burden of proof in showing that his condition today is the result of a hernia which he sustained on July 13, 1927.

The Supreme Court in an opinion (page 138 of State of Case) reversed the Common Pleas Court and the Deputy Commissioner of Compensation and in arriving at the conclusion they only considered the first Reason as above stated.

It is our contention that the Supreme Court was right in its reversal and that any one of the remaining five Reasons assigned is sufficient to support a reversal and of necessity we will argue in reply to the appellant's brief and re-argue the remaining five Reasons as originally urged in the Supreme Court.

We shall consider the Points as submitted by appellant.

**POINT I.**

There was no evidence to support the finding of the learned Justice (State of Case, page 140) that the Commissioner "entertained and granted an application to reopen the original proceeding on the theory that such application was made 'within one year from the date of the last payment of compensation as provided in the (supplement to the) Workmen's Compensation Act. Chapter 149, Par. 5 of P. L. 1918' (page 431)."

We cannot see how the appellant can advance this point for by referring to the language of the Deputy Commissioner of Compensation on page 36, line 31 State of Case which we quote:

"The original petition can be reopened if it is within the statutory time and this can be reopened, and I think you have established at least a prima facie case to reopen this question of medical proof to connect it up. I will consent to have it reopened and decide later as to whether it will be on the old one or on the new one."

It is clear that he had in mind the Statute of Limitations for he even mentions it and refers back to the original petition. At the next hearing the Commissioner amplifies the pleadings by the following language (State of Case, page 41, lines 11 to 30):

"The Court: On the Motion. I consider that the motion made and the argument made as at the last hearing.

Mr. Paul: Do I understand that this petition, acknowledged Nov. 5, 1928, and the acknowledged Nov. 3, 1928, are withdrawn or dismissed?

Miss Lewit: Withdrawn. In fact, I withdraw them right now.

The Court: Very well, it is withdrawn, and the case is reopened on the motion as made on January 29, 1929.

Miss Lewit: My last amended petition I desire to have withdrawn, but the first amended petition I desire to have dismissed as a matter of record.

The Court: Very well, I will consider it so.

Mr. Paul: I ask an exception to your Honor's ruling.

The Court: Note an exception."

After all the decks were cleared of the Amended Petition, new Petition and Motion, the only remaining part of the pleadings was the Motion to Amend the original Petition and which Motion was made one year and six months after the filing of the original Petition and after it had been carried to the Supreme Court and the Motion was made after it had been decided by the Supreme Court.

It seems futile for us to argue this point in view of the splendid and well considered opinion of Mr. Justice Parker in the Supreme Court. In that opinion he reviewed all the law pertaining to the section of the Act under consideration.

The statute has been often construed and is definite that the provision of Paragraph 21-F, the words "at any time" refers back to Section 23-H and means, "that the original award may be re-opened or modified within one year after the date of the accident or in case an agreement of compensation has been made between said employer and the claimant then within one year after the failure of employer to make payment pursuant to the terms of said agreement; or in case a part of the compensation has been paid by said employer, then within one year after last payment of compensation."

*Luszc's v. Seaboard By-Products Co.*, 101 N. J. Law, 170;

*Deslauriers Column Mould Co. v. Jackson*,  
3 N. J. Misc. 258, 127 Atl. Rep. 798.

It is the contention of the petitioner that the payment by the respondent of the award on August 1, 1928, operates as a last payment of compensation and that the petitioner therefore has one year within which to re-open the case, but the respondent contends that the words in the statute refers to an agreement to pay compensation and in the case at bar there never was any agreement to pay, but on the contrary it was paid under court order. To wit, a judgment.

Section 23-H referred to, merits your careful construction and you will note that the legislature has not framed each provision in the alternative but has stated that the claim shall be barred unless the petition is filed within one year after the date on which the accident occurred, then after it proceeds on a different theory, and on the thought that an agreement be entered into and an agreement is the meeting of minds and contains an element of mutualability so that by careful construction of the section, we find that in the absence of any agreement, the petition must be filed within the one-year limitation for in either construction of the section is impossible under the wording of the section, for the section referred to refers back to the agreement on each succeeding "or."

It is obvious that a payment of money under a court judgment does not involve any element of agreement and furthermore in the instant case the matter was brought through three courts, and because the Supreme Court said it should be paid, was why it was paid.

We have examined the authorities quoted by the appellant but fail to see how they are per-

herent to the issue excepting the Luszcz case which we have quoted.

### POINT II.

**The technical form of the procedure on which a reopening may be had is not important.**

There is nothing technical in the form of procedure under review. It is governed by statute and since the Workmen's Compensation Bureau is a creation of statute, it is controlled by the language of the statute and has no greater right than allowed by the statute. If we were to call our statutory proceedings technical and then relinquish under them, we may as well abolish all Legislative bodies.

### POINT III.

**The Deputy Commissioner acquired jurisdiction over the present reopening by the filing of the original petition for hernia, and retained jurisdiction over the present reopening by the allegation, upon the application for reopening, of sufficient facts to show that the present condition of the petitioner was attributable to the accident for which the original petition was filed.**

The Deputy Commissioner of Compensation clearly sets forth the original filing of the Petition and the Motion to Amend in the argument on the Motion to Dismiss (State of Case, pages 35-36).

“But there is nothing in the Act that I see that a hernia, as such, can be aggravated. Now, the petition was filed for a hernia and was presumably disposed of for the hernia. Now the situation arises the man is in this condition now. If it is based on an aggravation of the hernia, in fact, even then I do

not think the act applies because he has gotten his money for the twenty weeks. He did not elect to take the operation, and I don't see how the respondent can be brought in to pay more for the hernia. Now, the question is, is he suffering from the hernia or from something else or a combination of both, and then the question arises whether it shall be reopened for a condition aggravated by a hernia. The petition originally was filed on the theory of hernia only. Now we are concerned with this medical situation; this question arises whether the petitioner can bring in a new condition at the expiration of this period. That is another feature that might arise. In other words, the original accident happened July 13, 1927, and the petition was filed for a hernia. Now he is suffering I daresay not so much from a hernia as from another condition that the hernia may have incidentally caused to start up, but the question is whether this case can now be reopened to allege a new condition at this time."

Entirely new matter was set up in the Motion to Amend which was not mentioned in the original Petition. We also contend that Petition did not connect up the present condition with that of the hernia accident.

We therefore have the situation of an original petition being filed alleging hernia and now an attempt is made to amend the original petition one and one-half years after the occurrence of the original accident and in the amendment they seek to set up new matters not mentioned in the original petition.

The case is similar to that of *Benjamin & Johnes v. Brabban*, reported in 90 N. J. L., page 355, 103 Atl. Rep., page 688 and affirmed in the

Court of Errors in 105 Atl. Rep., page 717, where the Court said:

“A case solemnly adjudicated should not be re-opened for the purpose of allowing a party to make a new and distinct case.”

In the case of *Ehrhart v. Industrial Accident Commission*, Cal. 158, Pac. Reporter, page 193.

In the above case an award was made for an injury to a leg and more than six months after the petitioner applied for modification of the award so as to include compensation payments for a lung which he alleged was injured in the same accident and which was not previously reported and since the Statute of Limitations in California is six months, the Court refused to grant the modification.

In the case of *DeLucca v. Vezzetti*, reported in 128 Atl. Rep., page 545, it held:

“Petition for additional compensation held barred by the act when not filed within one year after last payment under settlement, in consideration of which original case was discontinued.”

It is obvious from the above that the words “agreement” and “settlement” are used as one for a settlement is an agreement and the Court there construed the section as controlling in the event of a settlement and dates the limitation one year from the last payment under the settlement.

By referring to page 112 of the State of the Case, you will find the full hospital chart which shows that on the day after the alleged accident the petitioner was in the second stage of tabes dorsales, and being in that condition the amendment could not have been allowed on newly discovered evidence for he then had the very same

condition for which 1½ years later the Compensation Bureau permitted testimony for an increased disability.

The case of *Christie v. Petrullo*, reported in 101 N. J. L. 492, gives the reasons for a new trial as follows:

“A court will not grant a new trial upon the ground of newly discovered evidence unless it be shown: First, that such evidence would probably have changed the result of the trial; second, that it was unobtainable by the exercise of due diligence for use at the trial; third, that the evidence is not merely cumulative.”

Obviously, if the petitioner had knowledge at the time of the original hearing that he was suffering from *tabes dorsales*, he is now barred from alleging it as an aggravation.

#### POINT IV.

Although the time for filing an original petition under section 23 (h) P. L. 1921, page 731—of the *Workmen's Compensation Act* was not extended by section 21 (f) P. S. 1919, page 211—Nevertheless there is no limitation upon the time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished.

The time to apply for a review was lost by petitioner in waiting one and one-half years before he moved in view of the hospital chart and the fact that he chose to claim only for the hernia in the original petition. We fail to see how appellant can urge this point in view of the definite and explicit language in the *Luszy* case (*supra*) and the *Deslauriers* case (*supra*).

We have examined the case of *Harris v. International Motor Co.*, 153 Atl. Rep., page 97 (not yet officially reported) and agree with that opinion but contend that it has nothing to do with the case at bar for the original agreement was an "agreement" to pay and not a "judgment." This is the distinction made in the opinion of the Supreme Court in the present case. Furthermore, the case at bar proceeded under a Motion to Amend and set up new matter—while in the *Harris* case a new Petition was filed.

We have examined several of the cases cited by the appellant under this point and cannot comprehend their relevancy and hence will not attempt to reply to them.

#### POINT V.

The time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that incapacity of the injured employee has subsequently increased or diminished, is not governed by section 23 (h) P. L. 1921, page 731—of the Workmen's Compensation Act.

Counsel does not go far enough in this point to aid the court in arriving at a fair consideration of the Statute, but should have added section (H) of the 1919 act and which two sections are to be read together in arriving at their interpretation as did the Court of Errors and Appeals in the *Luszy* case (*supra*). The opinion of Mr. Justice Parker on page 141 (State of the Case) clearly sets forth and quotes both extracts of the Act under review.

"Sec. 5 of 1918, and clause (h) of 1919 are quoted verbatim: Every claimant for compensation under the act to which this act is a supplement, or its supplements or

amendments, shall unless a settlement is effected of a petition filed under the provisions of section four, file a petition in duplicate with the secretary of said bureau in his office, at the State House, in Trenton, within one year after the date on which the accident occurred, or in case an agreement for compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation. A payment, or agreement to pay by the insurance carrier, shall for the purpose of this section be deemed a payment or agreement by the employer."

Clause (H) "In case of personal injury or death all claims for compensation on account thereof shall be forever barred unless a petition is filed in duplicate with the Secretary of the Workmen's Compensation Bureau, at the State House, in Trenton, within one year after the date on which the accident occurred, or in case an agreement of compensation has been made between such employer and such claimant, then within one year after the failure of the employer to make payment pursuant to the terms of such agreement; or in case a part of the compensation has been paid by such employer, then within one year after the last payment of compensation."

#### POINT VI.

"Disability" or "incapacity" contemplates the body as a unit, and not the function of a member or organ, so far as increase or decrease is concerned.

In advancing this point they attempt to excuse themselves for not alleging *tabes dorsales* con-

dition in the original petition. It is an elementary principal of pleading and practice that that which is pleaded must be proved and that which is not pleaded cannot be proved. Originally only a Hernia was alleged. That is a definite and fixed medical disability. We shall argue later as to the statute on "Hernia." We have examined the Hercules Powder Co. case referred to by appellant and in that case the original pleading was based on a complete disability.

#### POINT VII.

There being no statutory limitation upon the time to apply for a review of an award of compensation based upon a duly filed petition, on the ground that the incapacity of the injured employee has subsequently increased or diminished, the time for such application is governed by the same rules as in applications for review of judgments or for new trials at common law on the ground of newly discovered evidence.

We disagree with our opponents on the law of this point. The fundamental rule covering the right to reopen a newly discovered evidence is laid down in the case of *Christie v. Petrullo* (*supra*). We further contend there is a statutory limitation and again quote the Lusczy and Deslauriers case to sustain our contention.

We have examined 34 *Corpus Juris*, page 288, section 500 which is relied on by appellant and say that in this case they knew about the petitioner's disability the day after the accident for he then had all the symptoms he later disclosed so there was nothing NEW to be brought in.

**POINT VIII.**

The facts in the present application present a proper case for review of the award in the Workmen's Compensation Bureau upon the petition duly filed for hernia.

Under the hernia section of the statute, it is provided that upon paying the compensation due for a hernia, the respondent's obligation shall cease and terminate unless death results from the hernia and the petitioner in this case is still living.

For the purpose of the argument on this point, we will quote only that portion of the Hernia Section of the Statute, which we think is appropriate.

“If the employee refuses to permit of an operation, the employer shall meet the requirements above specified, pay the reasonable costs of the truss or other appliance found necessary, should also pay compensation for twenty weeks, FOLLOWING WHICH THE OBLIGATION SHALL CEASE AND TERMINATE unless DEATH RESULTS from the hernia.”

It may readily be seen that after the petitioner has received his twenty weeks' compensation for the hernia which was done in the instant case, that the obligation of the respondent ceases and terminates unless death results from the hernia.

In the instant case the petitioner is very much alive and Section 21-F, allowing a re-opening of an award on the basis of increased disability, does not refer to the hernia section because the hernia section of the act which governs its own disposition in that a hernia is recognized as a disease and rarely the result of trauma so that the modes operandi of a case of hernia is not

governed by the other provisions of the act, unless specifically referred to in the hernia section, and on careful reading of the entire section will show reference to other sections of the act, which the legislature had in mind in framing it.

The Deputy Commissioner of Compensation had definite ideas on the Hernia section and he expressed them fully in the argument before him and we refer you to that argument on (page 35, State of Case, top of page to line 15 on page 36).

We have examined the cases cited by the appellant and they are not applicable to the issue under consideration.

#### **POINT IX.**

Although all of the foregoing questions raised under Points 1 to 8 inclusive were not raised in the lower tribunals, they are nevertheless available to the defendant-appellant on appeal to the Court of Errors and Appeals, as being correct expositions of the law, appropriate to the facts involved, and necessary to determine the issues raised at the hearings below.

We contend that the only point available to appellant is that the Supreme Court was in error in its opinion. The present appeal raises new matter not considered by the Supreme Court and which therefore should not now be considered or advanced. Our opponents go to Oregon and Wyoming for authority on a pure question of New Jersey practice.

We take up now the medical aspect of the case and review the testimony as to whether or not the petitioner's present condition is the result of the Hernia.

It is elementary that the petitioner must sustain the burden of proof but in this case it surely cannot be said that he has, for every doctor called by the petitioner admits that it was possible that the condition of the man today, that is, of total disability as a result of tabes dorsales, could be incidental to the hernia and Dr. Granger, the attending physician (p. 64, l. 30), in speaking about the condition of the man today, as being due to the hernia, says:

“Q But you are not positive, are you, doctor? A That this is the direct result of it?

Q Yes. A No, I couldn't be positive.

Q You are a physician? A Yes.

Q And you have regard for your practice and for your oath? A Yes.

Q And you wouldn't come into court and absolutely swear that this man's condition today is the result of that accident on July 13, 1927, would you, doctor? A No, I couldn't.”

On page 66, line 25 of the testimony, the doctor admits that other conditions could light up the syphilitic condition and bring on tabes.

For instance, the following testimony:

“Q What other things, doctor, causes, could lighten up this alleged syphilitic condition of thirty years ago and bring the man to the condition he has got today, or resulting in tabes? A Well, at times the disease itself might.

Q With no fire to start it off at all, is that right, doctor? A That is possible.

Q It may just break out of its own accord, is that right, doctor? A Yes.”

On page 72, line 15, in the testimony, Dr. Granger admits that this condition of tabes could be incidental to the accident of July 13, 1927.

Further, the doctor testified that the tabes dorsales was of a slow progressive nature and that it took years to develop.

Dr. Wilner testified for the petitioner on symptoms of tabes dorsales and on page 87, line 14, it will be noted that every symptom he named was present in this petitioner the day after this alleged hernia, so it was admitted and embodied in the findings of the hospital charts, and by the testimony of the doctors, that the petitioner on the day that he had this accident was then in the second stage of tabes dorsales, and on page 87, line 35, the doctor describes the disease of tabes as follows:

“Q Could it appear in twelve hours, do you think, doctor? A I do not.

Q It would take a longer time than twelve hours? A I have never seen anything like twelve hours, I cannot surmise anything occurring as rapidly as all that, in a slow, progressive disease, which takes years and which may last a lifetime without symptoms.

Q But you say, doctor, that if the man had no reflexes and they are entirely absent, that you think then tabes was then there?

A Yes, sir.”

Dr. Sobin testified for the petitioner and on page 89, line 40, says that the injury which he received on account of the hernia aggravated and hastened the onset of the tabes, but it is interesting to note, that he was already in the second stage of tabes when he had the injury, so there was nothing to bring on, as will be seen in the following testimony, page 90, line 10:

“Q And you really and sincerely believe the trauma and injury he received to his central nervous system, re-awakened and aggravated the former condition that existed?

A Yes.

Mr. Paul: I object to that question as to the dormant condition. There is no evidence the condition was dormant.

(Discussion.)

The Court: Assuming that he had a dormant condition.

Q Assuming, doctor, that the man had a dormant condition, would you say that the injury re-awakened that condition? A I do, yes."

Even the Court, in the above testimony, assumed that the condition was dormant, whereas, it was quite active and had been, for six years, so the question as answered by the doctor, did not apply to the case, and on page 91, line 3, the doctor testified that the tabes dorsales would manifest itself without the intervention of any trauma.

"Q Say the infection has been contracted thirty years ago, wouldn't it be possible for the tabes to manifest itself at any time after the thirty-year period? A It may manifest itself at any time after the thirty-year period.

Q And it may not manifest itself as the result of trauma, either, need it? A Not necessarily."

It may occur to your Honors to wonder why the question appeared in the examination, as to the appearance of the disease within twelve hours after the accident. That was because the man was taken to the hospital the next day and the hospital chart was offered in evidence, and the chart showed that the man was in the second degree of tabes, so we wanted to show that the disease could not come on between the injury and the next day, so that it would appear that at the time of the alleged injury, the petitioner was then in the second stages of tabes dorsales. The hospital record is as follows (p. 112):

Mr. Paul: I would like to read into the record, the hospital chart.

“CHART REPORT.”

116596. Date of admission, July 14, 1927. 9:25 P. M. Provisional diagnosis, inguinal hernia. Retention of urine. Dr. Granger, attending physician. Ten weeks ago, while doing heavy plumbing work, suffered sharp pains in groin. Intestines came down. Easily pushed back. Wore belt for ten years. Last night came down and could not be replaced until doctor pulled on it and lessened it. Rheumatic pains in leg last three to five years, especially at night. Pains heavy and sharp. Poor appetite last two years. Eyes: Both pupils irregular, left pupil is larger than right. Pupils do not react to light. Nystagmus. Abdominal: Lower abdomen is distended and bladder is apparently dilated to level of umbilicus. Dull over that area. No rigidity, no spasm. Inguinal region has impulse on coughing. No mass present. Extremities: No edema; no deformities. Reflexes: Abdominal, both present; preastatic, right, present, left absent. Rhomberg negative. Babinsky, negative. Blood test shows Wasserman four plus. Signed release on July 16.”

On page 93, line 14, Dr. Sobin admits that the petitioner was in the second stage at the time of the accident, as appears in the following excerpt:

“Q If you have that symptom, combined with the absence of knee-jerks, negative Rhomberg and the absence of reflexes, would you then say that that was one of the symptoms of tabes? A I would.”

Dr. Dowd testified for the petitioner that he never examined the petitioner but only was called to answer hypothetical questions and on page 132, line 25, he enumerates all of the symptoms of tabes and it will be noted that the symptoms

he enumerated, are identical with those found on the hospital chart the day after the alleged accident and the doctor explained that tabes is a slow, progressive disease and the doctor mentioned that there are usually three or four stages and that the third stage is paralysis and the fourth stage is sometimes insanity, and on pages 90 and 91, in answer to a question on cross examination, after giving the symptoms, he admitted that the petitioner had tabes in the second stage the day after the accident and note these questions on cross examination:

“Q And in the second stage? A Certainly, yes.

Q So, that at the trauma, he had the tabes? A Yes.

Q Because, as you said before, tabes could not come on within twelve hours after a trauma? A Tabes could not come on in twelve hours.”

The doctor, on page 134, line 14, admits that after the petitioner is in the second stage, the third stage comes on in about sixty or seventy per cent. of the cases, without the intervention of any trauma, but as a matter of course from the very nature of the disease alone, as follows:

“Q And as a matter of fact, without the intervention of the trauma, he would have gone on through the third stage, wouldn't he? A Not as a matter of course; they sometimes are arrested in the second stage or even the first.

Q For how long, doctor? A For a long period, ten or twelve years.

Q Ten months, would you say? A Yes, sometimes.

Q But it comes, as a rule, doesn't it, as sure as death? A In about fifty or sixty per cent. of the cases.

Q And without the intervention of any trauma, too? A Without anything happening.

Q Just in the usual course of events?

A Yes, of syphilitic events."

The above testimony concludes the petitioner's findings insofar as the present condition of the man is and I challenge the petitioner to show any evidence sufficient in law to absolutely tie up the respondent as being responsible for this petitioner's present condition.

In the case of *Kalayis v. Puchinkis*, reported in 4 N. J. Misc. Rep., page 737, the question was whether or not a tubercular condition was a result of an injury and the petitioner did not negative the fact that his condition was a result of any other cause than the accident and that no admission has been made upon the part of the petitioner to exclude the idea that his present condition is the result, either of the natural progressive tendencies of the disease itself, or of any one of the number of causes testified to, by his own physicians, with which the defendant had no connection. The theory was based upon the case of *Migliaccio v. Public Service Railway Co.*, 3 N. J. Adv. R., 1427, where the Supreme Court said:

"It is incumbent upon the plaintiff to exclude the idea that death was due to a cause with which the defendant was unconnected."

In dismissing the case first mentioned, the Court said:

"I, therefore, find that the petitioner has not only failed to negative the existence of other possible causes for his present condition, but has also failed to establish any casual connection whatever between the alleged condition and the present alleged condition of tuberculosis."

Where, in the present case, has this petitioner attempted to negative any other causes of which the doctors testified to, in bringing on tabes?

The respondent produced Dr. Koppel who is the only expert in the case on matters pertaining to syphilis, in that he treats and that his qualifications are set forth on the record on page 40, and that he specializes in venereal diseases, genito-urinary system, and has, for the last fifteen years, and that he has been practicing for twenty-four years; that he examined the petitioner in this case and on page 99, line 20, he goes into the history and symptoms of tabes dorsales, and on page 100, line 25, the doctor admits on the record, that he was called in as an expert to operate on in cases where syphilis is present and operated on many cases and was asked the following questions on direct examination:

“Q In your own experience, doctor, did you ever meet with a case of syphilis which developed locomotor ataxia, as the result of an injury? A No, sir.

Q Did you ever treat, among the cases in your own experience, a case of chronic syphilis that was operated on or received injuries, without developing locomotor ataxia? A Oh, yes, quite a few.”

On page 101, line 18 of the testimony, the doctor describes what would bring on tabes as follows:

“Q And what would bring it on, doctor? A Well, there are two theories, as far as tabes is concerned, or wherever syphilis is concerned, in that there is a special strain of spirochete in syphilis that does do the damage to the nervous system, and has nothing to do with the other cases of syphilis—the first, second or third stages of syphilis. But no matter what the theory is, it is the germ of syphilis, and it has a reaction that induces the locomotor ataxia.

Q Do you say, doctor, that it is possible and probable that this man's condition today of tabes could be incidental to the al-

leged injury of July 13, 1927? A No doubt it was."

Dr. Henry Kessler who is in charge of the Rehabilitation Clinic of the State Department, testified for the respondent, that he examined the petitioner and on page 119, top, he stated that, taking into consideration the history of the patient, the hospital chart of the hospital, and the examination he made, that the injury of the hernia was incidental to the condition from which he is now suffering and that on page 65, Dr. Kessler said that the petitioner had tabes on his admission to the hospital the day after the alleged hernia and that the disease from which the man is suffering from, is a progressive disease and very slow, and on cross examination Dr. Kessler gave the following testimony:

"Q Assuming what you know of this man's case, will you say that this strain and shock of the central nervous system aggravated or could have aggravated or may have aggravated this condition of tabes? A No, for the following reasons: First of all, he had tabes in apparently the second stage at the time he was admitted to the hospital; that paralytic stage didn't come on until ten months afterwards. Second, that there was no direct injury to the spinal cord; that he had a hernia ten years ago, which, in a light manner, was just as injurious to the disease he had in his central nervous system."

After the above, the attorney for the petitioner attempted to inject into the case something which was not there, by having the doctor assume that the injury the man received was to his back, and the attorney attempted to argue from that, that the muscles of the abdomen are so related with the muscles of the back that injury to the abdomen or groin would communicate with and the same result would follow as

though the injury was to the spinal cord, but Dr. Kessler, on page 72, said that "Logic and medicine do not mix," and that the muscles are not connected in any way to the spinal cord, which is enclosed in a bony column by itself.

That was the respondent's testimony insofar as the medical aspect goes.

Now we have a situation where the medical testimony of the petitioner is not direct and positive as to what this man's condition is or is caused by, and they admit that it may be incidental to the injury. On the other hand you have positive information by experts of the respondent that the condition of the man today has nothing whatever to do with the injury, for the reason that he was in the second stage of tabes dorsales at the time and as sure as night follows day, the third stage would come on and it did come on within a period of ten months after the alleged injury, so we repeat that the petitioner did not sustain the burden of proof.

We refer your Honors, to the case of *Hamilton v. Congoleum-Nairn*, 7 Misc. Reports, page 248.

The above is a case in which the Deputy Commissioner of Compensation awarded compensation, based upon a death claim, where the facts appeared that the decedent fell and later died, as a result of an advanced stage of syphilis.

The history was that the decedent was in the last stage at the time of the accident, in that he dragged his leg when he walked, and died eight months after the accident.

Upon appeal to the Common Pleas Court, it was reversed on the ground that the death of the decedent was not due to the accident, but due to the normal progress of the disease.

In the case at bar the situation is identical, in that the history of the case, as given by the hospital chart, is the same as in the reported case and that he was in the second stage of tabes dorsales and that no matter what occurred the petitioner would be in the condition he is today.

In the case of *Wheeler v. Wolcott Holding Co.*, 7 N. J. Misc. Reports, page 206:

Petitioner received a cut in the head, was treated and discharged as cured. Later a claim was made for syphilitic aggravation. Doctors Dowd, Avidon and Kessler, testified that syphilis is of a progressive nature with periods of remission, and that the disease could have progressed to that extent found in the petitioner's condition, without being aggravated by any trauma. The petition was dismissed.

Again we have an identical case with the one at bar. Even the physicians for the petitioner admitted that the locomotor ataxia was a slow progressive disease, and that without any intervening cause the three stages would develop.

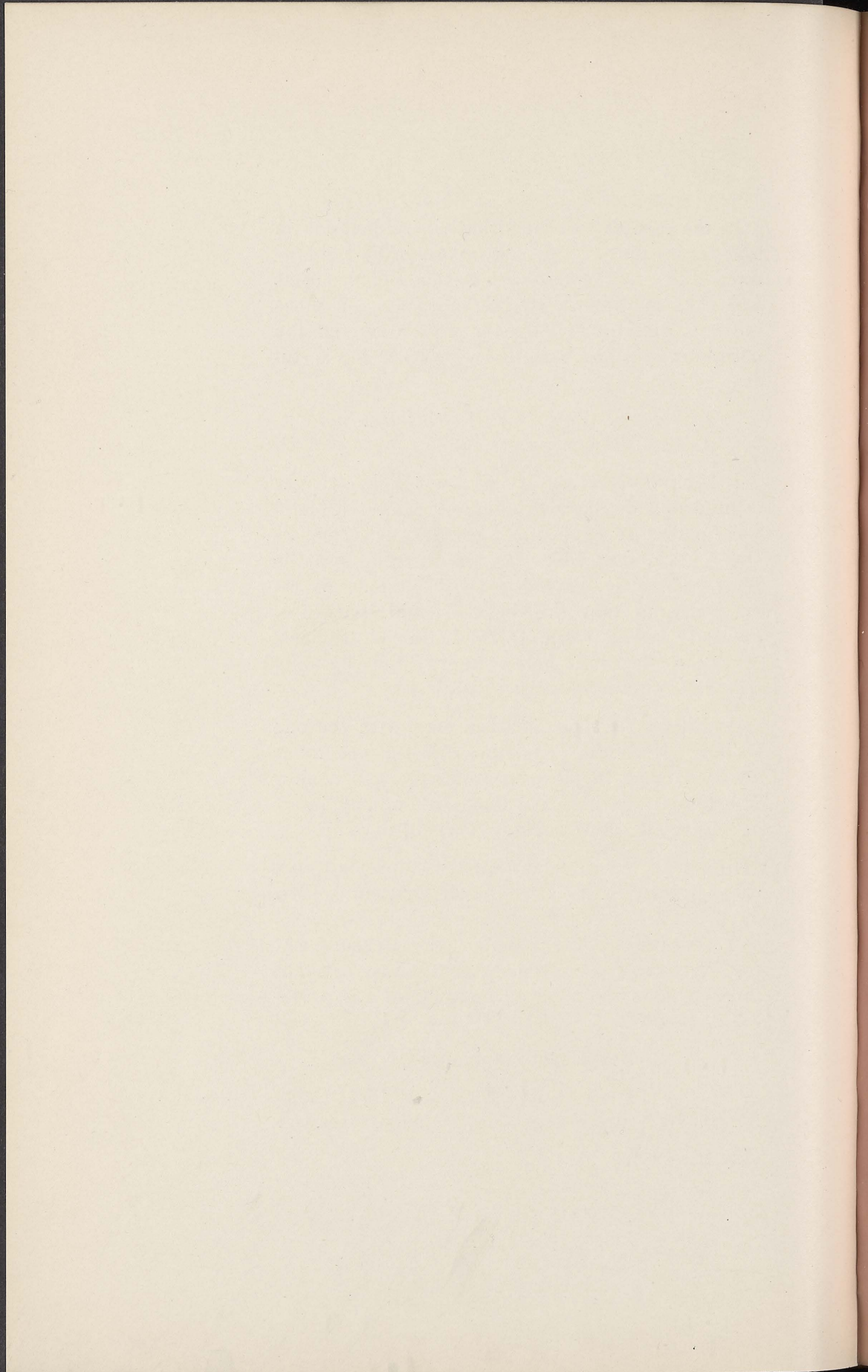
In conclusion we urge that the Supreme Court be sustained in its Opinion as written by Mr. Justice Parker for the Reasons there advanced and that this Court consider the Reasons not considered in the Supreme Court and we ask that those Reasons be affirmed in favor of the prosecutor-appellee.

Respectfully submitted,

JOSEPH C. PAUL,

Attorney for Prosecutor-Appellee and of Counsel.

May 22, 1931.



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